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POST ADMISSION PRACTICAL TRAINING

It is a truth universally acknowledged that the consequences of the introduction of a system of largely full-time university study for law students have almost all been beneficial. But the change has left an unsolved problem in relation to practical instruction. No longer does the newly admitted practitioner have several years of office experience behind him. A system under which the young lawyer's practical experience commences after or only shortly before admission has serious weaknesses. Demands on employers leave them little time for teaching. The growth in the number of solo barristers has seriously depleted the number of legal firms able to give worthwhile guidance to young lawyers who seek to specialise in advocacy. It always has been the case that a system of practical training based on pupillage or articles is narrow in scope; the experience the pupil obtains is necessarily limited to his master's field of practice. Overshadowing the whole problem is its industrial dimension, the fact that awards or their equivalent (determined as they are on the basis of factors that do not include the long term good of the legal profession) entitle those seeking their first jobs at or near the end of their university careers to wages far in excess of their then actual worth to their employers.

The problem of providing practical training for new entrants to the profession was one which the New Zealand Law Society was under a plain obligation to attempt to solve. Its first instinct was to turn for help to the four university law schools. A convenient way of so doing was to approach the Council of Legal Education (made up as that body is of the four law school deans, four NZLS nominees and a brace of Judges) and on 2 March 1977 the NZLS Secretary-General wrote formally to the Council of Legal Education asking that further practical training should be provided by the university law schools. The Council of Legal Education debated this request at meetings held on 22 April 1977, and on 7 September 1977 (this was a special meeting devoted wholly to the topic) and on 21 April 1978. It was at this last-mentioned meeting that the Council finally determined on its response to the cri de coeur of the NZLS. It passed two resolutions the text of which should be set out in extenso:

(a) That the Council advise each of the universities and the University Grants Committee that in its view the financial provision for legal education generally should be increased and that in particular additional resources are required to improve practical training;

(b) That the Council inform the New Zealand Law Society of the terms of resolution (a) and requests it to give further consideration to the part it can play and the contribution it can make in discharging its basic and continuing responsibility to train its members.

The problem, in other words, was returned firmly to the lap of the NZLS.

It is now necessary to go back a little in time and refer to two other developments in the field of legal education. One was the provision in the Technical Institutes of formal training

for legal auxiliaries. The other was an exciting and dramatic increase in the quality and quantity of continuing legal education, first and most markedly in Auckland with its greater resources in numbers but with awareness of the need and the potential later trickling down the map to other parts of New Zealand. Continuing legal education was and is run by either district law societies or the NZLS with, in a couple of centres, organisational help from local Departments of University Extension.

By the end of the 1970s a clear and workable pattern had emerged. Pre-admission legal education was the responsibility of the university law schools, with the Council of Legal Education exercising a measure of control by reason of its power to lay down the prerequisites for admission. Postgraduate qualifications were the sole concern of the university law schools. Responsibility for training legal executives was shared between the NZLS and the Technical Institutes. Continuing legal education in various forms was provided either by district law societies or the NZLS.

The position of the NZLS following the Council of Legal Education's resolutions of 21 April 1978 was this. The problem had not gone away. Because the universities could not or would not help the NZLS had no alternative but to act alone. Money was limited. The solution adopted by the NZLS was to build upon the experience it had by then acquired of successfully operating continuing legal education programmes. The decision was made to establish a programme of continuing legal education aimed specifically at the needs of new entrants to the profession. Just as for the protection of the public a degree of office experience and a knowledge of audit requirements is a prerequisite to a solicitor being permitted to practise on his own account so also for the same reason should be participation in the new programme. This scheme was in the first instance given the somewhat lumbering title of Post Admission Practical Training (PAPT). It is hoped soon to devise something a little snappier. The plan was approved by the Council of the NZLS on 30 March 1979. An involvement by the NZLS in legal education to this degree called for the appointment of a specialist staff member, and on the same date the NZLS Council resolved to employ a full-time Director of Education.

These were wise and far-seeing decisions. There have since that time been setbacks. Momentum was lost as a result of the resignation of the first appointee to the Director's position and of the time needed to find a suitably qualified successor. Delays in relation to the new Law Practitioners Bill have meant that the provision for compulsion that is to be requested of the legislature does not yet exist. Some of the smaller district societies have been understandably worried as to whether there would be a sufficient demand in their areas for the new programme to make its operation economically viable. Concern has been expressed by some university law teachers, particularly in relation to the line of demarcation between the new programme and the present professional year subjects offered by the law schools. It has even been suggested (astonishingly, in the light of the way that body washed its hands of the matter in April 1978, but perhaps not altogether seriously) that in some way the new programme should be placed under the control of the Council for Legal Education. The scheme is of course essentially one under which more senior practitioners endeavour to lend a helping hand to their recently admitted brethren; this has not stopped mischief-makers from depicting the scheme to students as one intended solely as a barrier between them and the law's glittering prizes.

But the difficulties are being overcome. A new enthusiastic and highly capable Director took up his duties in September 1980. The delay in the legislation has probably been a blessing in disguise simply because it has allowed a longer lead-in time. With the detailed syllabuses that are being developed (which are so devised as to throw a minimum burden on the instructor) it is probably going to prove simpler to provide the programme in smaller areas than in larger because accommodation problems will be so much more easily solved. It is now (or so the writer hopes) understood by the law teachers that there will be consultation in each law school centre to avoid overlap between the Society's programme and professional year instruction. And a successful Wellington pilot scheme left those young practitioners who enrolled for the course in no doubt as to its value.

Traditionally members of learned professions and skilled trades have recognised an obligation to impart their cunning to newcomers to their ranks. It is an obligation that members of the legal profession in particular have readily accepted over the centuries. The PAPT scheme represents an attempt to apply that tradition to today's circumstances. As with any new scheme its detail will no doubt require modification from time to time; it would be surprising if those responsible for devising

the scheme got it completely right at their first try. But in the writer's view the scheme in its essentials will prove of tremendous value in imparting to recent entrants to the legal profession skills that they need in their chosen calling if they are to serve their fellow citizens effectively and to obtain for themselves that satisfaction that comes from doing a tradesmanlike job.

D F Dugdale

CHRISTMAS MESSAGE TO THE PROFESSION FROM THE ATTORNEY-GENERAL

It is a privilege once more to extend my most cordial greetings for the coming Christmas season to all involved in the practice of the law and their families.

Every year carries with it significant events of considerable interest to our profession and 1980 has been no exception.

It has been a year marked for the most part by the deliberations of Commissions of Inquiry, implementation of a major parcel of recommendations of the Report of the Royal Commission on the Courts, and the imminent up-dating of important social legislation through the introduction of four Bills known as the "Family Law package".

Last year I took the opportunity to express my personal appreciation of lawyers who served the community outside their own professional practice. This willingness of members of the profession to act in the service of the public was exemplified this year in the spirit with which Mr Justice Mahon, Dr B D Inglis, and Mr Justice Taylor of New South Wales agreed to chair Commissions of Inquiry, all arduous challenges which they have met with total dedication.

I have also been particularly pleased with the expeditious and smooth manner in which more than 160 of the 246 recommendations of the Report of the Royal Commission on the Courts have already been implemented or are under action; only 34 have been deferred for further study, and the remainder either require no action or will be arranged administratively.

The profession, I am sure, will be looking forward next year to the enactment of the Law Practitioners Bill. There are no substantial differences of opinion between the Government and the Law Society on this Bill, which will be a major step forward in enhancing the profession in the eyes of the public.

I hope that 1981 will be marked by the same close and friendly association with members of the profession that I have enjoyed in the closing year.

J K McLay
Attorney-General

CONTRACT

PRIVITY OF CONTRACT

By J R FOX, Solicitor.

"If the opportunity arises I hope the House will reconsider Tweddle v Atkinson and the other cases which stand guard over this unjust rule" — Lord Scarman.

The recent House of Lords decision, *Woodar Investment Development Limited v Wimpey Construction UK Limited* [1980] 1 All ER 571, is of interest in relation to two basic issues in the law of contract. The first was in relation to whether the attempted but unsuccessful rescission of a contract would of itself amount to repudiation. The second was whether substantial damages could be awarded to a party for loss sustained by a third party to that contract.

The facts were straightforward. The vendor, (Woodar) in 1973 agreed to sell to the purchaser (Wimpey) a block of land for development. The price was £850,000 payable to the vendor and with provision for payment of a further £150,000 to a third party. The purchaser took the view that it was entitled to rescind the contract in reliance on a condition of the contract relating to compulsory acquisition by a statutory authority. It was held at first instance, and not thereafter challenged, that the purchaser was not entitled to rescind in reliance on this condition. The vendor claimed that the purported rescission amounted to a repudiation of the contract.

The vendor was successful at first instance and obtained judgment against the purchaser for a total of £462,000 which included the £150,000 for the nominated third party. The Court of Appeal by a majority of two to one upheld the vendor's claim but reduced the damages to £272,943 including £135,000 for the benefit of the third party.

Unsuccessful rescission and repudiation

The House of Lords, however, by a majority of three to two held in favour of the purchaser that, on the facts, the attempted rescission did not amount to repudiation of the contract. The majority took the view that the purchaser and the vendor had been content to have the rightfulness of the attempted rescission determined by the Court and that the purchaser had not manifested an intention to abandon, refuse future performance of, or repudiate the contract. Lord Wilberforce added that "it would be a regrettable development of the law of contract to hold that a party who bona fide relies on an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations."

On the other hand the dissenting Law Lords took the view that the purported exercise of a power of rescission being a total renunciation of all future obligations to perform any part of the contract cannot subsequently be watered down or deprived of its repudiatory quality. Lord Russell of Killowen went on, "I further assert that it is fallacious to deny the totally renunciatory and repudiatory quality on the ground that because the action is purportedly taken under a clause in the contract it is somehow affirming rather than repudiating the contract."

But in the result the majority held that the purchaser had not repudiated the contract and therefore did not have to pay any damages. Would the same result have followed in New Zealand had this been a contract entered into after the coming into force of the Contractual Remedies Act 1979? It would appear that the same problem, which can be regarded as essentially one of fact, would fall for determination under s 7 (2). This provides, "Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance."

The question then remains whether the words or conduct amount to a repudiation. Before embarking on such a course it might be

prudent for a party wishing to have the contract at an end to test the interpretation of the contract, presumably by way of the originating summons procedure rather than by an application under the Contractual Remedies Act 1979.

Privity — Third party damages

The House of Lords may have been divided over the issue of whether there had been repudiation but they were at one in taking the view (obiter) that, if there had been repudiation by the purchaser, only nominal damages should have been awarded by the Court of Appeal in respect of the third party. It is one of the fundamental propositions of the common law notion of contract that only parties to a contract may have rights and obligations thereunder. The doctrine of privity of contract was established by the House of Lords in *Tweddle v Atkinson* (1861) 1 B & S 393 and maintained by subsequent decisions in the House of Lords, including *Beswick v Beswick* [1968] AC 58. There are some recognised exceptions such as agency or trust, but none existed in this case.

The third party to the *Woodar v Wimpey* contract was not a party to the proceedings and could not have been. In the Court of Appeal the vendor was successful in obtaining damages for the benefit of the third party, Lord Denning taking the view that this was justified by the decision in *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92. This was a case where damages were awarded by way of compensation to one person for a breach of contract affecting not only him but also members of his family in relation to a joint holiday. The House of Lords did not go as far as saying that this case was wrongly decided, but took the view that it was decided on its own special facts, and was not authority for the view that damages can be obtained for the benefit of a third party.

In *Beswick v Beswick* the third party, C, was protected because the estate of A was able to obtain specific performance by B of the promise to pay the annuity to C. In *Woodar v Wimpey* it would not have been possible to avoid the doctrine in this way because it was agreed that for other reasons the contract had ceased to be in existence.

Lord Scarman at p 591 identified the two rules which effectually prevent A or C recovering that which B for value provided by A has agreed to grant to C. The first rule, the jus quaesitum tertio, is that the third party to a contract cannot enforce a provision made in his favour. The second rule is that in the absence of evidence to show that he has suffered loss, A is not able, for the benefit of C, to recover damages arising from the broken promise of B.

Both the rules relating to privity of contract are part of the law of New Zealand — See *Lambly v Silk Pemberton Limited [1976] 2 NZLR 427* as to the inability of the third party to enforce a contractual benefit conferred on him, and *Re Wilsons' Settlement Trust* [1972] NZLR 13 as to damages being nominal only.

Lord Scarman was of the view that both rules could be reconsidered by the House of Lords (but not the Court of Appeal) if the matter came before the House in a matter which required a decision. The decision was not required in the *Woodar v Wimpey* case because in any event the purchaser was not liable. Lord Scarman quoted with approval the view of Lord Reid in *Beswick v Beswick* that the denial by English law of third party contractual rights calls for reconsideration, particularly having regard to the "further long period of parliamentary procrastination" in implementing the Law Revision Committee's recommendation of 1937.

Reform

It is submitted with respect that the observations of the House of Lords relating to third party contracts and the implied criticism of the failure to legislate along the lines recommended by the United Kingdom Law Revision Committee were justified. Under the law in most other jursidictions, third parties have been given contractual rights either by statutory provision or, as in the United States, by development of case law. Western Australia and Queensland each have recent legislation giving such rights.

If there is to be New Zealand legislation then, as in Queensland, it would seem desirable to provide that a company incorporated after the date of a contract made for its benefit may, in fact, enforce the benefit. This was recommended in New Zealand by the Macarthur Committee and would overcome the frequent practical difficulties arising in this field from the rule that an agent cannot contract for a non-existent principal.

In New Zealand the Contracts and Commercial Law Reform Committee is at present considering the privity of contract doctrine with a view to recommending legislation. Reform does appear desirable to give effect to the reasonable expectations of the contracting parties. The strong words in the House of Lords are an indication that if such legislation is not passed in the United Kingdom then the House would itself reconsider the doctrine at the next suitable opportunity.

FAMILY LAW

EQUAL SHARING : EXTRAORDINARY CIRCUMSTANCES AGAIN

By W G F NAPIER*

In April this year, the Court of Appeal delivered its latest pronouncement upon section 14 of the Matrimonial Property Act 1976. The judgments in this case, **Castle v Castle**,[1] *continue an already lengthy line of litigation on the section,*[2] *but they constitute the first Court of Appeal decision in which an argument based on it has been successfully pleaded. This article discusses the reasoning in the case on the section 14 issue and notes the Court's comments on sections 18, 20 and 2 (2).*

The facts in brief

The parties were married in 1959 and adopted three children over the next few years. They purchased a house in 1963 in their joint names with the help of a State Advances mortgage and a $2,400 gift from the wife's parents. In 1968, the house, its furniture and a car belonging to the wife were sold and the family went to Australia to live. They returned in June 1971 bringing with them a car, and within a few weeks purchased (with the help of a $4,000 gift from the wife's parents, the sale of the car and a mortgage of $9,000), a house which was put in the wife's name. The parties lived there for a few weeks and then separated. Affidavits before the Court of Appeal[3] which had not been available to the Supreme Court disclosed the existence of a written separation agreement between the parties dated 6 August 1971. Under it, the proceeds of the sale of the car were to be paid to the wife.[4] The parties some time later reconciled for seven months, separated again briefly, and reconciled again for almost two years. They separated finally in October 1974. In 1972, the wife had started a retail business of her own which was financed by a second mortgage over the house and the sale of a small property purchased by her the previous year. The business was moderately successful and she started a second business which was financed by a $3,000 loan from her father. The businesses struck trouble in late 1974 and in 1975. The wife sold the house in December 1975 for $31,000 and paid off the loan to her father and a bank overdraft from the proceeds.

Section 14 in the Supreme Court

It was clear that Quilliam J in the Supreme Court[5] had not erred in his approach to s 14 and that on the evidence before him, his conclusion was unassailable. He stated:[6]

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[1] [1980] Butterworths Current Law, 420. Full judgments were given by Richardson and McMullin JJ. Richmond P concurred briefly. The other Court of Appeal decisions on s 14 are *Burrell v Burrell* (1979) 2 MPC 29; *Dalton v Dalton* [1979] 1 NZLR 113; *Martin v Martin* [1979] 1 NZLR 97; *Reid v Reid* [1979] 1 NZLR 572; and *Williams v Williams* [1979] 1 NZLR 122.

[2] For analyses of the existing case law, see D B Collins, "Section 14 — The Bane of the Matrimonial Property Act 1976" [1978] NZLJ 238; and W R Atkin, "The Survival of Fault in Contemporary Family Law in New Zealand" [1979] 10 VUWLR 93, 96-100.

[3] There were seven new affidavits — five by or in support of the appellant and two by or in support of the respondent. The Court accepted them but did emphasise that only non-controversial evidence bearing on the issues could be admitted under "the interests of justice" criterion laid down by s 39 (4).

[4] It fell within s 57 (5) and was therefore given effect. The relationship of s 57 (5) with s 55 (1) is, in Richardson J's words, "not easy to determine". Section 55 (1) is subject to s 57 (5) and regard is only to be had under s 55 (1) to an agreement when "it fairly bears" on the determination of the application under the 1976 Act. Nevertheless, an agreement which is a final settlement of a matrimonial property question is to be given full effect under s 57 (5). Section 55 (1) seems to be redundant in this situation.

[5] *Castle v Castle* [1977] 2 NZLR 97.

[6] Ibid, 102. Approved by the Court of Appeal in *Martin*, supra, 103, 111.

> "The general purport and intent of the Matrimonial Property Act is, I think, clear. Except for marriages of short duration (which is not the case here) it is to ensure that in the majority of cases there will be an equal division between the spouses of all matrimonial property. This is, I think, the primary and governing intention of the legislature, and s 14 is to be interpreted in the light of that. The expression 'extraordinary circumstances that in the opinion of the Court render repugnant to justice the equal sharing between spouses . . .' must accordingly relate to the exceptional situation and not to the commonly recurring one. The extraordinary circumstances will, I think, require to be those which force the Court to say that, notwithstanding the primary direction to make an equal division the particular case is so out of the ordinary that an equal division is something the Court feels it simply cannot countenance."

Quilliam J considered (i) the gifts made by the wife's parents towards the purchase of the two homes; (ii) the husband's inability to keep a steady job; (iii) the wife's majority contribution to the total family income; (iv) the significant nature of the husband's contribution to the marriage partnership; and (v) the wife's provision of assets. He concluded that there were no extraordinary circumstances apparent which rendered equal sharing repugnant to justice. He contemplated the possibility that a truly gross disparity might have existed between the contributions of the spouses which could satisfy s 14,[7] but denied that one existed on the facts before him.

Section 14 in the Court of Appeal

Richardson and McMullin JJ proceeded on the basis that the new affidavits disclosed circumstances sufficient to bring s 14 into operation. It is convenient to list and comment on each of their reasons in turn.

(1) The husband's agreement in the separation document to the proceeds of the sale of the vehicle, the only substantial remaining asset of the marriage, being paid to the wife was significant. The car was worth about the same as the total of the gifts that the wife's parents had earlier made to assist in the purchase of the home; this may have been a factor in the decision to give the wife the proceeds. This was said to be a recognition of the wife's greater financial contribution to the marriage partnership.

This argument seems to be a strong one, but four points can briefly be made about it. First, it must be remembered that the separation agreement was made when the Matrimonial Property Act 1963 was in force and that it was perfectly usual for property to be allocated to one spouse only. Indeed, the allocation of specific property to each spouse, subject only to an overriding judicial discretion, was the dominant aim of that Act. The allocation in the agreement cannot therefore be considered extraordinary in the light of the prevailing law. Second, the vehicle as a family chattel was prima facie matrimonial property under the Matrimonial Property Act 1976.[8] Third, the wife put the proceeds of sale into the purchase of the *matrimonial* home. Fourth, the agreement related to one item and not to her perhaps intangible contributions over the largest part of the marriage — the preceding 12 years.

Thus, while this reason does indicate a mutual recognition of the wife's greater contribution, in itself it is not extraordinary and goes only a small part of the way towards satisfying the strong language of s 14.

(2) The proceeds from the sale of the car and a gift of $4,000 from the wife's parents were together put towards the purchase of the home. It was recognised by the Judges that the wife, through this gift, made a greater contribution than the husband towards the purchase.

It is submitted that these are in no way inherently extraordinary circumstances. An earlier dictum of Richardson J himself applies:[9]

> ". . . It is not extraordinary in our society for one spouse to contribute from his or her resources to the acquisition and running of the matrimonial home and this is reflected in the provisions of the Act. . . . It would have been extraordinary if this wife had not made substantial financial contributions to the marriage partnership over the years."

It is also submitted that the status of the gift was not clear. The Court of Appeal appeared to

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[7] Idem. Approved by the Court of Appeal in *Martin*, supra, 111, with Woodhouse J reserving his conclusion as to this point at 103; and in *Dalton*, supra, 116-117, 120, again with Woodhouse J's reservation (at 114).

[8] Section 8 (6) (subject to a s 57 (5) agreement).

[9] *Dalton*, supra, 120. Cf Richardson J's specific comment in this case that the wife's purchase of the property from her own resources "was a contribution to the marriage partnership over and above regular contributions made in the course of the operations of the marriage partnership".

assume that it could be extricated from the home. In fact, a gift used on the matrimonial home is matrimonial property in the absence of a s 21 agreement and merges with the house.[10] And it does seem odd at first glance that a gift which is not separate property can still be isolated in the manner of separate property to determine a disparity in contributions under s 14.

The Court should have addressed itself to these arguments. It would probably have concluded that if s 14 is to be satisfied by a gross disparity in contributions to the marriage partnership, all the relevant s 18 contributions, including cash matrimonial gifts, should be open to scrutiny.[11]

A final reservation about reason (2) can be expressed. Knowledge of the gift was not disclosed only by the new affidavits. Quilliam J considered the gift, but did not take it as a strong indication of extraordinary circumstances.[12]

(3) The registration of the home in the wife's name with the consent of the husband was an indication that the husband abandoned any claim to a legal or equitable interest in the property. It was this action which recognised the wife's greater financial contribution. It was emphasised by the fact that the first separation occurred a short time later, and the husband was given little chance to build up contributions through services around the home to the marriage partnership.

It should be noted that the abandonment of claim to the legal title by the husband is not significant under the Matrimonial Property Act 1976. Certainly, property ran with title under the Matrimonial Property Act 1963. Now, however, the home is prima facie matrimonial property, and title is not intended in itself to be indicative of contributions to the marriage partnership. Nevertheless, it is clear that the acquisition of the home by the wife — she was the sole source of the necessary cash and arranged for its purchase — was a substantial contribution to the partnership within s 18.[13]

(4) The first separation which took place a short time after the purchase of the property was followed by two discrete and ultimately unsuccessful reconciliations together totalling about two years. It was only during the brief reconciliations that the family lived together in the home, and the Court indicated that it would be repugnant to justice to allow the equal sharing principle of the Act to operate in relation to the proceeds of the sale of the home simply because of those sporadic reconciliations.

It was clear that the home was matrimonial.[14] Section 11 of the Act thus applied, subject only to the operation of s 14. It was extraordinary that the wife was the sole contributor to the purchase of the house (reason (3)), and that it was exclusively her property to all intents and purposes save the two reconciliations. These circumstances rendered it repugnant to justice to give the husband an equal share of the proceeds of the sale of the house. An argument along these lines

[10] Section 10 (3). In effect, the formulation "matrimonial home and the family chattels" refers also to cash gifts which go towards the purchase of the home or chattels: "Section 10 is, I consider, designed to ensure that gifts which go towards the matrimonial home are, in the absence of agreement to the contrary to be treated as absorbed into the matrimonial home so as to have lost their identity as gifts": *Castle* (SC), supra, 100. See also *Symonds v Symonds* (1978) MPC 201, per Somers J at 203. Cf *Syme v Wilson* (1979) 5 Recent Law 5 where the proceeds of gifts went towards matrimonial property but could be traced and designated separate.

[11] Monetary gifts by third parties to one spouse may constitute contributions by that spouse to the marriage partnership under s 18 (1) (d): see *Bleakley v Bleakley* (1978) MPC 31; *Harris v Harris* (1978) MPC 101; cf *Bromwich v Bromwich* [1977] 1 NZLR 613, dicta per Barker J at 618. These gifts may help to create a s 14 disparity: see *Sopilko v Sopilko* (1979) 2 MPC 176.

[12] Quilliam J ignored the gift because he stated that it could not be extricated from the home and designated separate property, but he may not have appreciated that it could still be used to quantify contributions.

[13] Section 18 (1) (d).

[14] *Castle* (SC), supra, 99-100. Richardson and McMullin JJ made frequent references to "the matrimonial home" without arguing the issue, so a brief explanation may be useful. First, the status of the home cannot have fluctuated according to its use for the moment; it was not matrimonial when they lived together and separate when they did not. Second, the use to which the property was put just before the final separation (ie, when they were still living together) determined whether it was matrimonial or not: s 2 (4). Third, the fact that the periods during which Mr and Mrs Castle did live together in the home were sporadic and totalled only about two years does not really detract from the matrimonial character of the property: "While it may be that in some cases a home that has been used for a short term before the separation of the parties as the principal family residence is not to be regarded as being used habitually, I do not think that, in principle, the shortness of the period of its use should preclude it from being said to have been used "habitually" if in fact it is the house in which the husband and wife have made their only or principal family home": *Beuker v Beuker* (1978) MPC 20, per McMullin J at 22.

would have been sufficient to justify the use of s 14 here, but the Court provided further explanation. Its amplification, it is submitted, left a little to be desired.

Richardson J stated:

> "Analogies cannot be pressed too far. But it is relevant to consider what the position would have been had the parties been divorced and then had remarried at the time they were reconciled. In that case, the second marriage would have been a marriage of short duration and the proceeds of sale of the matrimonial home would have been determined in accordance with the contribution of each to the marriage partnership (s 13). When these parties started living together again in what was at the time exclusively the wife's property, they were in a somewhat similar position."

With respect, it is suggested that the duration of a marriage under s 13 is not an analogy that can be "pressed" at all. Richardson J has himself stated:[15]

> "It is apparent . . . from the scheme of s 13 that neither the purchase by one spouse alone before the marriage of the future matrimonial home nor a contribution to the partnership by one spouse clearly disproportionately greater than that of the other spouse is sufficient, without more, to displace the presumption of equal sharing in s 14."

The reason is clear. A contribution of one spouse to a marriage partnership which "has clearly been disproportionately greater than that of the other spouse"[16] is not sufficient to constitute an extraordinary circumstance making equal sharing repugnant to justice. The s 14 test is far more stringent than the s 13 one.[17] Just because Mr and Mrs Castle would have satisfied the s 13 criteria had they entered a short second marriage would in no way necessarily have satisfied the s 14 criteria.

McMullin J stated:

> "The separation agreement and the transfer of [the home] to the wife occurred at about the same time. The husband would then have had no claim [to the home] under the Matrimonial Property Act 1963, and indeed what the parties had done amounted to an expression of (common intention) within s 6 of the 1963 Act so as to defeat any claim by the husband."

There was an indication that it would be repugnant to justice if the husband was given an equal share of the home under the 1976 Act when the 1963 Act clearly denied him any share. In effect, the change in the law made Mrs Castle a victim of an injustice within s 14. But this argument was dealt with and dismissed by the Court of Appeal in *Martin*, supra:[18]

> "I cannot regard the changes in the legislation as an extraordinary circumstance. The 1976 Act was designed to reform the law of matrimonial property and in doing so to recognise the presumptions of equal sharing in matrimonial property on breakdown. Parliament must have been well aware that many spouses who would expect to receive only a small interest under the 1963 legislation, would now be receiving an equal share. And in the transitional provisions of s 55 it had under consideration cases . . . where the marriage had broken down and there were proceedings pending and it decided that the hearing should continue under the new legislation."

The final sharing

Having decided that there existed extraordinary circumstances which made equal sharing repugnant to justice, the respective shares of the spouses in the matrimonial property fell to be determined by an assessment of the contributions of each to the marriage partnership. The Court of Appeal concluded that Mrs Castle had contributed three times as much to the marriage partnership as her husband: she received 75 percent of the proceeds of the sale of the home. The Court's reasons for this division largely restated the four reasons given above for the use of s 14. Specifically, Richardson and McMullin JJ took into account (i) the allocation of the proceeds of the sale of the vehicle to the wife as a belated repayment of the gift from the wife's parents (see reason (1) above); (ii) the wife's payment of the purchase money for the property from her own resources (see reasons (2) and (3) above); and (iii) the fact that the husband and wife only lived together for a total of about two years after the first separation (see reason (4) above),

[15] *Williams*, supra, at 129.
[16] Section 13 (1) (c).
[17] See *Martin*, supra, per Richardson J at 110.
[18] Ibid, per Richardson J at 111. See also Cooke J at 107; and Ongley J in the Supreme Court: *Martin v Martin* (1977) MPC 139, 141.

and that when the parties were living apart between reconciliations the wife had the care of the three children while maintaining a full-time job.

Only (iii) introduces a new element — the wife's care for the children while in full-time employment, which is clearly within s 18 (1) (c).

It is submitted that restating the reasons for finding a gross disparity which satisfies s 14 is of only limited assistance in the problem of quantification of that disparity. In fact, this problem could have been resolved more easily in this case than in many others: the wife was the sole financial contributor to a house which was eventually sold, and she cared for the children while the parties were separated; against this should have been explicitly balanced the husband's contribution during the two reconciliations by way of maintenance of the property and specific amounts going towards improvements. Final percentages could thus be settled upon largely by direct comparisons of financial contributions from the period of the house purchase onwards. Intangible contributions (such as care of the children) would have certainly counted here but were not the sole or principal basis of a possible disparity in contributions.[19]

The Court of Appeal neglected the first 12 years of the marriage in making its assessment.[20] It omitted from its calculations Mr Castle's contributions as husband and father over 11 years which were "not insignificant".[21] Those years spent by him in sharing the upbringing of the children and in services about the home, together with the financial contributions from his earnings (even if the evidence showed that his employment was not completely regular), ought to have been expressly considered. On the other hand, the wife's contributions to the care of the children, her performance of household duties, her almost continuous full-time employment throughout the marriage and the early $2,400 gift from her parents outweighed those of her husband over the same period.

Deductions from proceeds of sale of the property

A $6,500 overdraft with the Bank of New Zealand and a $3,000 loan from the wife's father had been repaid out of the proceeds of the sale of the house. If these debts were personal under s 20 (7), they could be deducted from the share of Mrs Castle who ran them up. In that case, she would effectively end up with that much less of the proceeds of the sale. Mrs Castle ran two businesses whose profits were used both to maintain the family and the enterprises themselves. The bank account was used for business and family purposes, and the Court found it impossible to separate the two types.[22] The businesses were clearly not "common enterprises" within s 20 (7) (b) as the wife had declined to allow her husband to participate in them. They were also outside s 20 (7) (d) as not being incurred "for the benefit . . . of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage". Apparently, spending an unidentifiable part of the remuneration from the businesses on the family was not sufficient to say that the debt was incurred for the benefit of the children.[23]

The debt owing to Mr Castle's father was

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[19] ". . . it is not easy to add together the significance of unlike things (some tangible, some intangible) in order to estimate the total achievement of the one spouse, let alone compare it with a different achievement by the other": *Reid*, supra, per Woodhouse J at 583. The tendency to give undue weight to monetary contributions despite s 18 (2) is recognised as a problem, idem. Nevertheless, all other contributions being equal, a greater financial contribution by one spouse makes his or her total contribution to the marriage partnership greater: *Foss v Foss* [1977] 2 NZLR 185, per White J at 187, 189; *O'Connor v O'Connor* (1978) MPC 149, per Vautier J at 150; and *Barton v Barton* [1979] 1 NZLR 130 (CA), per Cooke J at 135.

[20] ". . . although it was a marriage of 15 years, it is reasonable in the special circumstances of this case to focus more on the last few years of the marriage.", per Richardson J.

[21] *Castle* (SC), supra, 100.

[22] Perhaps this difficult separation process was not even necessary. The bank mortgage was secured by a second mortgage over the matrimonial home. On one view, this means that the debt secured by the mortgage itself becomes matrimonial. The actual purpose behind the mortgage — that of helping to finance one of the wife's separate ventures — cannot be looked at, and the debt becomes a joint one within s 20 (7) (a): see *Frost v Frost* (1978) MPC 84, cf the view that in substance the liability is that of the wife's business, incurred for the benefit of that business, even if the matrimonial home is security: see *Kelly v Kelly* (1978) MPC 117.

[23] The test is generally the prospective benefit to the family from the incurrence of the debt for the purpose of the business of one spouse: see *Frost*, supra, *Patterson v Patterson* (1979) 2 MPC 143; and *Quaid v Quaid* (1979) 2 MPC 155.

The Court of Appeal here added a gloss in insisting that the benefit must be identifiable and complete. Counsel for the appellant was in fact able to produce evidence of six specific payments from the account for the benefit of the family (s 20 (7) (d)) and evidence of a further nine for the

used primarily to expand the stock of one of Mrs Castle's businesses and therefore was also personal.

Having determined that the debts were personal but were satisfied out of the matrimonial property, the Court used its discretion to compensate Mr Castle by increasing his share in the property.[24]

Post-separation contributions

Mrs Castle paid the outgoings on the property and cared for the children after separation. It was argued on her behalf that these contributions were worthy of compensation by use of the s 2 (2) discretion.[25]

Richardson J refused to allow use of the discretion because there was no evidence that the wife greatly contributed to the value of the property; she maintained and preserved it, but she had also the use of it after separation. And in any case, care of the children was not a contribution towards the *property* within the frame work of that discretion.[26] McMullin J thought that the period after the separation was not lengthy and that the use of the provision should be "the exception rather than the rule".

Although Mrs Castle's use of the property counter-balanced any compensation she could have received from the maintenance and preservation of it, two comments can be directed towards the reasoning of McMullin J. First, the length of the period after separation should not be conclusive. It is the value of improvements made to the property which should count, not the period over which they were made; indeed, the *smaller* the period of use of the property, the greater the effective value of those improvements. Second, it is submitted that if the discretion is to be used at all, it should be used fully to provide for post-separation maintenance of property in much the same way that s 17 provides compensation for pre-separation sustenance of separate property.[27]

Conclusions

The Court of Appeal gave Mrs Castle seventy-five percent of the proceeds of sale of the matrimonial home, but increased the share of her husband proportionately to compensate him for payment out of those proceeds of her personal debts.

The conclusion cannot be avoided that the Court was unsure as to the criteria to use. Inconsistencies with dicta in previous cases and a reticence to quantify intangible contributions — a necessary task if the final shares are to be determined with any accuracy — betrayed the insecurity of the Court in applying what amounts to a broad judicial discretion.

Nevertheless, there is little doubt that the use of s 14 was justified here. At the back of the Court's mind was probably the thought that if s 14 was not invoked in Mrs Castle's favour, she would receive practically nothing after paying off her debts. A comment to this effect was made by Richmond P during the hearing. McMullin J's response to that comment is worth repeating: "To the innocent bystander it would appear monstrous!"

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improvement of the home (s 20 (7) (c)); surely a minimum figure could have been set by the Court because part of that benefit *was* quantifiable.

[24] Section 20 (6). The discretion, said the Court of Appeal, is to choose one of the s 20 (6) alternatives and is not an unfettered one enabling it to avoid one choosing any of the alternatives, cf *Allum v Allum* (1979) MPC4, per Ongley J at 4-5.

[25] It can be used simply to pin a value on a property which will adequately compensate a spouse who has done more than his or her share to preserve or improve the property: see the majority in *Meikle v Meikle* [1979] NZLR 137.

[26] Cf ibid: "The Act is concerned throughout with much more than bricks and mortar", per Cooke J at 155; and *Herrick v Herrick* (1979) 2 MPC, 92, per Somers J at 93.

[27] The ideal is probably legislative amendment: see *Meikle*, supra, per Woodhouse J at 144.

CRIMINAL LAW

CRIMINAL RESPONSIBILITY AND INTOXICATION — THE AUSTRALIAN REJECTION OF MAJEWSKI

By Dr G F ORCHARD*

1. Introduction

It is now generally accepted that in serious crime the guilt of an accused should be assessed on a "subjective" basis. That is, apart from exceptional cases where strict liability or liability for negligence is imposed, the tribunal of fact should have regard to the accused's actual state of mind at the time of his relevant conduct. There is no presumption of law that a person foresaw or intended the natural and probable consequences of his acts, nor that he was aware of existing circumstances. The question is not what a "reasonable", or even an "ordinary", person would have had in mind, but rather what did the accused himself apparently foresee, intend, know or believe.

The inquiry must be as to what was "apparently" the accused's state of mind because it remains as impossible as ever to look directly into the "mind", so the assessment of the accused's intention or awareness depends on the inferences drawn from his conduct, admissions and other statements, and on whatever credence is given to any evidence given by himself and "mental experts". The determination remains unavoidably "objective" to the extent that observable behaviour is of fundamental importance as evidence from which unseen mental states may be inferred. Nevertheless, even when an accused does not give evidence the acceptance of the "subjective" approach means there is no rule of law which can supply the answer simply by reference to the adjudicator's conception of what a reasonable person would have foreseen and known, and all manner of permanent or temporary personal attributes of an accused can and should be considered. Ignorance, inexperience, stupidity, thoughtlessness, impulsiveness or panic will tend to diminish foresight, but any special knowledge, experience, forethought or planning may doubtless increase it.

Perhaps the most significant steps towards the ascendancy of the "subjectivist bug"[1] have been the academic, legislative and judicial rejections of the support for a presumption of intention provided by *DPP v Smith* [1961] AC 290,[2] and the decision in *DPP v Morgan* [1976] AC 182 rejecting the idea that in serious crime a mistake must be based on reasonable grounds before it can excuse. At the same time the appearance of the defence of automatism has shown that it is possible to rebut the apparent presumption that a sane person is at least aware of and in control of the movement of his limbs.

2. Voluntary intoxication

Since the early nineteenth century it has been recognised that in some cases absence of mens rea requires acquittal notwithstanding that it resulted from voluntary intoxication, but here subjectivism has met resistance and the scope of the exculpatory principle has remained controversial. Before considering the area of dispute it is convenient to summarise a number of points that are tolerably clear.

First, the mere fact of voluntary intoxication is no defence to any crime. This has never been in doubt although the application of the principle to alcoholics and drug addicts illustrates the limitations of the mens rea doctrine as a device for fixing criminal guilt according to moral culpability.

Second, the principles governing the effect of alcohol also apply to other drugs.[3] Again this has not been questioned by the Courts although

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[1] Cross (1975) 91 LQR 540, 551.

[2] Eg, Glanville Williams (1962) 23 MLR 605; Buxton [1966] Crim LR 195; *Parker v The Queen* (1963) 111 CLR 610, 623-624; s 8 of the Criminal Justice Act 1967 (UK); in New Zealand "objective" tests were deleted from ss 66(2) and 167(d) of the Crimes Act 1961; and see *Downey* [1971] NZLR 97 (CA); *Kamipeli* [1975] 2 NZLR 610 (CA); cf *Kake* [1960] NZLR 595 (CA).

[3] Eg, *Lipman* [1970] 1 QB 152; *Viro v The Queen* (1978) 18 ALR 257.

at one time doubts might have arisen because of a comparative lack of general familiarity with the sometimes rapid and radical effects of some drugs.

Third, insanity caused by the ingestion of an intoxicant is governed by the rules applicable to other forms of insanity,[4] although this is of limited significance now that it is held that "disease of the mind" does not include a temporary disorder caused by the application to the body of an "external factor", including an intoxicant.[5]

Fourth, where an offence requires a "specific intent" the accused is entitled to acquittal if he lacked the required intent, even though this resulted from the effects of voluntary intoxication. It has now been held that this concession of the developed common law does not involve shifting the persuasive burden of proof to the accused, and it does not require that the accused was "incapable" of forming the required intent.[6]

The outstanding issue is whether this last exculpatory principle should apply to all offences requiring a mental element, or whether it applies only to a limited class of offence.

3. Majewski and its critics

For England the question was authoritatively answered in *DPP v Majewski* [1977] AC 443. There the House of Lords held that voluntary intoxication can provide a defence only to crimes which require a "specific intent" and in the case of other offences (where the required mens rea is said to be a mere "basic intent") it can never excuse, no matter how extreme the effect of the intoxicant.

> "In the case of these offences it is no excuse in law that, because of drink or drugs which the accused had taken knowingly and willingly, he had deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing, or even to be conscious that he was doing it" (ibid, 476 per Lord Elwyn-Jones LC)."

The important practical effect of this rule is that voluntary intoxication will never excuse completely when violence to the person or damage to property is established, for in such cases a "basic intent" offence will always be available.

Majewski had a generally critical reception from commentators,[7] there being two main objections. First, the distinction between specific and basic intent remained uncertain. Three different tests for identifying a specific intent were suggested (an intent to achieve something beyond the actus reus, something more than recklessness as to the actus reus, or a "purposive element") but none of these explains all the classifications of offences which have in fact been made.[8] Second, and more importantly, it was objected that the decision contravened fundamental principles of criminal responsibility developed by the Courts this century. In particular, the rule in *Majewski* means that a person may be convicted of a crime, even a very serious crime, although he never in fact formed a state of mind required by the definition of the crime (and their Lordships suggested no exception for states of mind required by statutory definition), and even though his offending conduct was "involuntary".

Their Lordships sought to answer such latter objections in two ways. First, even if the rule was a departure from commonly applied principles it was justified and demanded by considerations of public policy. The law would not adequately promote the prime purposes of the maintenance of public order and the protection of individuals if the effects of voluntary intoxication were capable of excusing all offences, particularly all those involving violence. Such a rule would offend "common sense" and so shock the public as to seriously undermine general confidence in the law. Second, it was suggested that the rule did not really depart from the general principle requiring proof of a "guilty mind" because for crimes of basic intent recklessness is sufficient mens rea, and a person who voluntarily consumes intoxicants to the extent that his state of mind is signifi-

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[4] *DPP v Beard* [1920] AC 479, 501.

[5] Eg, *Cottle* [1958] NZLR 999 (CA), 1011, 1032; *Quick* [1973] QB 910; for doubts where lasting "disease" combines with intoxication, cf, eg *Meddings* [1966] VR 306; *Burns* (1973) 58 Cr App R 365; and *Dodd* (1973) 7 SASR 151, 153; and on "external factors", see Mackay [1980] Crim LR 350.

[6] Eg, *Kamipeli* [1975] 2 NZLR 610 (CA); *Viro v The Queen* (1978) 18 ALR 257; *Sheehan* [1975] 1 WLR 739.

[7] Eg J C Smith [1976] Crim LR 376; Gold (1976) 19 Crim LQ 34; Glanville Williams (1976) 126 New LJ 658; C R Williams, An Annual Survey of Law 1976, 88; Walker [1977] NZLJ 401; Orchard [1977] 1 Crim LJ 59; for support of it, see Dashwood [1977] Crim LR 532, 591; Cross 92 LQR at 522-525.

[8] See, eg, Smith and Hogan, *Criminal Law*, 4th ed, pp 186-188.

cantly affected is guilty of a reckless course of conduct. This theory was open to the obvious objection that it classified a state of mind as "reckless" without requiring any foresight of consequences or awareness of circumstances (and nor indeed did it require foreseeability of events), and thus gave the term a meaning it does not have in other contexts in modern criminal law.[9] No doubt it was because of this that Lord Simon offered the alternative explanation that the voluntarily intoxicated mind is "as wrongful as", and in law is the "equivalent" of, recklessness.

The introduction of the recklessness theory into the reasoning means that *Majewski* is open to two interpretations. The more Draconian conclusion is that proof of voluntary intoxication (at least if it was of such a degree as to affect the accused's awareness or foresight) relieves the prosecution of the need to prove any other state of mind, because it amounts to proof of mens rea.[10] Alternatively the decision may be "read down" so that it provides no more than a negative rule that voluntary intoxication can never provide the basis of a defence to a crime of basic intent, so that evidence of such intoxication cannot be relied upon in support of a defence of accident, lack of intent or foresight, mistake, ignorance or automatism — but such defences may be supported by other evidence notwithstanding the intoxication.[11]

Recently, in *Jaggard v Dickinson*[12] the Divisional Court went one step further in holding that where a statute does not merely require intention or recklessness but expressly provides that an honest but "unjustified" and mistaken belief in certain circumstances is a defence, such a mistake induced by voluntary intoxication excuses even though the offence is not within any definition of offences of "specific intent". This places a premium on the extent to which Parliament has defined the required mens rea. In contrast, although the statutory requirement that an accused recklessly cause damage is judicially interpreted as meaning that he must actually appreciate that there is a risk of damage such foresight is not required if it is absent as a result of self-induced intoxication.[13] But an aggravated form of this offence requires "reckless" damage to property by a person who is also "reckless" as to whether life would be thereby endangered and such latter recklessness is equated with a specific intent so that drunkenness is relevant to whether it existed, although it is not relevant to whether the accused was "reckless" as to the damage to property — a mere "basic" intent.[14] This result might be expedient but it involves manifest distortion of the normal rules of statutory interpretation and the concept of relevance.

4. The position in Australasia before O'Connor

With the possible exception of a couple of cases on mistake[15] *Majewski* appears to be consistent with previous English decisions on intoxication. In New Zealand and Australia however there are modern cases where Courts have adopted a different approach.

In New Zealand, in the important considered judgment in *Kamipeli*[16] the Court of Appeal concluded that voluntary intoxication could be relied upon in support of a denial of "recklessness" or "general intent", and not just in respect of a "particular" intent. But when the Lords reached the opposite conclusion the Court announced that the question must be regarded as open.[17] That remains the position in this jurisdiction although in *Kaitamaki* [1980] 1 NZLR 59, 63, (CA) it was accepted that voluntary intoxication should be taken into account on the question whether the accused believed the victim consented to an alleged rape, although it is thought that offence is classified as one of basic intent in England and the Court of Appeal made no mention of any such question of classification.

In Australia, in *Ryan* (1967) 121 CLR 205, 216 Barwick CJ said a person could not be guilty of a crime if the relevant deed was not a "voluntary or willed act", and in Victoria this principle was applied at first instance in cases where the "involuntariness" arose from voluntary intoxication.[18] Subsequently *Majewski* was

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[9] At least where recklessness as to actual or possible consequences of conduct is in issue; cf Murphy [1980] 2 All ER 325; *Lawrence. The Times* 30 July 1980.

[10] *Smith and Hogan*, op cit, 188 appear to assume that this is the correct interpretation; and see Glanville Williams, *A Textbook of Criminal Law*, pp 427, 432.

[11] Compare the approach when insanity is relied upon but the persuasive burden is not discharged: *Roulston* [1976] 2 NZLR 644 (CA), 647.

[12] *The Times*, 26 July 1980.

[13] *Stephenson* [1979] 2 All ER 1198, 1204; *O'Driscoll* (1977) 65 Cr App R 50.

[14] *Orpin* [1980] 2 All ER 321.

[15] *Gamlen* (1858) 1 F & F 90; *Cogan* [1976] QB 217.

[16] [1975] 2 NZLR 610 (CA); and see dicta in *Cottle* [1958] NZLR 999 (CA), 1007, 1015, 1021, 1025, 1032, 1034.

[17] *Roulston* [1976] 2 NZLR 644 (CA) 653.

[18] *Haywood* [1971] VR 755; *Keogh* [1964] VR 400; for other inconclusive Australian authorities, see C R Willaims, *An Annual Survey of Law* 1976, p 93; in *Kaminsky* [1975] WAR

cited in the High Court in *Viro v The Queen* (1978) 18 ALR 257 in uncritical but inconclusive terms, although this was interpreted as implied approval in *Fahey* and *Lindsay*.[19] There the Court of Criminal Appeal of South Australia followed *Majewski*, although it adopted a conservative interpretation of it, to the effect that voluntary intoxication does not provide conclusive evidence of mens rea but it may not be relied upon to rebut an inference of basic intent or recklessness.

Then however *Majewski* was rejected by the Court of Criminal Appeal of Victoria in *O'Connor*,[20] and the Crown applied to the High Court of Australia for special leave to appeal from this decision.

5. The Decision in The Queen v O'Connor[21]

O'Connor was seen going through the glove-box of a car owned by a policeman and when the owner arrived shortly afterwards he found him holding a map-holder he had taken from the car. Upon being questioned the suspect ran off but the policeman gave chase and caught him. O'Connor then stabbed the policeman in the arm with a knife he had also taken from the car, and in the ensuing struggle he apparently tried to strike again, and when he dropped the knife he tried to recover it.

O'Connor was charged with three offences: theft, wounding with intent to cause grievous bodily harm or to resist lawful apprehension, and unlawful wounding. He gave evidence that before the incident he had been drinking and had taken a particular drug. He said he had no recollection of the alleged theft or wounding and there was medical evidence that a combination of alcohol and the drug would cause hallucinations and could have prevented the formation of an intent to steal or wound. In conformity with *Majewski* the trial Judge directed the jury that the intoxication should be considered on the question whether he had in fact formed the specific intent required for the first two offences, but it was irrelevant to the charge of unlawful wounding which required no specific intent. The jury acquitted of the first two offences but convicted of unlawful wounding.

The Court of Criminal Appeal held that *Majewski* should not be followed in Victoria and that the jury should have been told to take into account with all the other evidence the evidence of intoxication in deciding whether the state of mind required for unlawful wounding was present. The Court was particularly influenced by the fact that *Majewski* was contrary to the established practice in the State, and the Judge's directions required a conviction even though the wounding was not "voluntary or willed", and this was inconsistent with the judgment of Barwick CJ in *Ryan*. It was further held that the acquittals on the first two charges meant that had the jury been properly directed and consistent it would have acquitted of unlawful wounding, so the Court directed an acquittal rather than a retrial. It is submitted that Murphy J is right in thinking that this was too generous. The evidence does not appear to have precluded the jury inferring that the accused deliberately wounded the victim without any more particular ulterior intent, and without having formed an intent to steal; in view of the seriousness of the offence, the controversial nature of the defence, and the apparent strength of the prosecution case, it would seem that a retrial would have been more appropriate.[22]

The High Court granted the Crown special leave to appeal but dismissed the appeal by a majority of four to three (Barwick CJ, Stephen, Murphy and Aickin JJ; Gibbs, Mason and Wilson JJ dissenting).

The majority expressed themselves in rather different terms but each rejected the distinction between crimes of specific and basic intent and each rejected the idea that the mere fact that an accused's mind was affected by voluntary intoxication justifies the Courts abandoning the requirement that the prosecution prove a mental element required for the commission of the offence. Although there is some tendency to speak in terms of a required "intent" it seems clear that, subject to possible qualification in respect of manslaughter and certain statutory offences, the principle accepted by the majority is that voluntary intoxication may be relied upon in support of a denial of any state of mind requiring consciousness or awareness, whether it be a requirement that conduct be "voluntary" or that conduct, circumstances or consequences be intended, known or foreseen, or that there be recklessness.[23]

143, 148 Wickam J suggested that even in States where the intoxication rule has been codified any intent could be negated in this way; cf *O'Connor* (1980) 29 ALR 449, 503.

[19] (1978) 19 SASR 577; see Walker [1979] 3 Crim LJ 13.

[20] Unreported, 30 April 1979; see Fairall [1979] 3 Crim LJ 211.

[21] (1980) 29 ALR 449.

[22] Cf *Reid v The Queen* [1979] 2 WLR 221 (PC).

[23] See, eg, the approval of the judgment in *Kamipeli*: 29 ALR 449, 464 per Barwick CJ, 491-492, per Aickin J; and

It was thought that the English rule involved a departure from fundamental principle in that it imposed criminal liability in respect of acts which may be involuntary or unaccompanied by a state of mind required by the definition of a crime, and Aickin J did not think it could be reconciled with the High Court's rejection of any presumption of intent.[24]

It may be added that the principle supported by the majority judgments is not affected by some puzzling theory propounded by Barwick CJ who would classify a "purpose" with which the definition of a crime might require an act to be done as being part of the "actus reus".[25]

The dissenting Judges gave three main reasons why *Majewski* should be followed. First, the weight of authority supported it and no sufficient reason for changing the law had been established. Second, it was morally wrong for a person to escape all responsibility for his actions merely because of the effects of self-induced intoxication, and a contrary view would not be acceptable to the public. The Solicitor-General had apparently argued that voluntary intoxication meant that a basic intent must be conclusively presumed but it seems the minority would merely hold that such evidence may not be relied upon to negative mens rea, Lord Simon's equation of voluntary intoxication and recklessness providing the "ethical justification" rather than the "legal basis" for finding a guilty mind.[26] Third, the rule was justified by public policy, or the "social judgment" that it was needed in order that the law should provide adequate protection to people.

The majority were not persuaded that public policy or social defence required the *Majewski* rule. No doubt society needs protection from violent inebriates and drug-takers, but so it does from other violent people and it does not follow that abandonment of the most fundamental principles of criminal liability is justified. Not all instances of voluntary intoxication can be stigmatised as involving particularly wrongful or irresponsible conduct,[27] and properly directed juries may be relied upon to appreciate that only rarely will intoxication exclude voluntary conduct or intention to act. Recognition that intoxication might negative any required state of mind will not create a risk of a significant number of wrongful acquittals, and indeed voluntary intoxication will usually help prove mens rea by providing an explanation of why the accused might have deliberately acted in a possibly uncharacteristic manner. Moreover, it is unrealistic to suppose that drinkers or drug-takers will be at all deterred by the threat of punishment for possible offences which they do not in fact foresee, and experience in Victoria does not suggest that the wider exculpatory rule has any influence on the incidence of crime, or that it leads to public outrage or widespread decline in respect for the law.[28]

It was also thought that the distinction between specific and basic intent was unsatisfactory in that it is difficult to define, it is not based on any factual differences between various states of mind, and it does not always work rationally in that it is not always the more serious offences that require a specific intent.[29] The minority thought that the difficulties had been exaggerated and that "special intent" had been adequately defined by Gibbs J in *Viro* as "an intention to cause a particular result", a definition which "identifies an offence which requires in addition to proof of a voluntary act attended with foresight of consequences proof of an additional element related to the purpose with which the impugned conduct took place".[30] But this is as inadequate an explanation as those in *Majewski* in that it does not appear to explain why murder at common law requires a "special" intent,[31] nor why receiving is such a crime,[32] and it would have to be modified to accommodate the recent English cases concerning "ulterior recklessness"[33] and mistaken belief expressly contemplated by statute.[34]

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the approval of the dissent in *Leary v The Queen* (1977) 33 CCC (2d) 473, at 492-493 per Aickin J; Stephen J, at 471, contemplated the negation of "the mental element necessary for the commission of the offence in question"; and Murphy J, at 484, would not allow the imputation of any required "mens rea".

[24] Ibid, 489, 493.

[25] Ibid, 462-463; at 462/30 the word "helpful" is a misprint for "unhelpful" which appears in the original transcript.

[26] Ibid, 469-470 per Gibbs J; 482 per Mason J; 502, per Wilson J.

[27] Ibid, 456-457 per Barwick CJ; 475-476, per Stephen J; and compare, eg *Pembliton* (1874) LR 2 CCR 119; *Cunningham* [1957] 2 QB 296; *Venna* [1976] QB 421; *Flack v Hunt* [1980] Crim LR 44.

[28] Ibid, 454, 460, 465, per Barwick CJ; 474-475, 477, per Stephen J; 494 per Aickin J.

[29] Ibid, 464 per Barwick CJ; 476, per Stephen J.

[30] Ibid, 500-501 per Wilson J.

[31] Cf *Hyam* [1975] AC 55.

[32] *Durante* [1972] 3 All ER 962.

[33] *Orpin* [1980] 2 All ER 321.

[34] *Jaggard v Dickinson, The Times*, July 26, 1980.

6. Four miscellaneous points

(a) *Involuntary intoxication.* The restrictive rule in *Majewski* has never been applied to "involuntary" intoxication. This category includes cases where the accused was unaware that he was consuming the intoxicant and, presumably, cases where he consumed it under duress; and it includes the voluntary consumption of a substance pursuant to genuine medical advice, presumably because that could not be regarded as wrongful or "reckless" conduct.[35] There have been occasional suggestions that involuntary intoxication might provide a defence even if it did not result in the absence of mens rea, but that would be an excessively uncertain defence and it is probable that such intoxication goes only to sentence.[36] This view is supported in *O'Connor* where Barwick CJ took the view that intoxication, whether voluntary or involuntary, provides no defence unless it leads to involuntary conduct or the absence of a required "intent".[37]

Nevertheless, involuntary intoxication involves an interference with the accused's mental capacities through no fault of his and by analogy to the defence of reasonable mistake recognised in *Proudman v Dayman* (1941) 67 CLR 536 a defence of ignorance or mistake caused by involuntary intoxication might be allowed in respect of offences of strict liability. In *Flyger v Auckland City Council*[38] on a charge of driving with an excess blood-alcohol level it was claimed that involuntary intoxication had contributed to the actus reus in that the level was excessive only because unknown to the driver his friends had added vodka to his soft drink. McMullin J concluded that when the accused has voluntarily consumed the liquor there is no requirment that he realise his blood-alcohol level might exceed the statutory limit, but ignorance of this possibility will provide a defence if the statutory limit is exceeded only because others surreptitiously added to his drink without his knowledge. This conclusion was thought to be consonant with "justice and commonsense" and it might equally be thought that ignorance or mistake caused more directly by involuntary intoxication should provide a defence even when strict liability is normally imposed.

(b) *Strict liability, negligence and manslaughter.* It has been suggested that voluntary intoxication will never support a defence to an offence of strict liability or negligence, for in such a case no mens rea, intention or foresight need be proved.[39] Similarly, in *O'Connor* there are a number of remarks which might suggest that voluntary intoxication is irrelevant in any such case.[40]

This must be qualified. First, some offences will require mens rea in respect of some elements of the actus reus but strict liability will be imposed in respect of others,[41] and in these cases there is no reason why intoxication should not exclude the mental element required. Second, on the majority view in *O'Connor* voluntary intoxication should excuse *any* offence if it led to the relevant conduct being "involuntary", because voluntary conduct is essential for criminal responsibility even when strict liability is imposed. This conclusion is supported by the judgment of Barwick CJ, with one exception: he accepts that manslaughter may still be an "entrenched anomaly" which voluntary intoxication may never excuse.[42] He added that this does not provide "any justification for any further departure from fundamental principle where voluntariness or requisite intent is absent", but the result is that there is not a clear majority supporting the view that voluntary intoxication may support an acquittal of manslaughter.

(c) *Dutch courage and pre-existing fault.* In *O'Connor* the majority rejected the theory that merely choosing to get intoxicated is equivalent to recklessness. Nevertheless, two cases were mentioned where an accused may be held responsible although his conduct which ultimately causes or constitutes the actus reus was done without mens rea or consciousness. If an accused decides to commit an offence and consumes an intoxicant for the purpose of enabling him to commit it he cannot rely on intoxication as an excusing factor even in the unlikely event of it having had the effect of causing him to act without a required mental element. Further, if an accused realises there is a significant risk of his committing an offence while intoxicated and he commits the actus reus of a foreseen offence of basic intent after

[35] *Quick* [1973] QB 910.

[36] *Smith and Hogan*, op cit, 189.

[37] (1980) 29 ALR 449, 455; and see 474 per Stephen J.

[38] [1979] 1 NZLR 161; cf *King* (1962) 35 DLR (2d) 386 (ignorance of impairment of driving ability a defence when the impairment resulted from an anesthetic injected by a dentist).

[39] Eg, CR Williams, *An Annual Survey of Law* 1976, p 88.

[40] (1980) 29 ALR at 471, per Stephen J; 483, per Murphy J; 489, 493 per Aickin J.

[41] *Smith and Hogan*, op cit, 79.

[42] (1980) 29 ALR at 465; contrast the statement at 466, and *Haywood* [1971] VR 755; cf *Grice* [1975] 1 NZLR 760, 767 (CA).

having become voluntarily intoxicated he may be convicted of that offence even if he finally acted without a required mental element, for he was genuinely reckless in becoming intoxicated.[43]

In such cases the Court should usually be able to find conduct done with the required mens rea which was sufficiently proximate to the actus reus to be a legal cause of it, so that there is no objection that actus reus and mens rea were not contemporaneous. Alternatively, Stephen J would accept the suggestion in *Smith and Hogan* that such cases are analagous to those where an accused acted through an innocent agent.

Barwick CJ thought that if an accused acted with the required intent or recklessness in becoming intoxicated his subsequent conduct is not properly regarded as "involuntary", even if he was not aware of what he was doing. It is suggested that the more straightforward and better view is that involuntariness in bringing about an actus reus will not generally excuse a person who while conscious and in control of his conduct acted with the state of mind required for the offence in inducing a state of irresponsibility. Moreover, negligence at that time should suffice for liability if the accused subsequently brings about the physical elements of an offence of negligence.[44] This does not mean that the mere fact that intoxication was self-induced means that it can never provide a defence to an offence of negligence for there can be neither recklessness nor negligence in the air and if the subsequent conduct was involuntary the accused should be liable for negligence only if the actus reus in question was foreseeable when he became intoxicated.[45]

(d) *The evidential burden.* The accused does not have the persuasive burden of proving that his conduct was involuntary or that he lacked any required state of mind. However, there seems to be a rebuttable presumption of law that conduct is voluntary, so that the jury will be directed to consider that issue only if there is evidence which the Judge considers is reasonably capable of raising a reasonable doubt about it.[46] In contrast, there is no presumption that a person intended obvious consequences of his conduct, or knew of circumstances, so that the question whether he acted with intent or knowledge required for an offence must always be left to the jury. Nevertheless, the jury is entitled to infer such intent and knowledge, and if in the Judge's view that is the only reasonable inference it *might* be proper for him to say that it is the inference that ought to be drawn.[47]

Moreover, while the general issue whether required mens rea is proved must be left to the jury it seems that particular explanations of why it might be absent need not be considered if there is no evidence capable of creating a reasonable doubt on that particular issue.[48] This seems to be the case when it is claimed that mens rea was absent as a result of intoxication, and in this sense the accused has an evidential burden on the issue: if there is no evidence capable of raising a reasonable doubt that this was the case the issue of intoxication should be withdrawn from the jury. Even when there is such evidence the Judge should carefully explain that intoxication is not itself a defence, and it will be proper for the Judge to warn the jury that it should not lightly conclude that the accused may have acted without mens rea because of intoxication.[49]

7. Possible reform

The present position in New Zealand remains uncertain but it may be hoped that the decision in *O'Connor* will encourage the Court of Appeal to adhere to the views expressed in *Kamipeli* and reject *Majewski*. It is submitted that the rule approved by the House of Lords is so unsatisfactory that were it to be adopted here there would be a strong case for statutory intervention, but acceptance of the view of the

[43] (1980) 29 ALR at 456, 461, 464-465, per Barwick CJ; 475, 477, per Stephen J; 484 per Murphy J; liability in such cases is supported by *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349 and *Egan* (1897) 23 VLR 159; see also *Sione v Labour Department* [1972] NZLR 278.

[44] Cf Elliott (1968) 41 ALJ 497; Orchard [1971] Crim LR 132, 214, 217.

[45] *Leary v The Queen* (1977) 33 CCC (2d) 473, 493-494 per Dickson J, dissenting; contra *Quick* [1973] QB 910, 922; *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 410; *O'Connor* (1980) 29 ALR 449, 481-482 per Mason J, dissenting.

[46] *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 413.

[47] *O'Connor* (1980) 29 ALR 449, 485-487 per Murphy J; cf *Warner v MPC* [1969] 2 AC 256, 307-308; *Strawbridge* [1970] NZLR 909 (CA) suggests that merely because mens rea is not expressly required by the statute it *must* be presumed in the absence of contrary evidence; quaere.

[48] *Cross on Evidence*, 5th ed, UK, p 96; cf Glanville Williams (1977) 127 New LJ 156, 182.

[49] *Kamipeli* [1975] 2 NZLR 610, 619; *O'Connor* (1980) 29 ALR 449, 466-467; Glanville Williams *A Textbook of Criminal Law*, 1978, p 420 doubts whether the Judge can ever properly withdraw the issue.

High Court of Australia might also create the impetus for legislative reform.

There is little support for legislation giving effect to the rule in *Majewski*[50] but it is commonly supposed that there is need for some reform. Even among those who oppose the rule in *Majewski* it is common to find support for the creation of a new offence of which the accused could be convicted if acquitted of another offence on the ground that he lacked mens rea or acted involuntarily as a result of voluntary intoxication.[51] This gets some support from the majority in *O'Connor*, particularly Barwick CJ who thought that a substantial penalty should be available.[52] Proposals for such an offence range from those confined to cases where personal injury has been caused,[53] or where there was at least a risk of such injury,[54] to suggestions that commission of the actus reus of any offence under the influence of voluntary intoxication should justify conviction.[55]

It is submitted that haste in this direction is unnecessary and undesirable. No doubt the creation of such an offence would become desirable if complete acquittal by reason of intoxication became common, but it seems hardly conceivable that this will occur, and in most cases intoxication will continue to be evidence explanatory of guilt rather than suggesting lack of mens rea. It is difficult to imagine that *O'Connor* poses any significant threat to society or the rule of law, and creation of a special offence along the lines suggested would involve a departure from general principles of responsibility that would be little less radical than that involved in the rule in *Majewski*. If principled reform of the law is to be pursued such an offence should not be introduced without some more general consideration of the extent to which criminal responsibility should depend on a person's actual intention or awareness.

[50] Although the Model Penal Code includes a similar rule: MPC s 2.08(2).
[51] Eg, Glanville Williams, op cit, 427; *Smith and Hogan*, op cit, 191.
[52] (1980) 29 ALR at 466; and see 477, per Stephen J; 484, per Murphy J; 494, per Aickin J.
[53] Fingarette (1974) 37 MLR 264, 279.
[54] Butler Committee on Mentally Abnormal Offenders, Cmnd 6244, 1975, para 18.54.
[55] Ashworth (1975) 91 LQR 102, 130; this appears to be the position in West Germany: Daly (1978) 21 ICLQ 378; but in 1977 in South Australia a simple *O'Connor* rule was recommended: Criminal Law and Penal Methods Reform Committee of SA, Fourth Report, para 16.

CASE AND COMMENT

Technological change in the law office

New Zealand's Industrial Tribunal has ruled that a decision to introduce new technology remains a managerial prerogative, outside the scope of third party consultation and not subject to compulsory conciliation and arbitration: *New Zealand Federated Clerical and Office Staff Employees IAW v Wellington Law Practitioners IUE* (Arbitration Court, Wellington, 20 August 1980, AC 101/80; Horn CJ). The award of the Arbitration Court establishes that, while the *consequences* of technological change may properly be disputed under the Industrial Relations Act 1973, the precursing decision itself is not a matter for a conciliation council, a disputes committee, the relevant industrial union, or even the Court itself. If a law office in Wellington, for example, with 10 practitioners and six secretaries, wishes to install a word processor, eventually to eliminate two secretaries, the employees affected should be advised. Once the final decision has been made, full consultation should take place. Only where there are actual redundancies, however, as opposed to reduced job opportunities in the future, can a disputes committee — and thus the Court at second instance — take jurisdiction.

The problem was brought to the Court by the Clerical Workers' Union, under s 84 of the Industrial Relations Act 1973, as a partially settled dispute of interest. The Union made the following claim (which was unacceptable to the Wellington legal employers):

> "TECHNOLOGY
> "(a) Where the employer is contemplating the introduction of new computer technology including word processing machines, the employer shall have full dis-

cussions and consultations with the delegate and Union concerned prior to such decisions being made.

"(b) Where any dispute arises in relation to this clause and cannot be disposed of by the employers and workers' representatives the provisions of [the disputes clause] shall apply."

Full argument was made to the Court, not only by the parties concerned, but also by the Federation of Labour and the Employers' Federation. In view of the great significance of the problem and favoured by in-depth submissions by the central organisations, as well as by evidence from a senior Treasury official, the Court departed from long established practice and articulated at some length the reasons for its decision. It must be concluded, therefore, that the decision, although it directly concerns only the New Zealand (excluding Northern and Taranaki Industrial District) Law Practitioners Award, will control such disputes in every industry in every industrial district, in defining the parameters of union involvement in technological change. The Court has also rejected an implicit invitation that it become the Caesar of technological innovation in New Zealand, standing over every scientific metamorphosis, with thumbs up or thumbs down.

The necessary sine qua non of the Union claim is that technological changes are properly negotiated between Union and management as a "dispute" under the Act. Both disputes of right (s 116) and disputes of interest (ss 68-90), as defined in s 2 of the Act, are dependent upon the meaning of "dispute", which in turn incorporates "industrial matters" as the locus of a dispute under the Act. Industrial matters incorporate "all matters affecting or relating to work done or to be done by workers, or the privileges, rights, and duties of employers or workers in any industry . . . [including] (a) all matters affecting the privileges, rights, and duties of unions or associations or the officers of any union or association; and (b) all matters affecting or relating to the preferential employment, or the non-employment, of any person or class of persons, whether a member or members of a union of workers or not . . .; and (c) all matters that by this or any other Act are declared or deemed to be industrial matters . . . .". The Court quoted extensively from the leading case of *New Zealand Bank Officers IUW v ANZ Banking Group Ltd* (IC 71/77; not reported in the 1977 Industrial Court judgments), wherein Jamieson J referred extensively to Australian cases, including *Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443 and (1967) 117 CLR 78, *Portus* (1972) 127 CLR 353, and *Cocks* (1968) 121 CLR 313.

The Court emphasised the following passage from *Cocks*, which had been relied upon by Jamieson J in the *Bank Officers* case:

> "The Act does not commit to the Commission authority to regulate generally the manner in which the industry shall be carried on; its authority is limited to regulate the relationship of master and servant in the industry and matters which are truly incidental to that relationship."

In the *Bank Officers* case, Jamieson J concluded that a claim to a favourable loan policy was a dispute emanating from a prospective mortgagor-mortgagee relationship, not the employer-employee relationship.

The Court was also impressed with the evidence from the Treasury that new job creations in New Zealand should take place in the export sector of the economy as opposed to, for example, legal services in the internal sector.

The Court concluded that a dispute over the introduction of new technology is not an industrial matter, could not be a dispute under the Act, could not be raised at conciliation or as a dispute of right, and remained a managerial prerogative. The clause fixed by a majority of the Court reads as follows:

> "TECHNOLOGY
>
> "(a) When an employer is considering the introduction of new computer technology (including word processing machines) the employees likely to be affected by any decision arising therefrom will be first advised.
>
> "(b) When an employer has decided to introduce such technology the employer concerned shall consult fully with the employees affected and the representative of the union.
>
> "(c) When the introduction of such technology will result in redundancies, the employer concerned shall notify the union to enable discussions on redundancy to take place. Such notification shall be in accordance with [the redundancy clause] of this award."

For recent discussions of technology in the law office see [1980] NZLJ at 118, 176, 232, and 301. For other references to law practitioners in the industrial arena, see notes by Professor Szakats at [1977] NZLJ 319 and [1978] NZLJ 15.

Wm C Hodge

RECOMMENDATION FOR DEPORTATION BY A COURT

By A N KHAN*

The precedent provided by the English Court of Appeal on matters to be considered by a Court when making a recommendation for deportation of a convicted alien in **R v Caird** *(1970) 54 Cr App Rep 499 had been accepted and followed by the New Zealand Court of Appeal in* **R v Mamud** *(CA9/1978 unreported). Two recent cases, one each in the English and New Zealand Courts of Appeal, have thrown further light on the subject.*

Court's power to make recommendation

The New Zealand Immigration Act 1964 empowers a Court, under s 22(1)(a) to make a formal recommendation to the Minister, on the conviction of an alien accused, that he be deported. However, under s 22(1)(b), the Minister himself, without any judicial recommendation, can take steps to have such a person leave the country. These provisions are identical to s 14(A)(1) of the Immigration Restriction Act 1908, as amended by s 6 of the Immigration Restriction Amendment Act 1959.

The English Immigration Act 1971 has similar provisions (s 6) under which a convicted non-patrial may be recommended for deportation (See Khan, "Fugitives Go Back" (1979) 143 JP 448)

Detriment

The Court making the recommendation for deportation must consider whether the accused's continued presence in the country is to its detriment. New Zealand Courts can legitimately take into account the consideration that New Zealand has no use for criminals of other nationalities, epecially persons convicted of serious crimes or those with long criminal records. Whilst a minor offence may not warrant a recommendation, the more serious the crime the more clear it is that a recommendation be made (*R v Nazari and others* (1980) Cr App Rep 87; see also Sachs LJ in *Caird*, supra).

Future Consequences

The New Zealand Court of Appeal has held in two recent cases that future consequences to the accused are a relevant consideration for the Judge making the recommendation. In *Mamud*, supra, the accused was a citizen of Singapore and became involved with the importation of heroin from his country of origin into New Zealand. He was found guilty and sentenced to 10 years' imprisonment. The trial Judge made a recommendation for deportation, disregarding any consequences that might take effect after the accused had served his sentence. Two of the factors the defence had asked to be considered were:

(1) the laws of Singapore on dealing with heroin were very severe, in that the accused might have faced a capital charge (such charges are tried without a jury); and

(2) The accused would have to live for a long time in a New Zealand prison with the possibility of deportation and trial in Singapore hanging over him.

However, the trial Judge, after anxious consideration, decided to disregard any consequences that might take effect in 10 years' time. The Court of Appeal reversed the decision and said that a trial Judge is

> "obliged to deal with the matter now, knowing that a positive decision in favour of deportation would inevitably have a continuing effect until action had been taken upon it one way or the other . . . the recommendation itself necessarily (involves) consideration of the possible consequences it could have . . . they [are] consequences which [are] entirely relevant to the exercise of the judicial discretion which alone could initiate the process leading to an order in

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> terms of para (a) of section 22 of the Act . . . It would not be right on humanitarian grounds and it is unnecessary for procedural reasons that [a convict] should be left throughout [a] very long period facing a formal recommendation for deportation with the possible consequences of a capital charge at the end of it".

Another trial Judge, in a more recent case, in identical circumstances, after imposing 10 years' imprisonment said to the accused that it may be that on humanitarian grounds a recommendation for deportation should not be made. But

> "you should have had that in your mind before you decided on your present course of action and I see no reason why you should not suffer anguish while serving your term of imprisonment".

However, the Court of Appeal (*R v Mahmod* [1979] 1 NZLR 62) disagreed with this approach. Woodhouse J, delivering the Court's judgment, said that it was clear that the provision for deportation has not been designed for the purpose of adding to a convict's sentence in terms of punishment. The Court followed *Caird*, supra, and *Mamud*, supra. The Court also followed another English Court of Appeal's decision: *R v Walters* [1978] Crim LR 175 in which the severe consequences of deportation to Jamaica had been taken into account.

Political system in other countries

Should the Court making a recommendation for deportation take into account the political system of the country to which the accused would be returned? According to Lawton LJ in *Nazari*, supra, the Courts have no knowledge of the political systems which operate in other countries. A political system may be harsh, oppressive or undemocratic. But it is undesirable for a Court to pronounce uncomplimentary views about regimes in other countries. Such matters have to be considered by the Minister when accepting or rejecting the Court's recommendation. The Minister is in a much better position to inform himself (1) whether an offender's return to his country of origin would have consequences which would make his compulsory return unduly harsh; and (2) about what is happening in other countries. If a person is convicted for a long sentence, the regime of his country, which may be harsh presently, may change. The Minister would bear in mind whether it would be unduly harsh to send him back to his country of origin at the end of his sentence.

Innocent parties

The guidelines provided in *Nazari*, supra, include the matter of the effect that a recommendation for deportation can or will have upon others who may not be before the Court and who may be innocent of any blame. Courts should not have any wish to break up families or impose hardship on innocent people. The deportation of a husband may put a law-abiding and good wife in a very difficult situation. She would have to make her mind up whether to go with the husband or not. If there are children in the family, her plight would be even worse as she would have a heart-rending choice to make. In such a case, the trial Judge should consider the facts "very carefully".

Conclusions

The Court's power is only to make a recommendation to the effect that in its view the accused's presence is to the detriment of the host country. The final decision is to be made by the Minister responsible for deportation. It is up to him to take into account all the relevant factors and personal circumstances of each person whose case he is considering including the political situation of the country concerned. Deportation is not to be treated as additional punishment.

At the end of the sentence, the Minister would be able to determine whether the convict has benefited from his incarceration and thus not to be deported (see *R v Elliott* [1964] NZLR 158).

Every conviction does not necessarily follow with a recommendation for deportation. Therefore when a Court is asked to make such a recommendation, it should be furnished with evidence directed to that very question. The Court, before making the recommendation, must make a full inquiry into all the relevant factors. The better practice would be to invite counsel to address the Court on the possibility and advisability of making a recommendation for deportation, after the sentence has been passed.

LEGAL LITERATURE

Goodall and Brookfield's Law and Practice of Conveyancing with Precedents, Fourth Edition by F M Brookfield, Butterworths 1980, xxxix, 593 pp (incl index) $60. Reviewed by Ian L Haynes.

Practitioners will welcome the publication of the Fourth Edition of the above work. The original edition was first published in 1935 and the Second Edition, edited by that prolific legal writer, the late E C Adams, became available in 1951. It is probably fair to comment that by 1970 the text and precedents had in many areas become somewhat divorced from the practical needs of conveyancers. The publication of the Third Edition in 1971 under the editorship of Professor F M Brookfield did much to rectify this situation, and in the Fourth Edition the same editor has further updated the text and kept it in tune with current needs of the practitioner.

The latest edition follows the format of its predecessors. In each chapter the salient legal principles are succinctly set forth, and relevant authorities are referred to, followed by the precedents themselves. The preliminary notes are in the words of the original editor intended to be "something in the nature of a commentary upon, rather than a complete exposition of the law". For all that, the notes are valuable and of considerable assistance, summarising for the reader the legal principles involved, and referring him to the relevant authorities and literature on each topic.

The Fourth Edition covers some fresh ground. There is a chapter dealing with certain types of flat ownership, namely stratum estates under the Unit Titles Act, together with the somewhat older "cross-lease" system. This chapter is particularly useful in the absence of any established New Zealand text on flat ownership. Again, following the passing of the Matrimonial Property Act 1976, there is included a precedent for an Agreement contracting out of the provisions of that Act. It is suggested that further precedents in this important and developing area would be welcome. In many ways both of these subjects deserve to be dealt with in greater depth, but it is recognised that the wide general field which the text must traverse may well preclude this.

In the new edition some of the lesser used precedents have departed, thereby making way for more up-to-date material. Further, a more modern style has been adopted in many of the precedents, both in language and also in form, and this will find favour with many.

It may well be that the text could in some respects be still further improved, and by way of illustration the following matters are mentioned:

(1) There may be room for the text to be even more closely attuned to the conveyancer's practical needs. Most would agree that these days a combined notice to a mortgagor under ss 90 and 92 of the Property Law Act 1952 (which is missing) would be of greater practical value than, for example, a declaration of non-gift by a married woman for stamp duty purposes (which is now little used).

(2) In places some rearrangement of precedents would probably assist the reader's convenience. For instance, it would be helpful if the various documents relating to a mortgagee sale under conduct of the Registrar (Section 92 Notice, Application to Registrar, supporting Declarations, Conditions of Sale, Advertisement, and Transfer following sale) were grouped together under the chapter on mortgages rather than scattered around under four different chapters, with the Application itself absent altogether.

(3) In some of the precedents there is room for further refinement of the drafting. This is exemplified by the following recital which appears in an assignment of a vendor's interest under an Agreement for Sale and Purchase:

> "The Assignor has agreed with the Assignee for the sale to *him* of *his* interest in the agreement for the price of $....."

However, the above matters are minor, and do not significantly detract from the value of the text.

Goodall, in the preface to the First Edition wrote "The writer ventures to hope that the forms now furnished will assist practitioners". The passage of time has demonstrated that this hope has been amply fulfilled. That this has been so in more recent years, has in large measure been due to the industry and ability of the subsequent editors. It requires no great depth of vision to predict that the latest edition will, even in these days of printed forms and refined word processing systems, continue to be of great assistance both to practitioner and student.

The Commonwealth Law Bulletin. Price per issue, including postage, is £2.00 (annual subscription £8.00) and the C L B may be purchased from Commonwealth Secretariat Publications, Marlborough House, London SW1 5HX, England. Reviewed by Kaye Turner.

The Commonwealth Law Bulletin (C L B) is a "unique, helpful and relevant source of information on Commonwealth legal developments", Commonwealth Law Ministers said at their meeting in Barbados in May. They, and their officers, were increasingly reliant on it, and, more and more, Commonwealth jurisdictions were benefiting from the experience of their fellows.

This is high praise indeed for a publication that began only six years ago, with a modest 30 page issue. It was six months before enough material could be gathered to fill a second. Now a highly-organised and professional operation, the whole enterprise is founded on a carefully-tended network of individuals within Law Ministries throughout the Commonwealth. They respond to requests from the Commonwealth Secretariat with information about recent developments in their jurisdictions, and provide copies of legislation and law reform reports to Commonwealth colleagues who have read about them in the *Bulletin* and wish to gain from their experience.

There was no way, critics said in the early days of publication, in which an enterprise based only on enthusiastic volunteers could survive. But it has flourished, and the C L B is now an established landmark on the legal scene as a regular quarterly (and has been since 1976) of about 400 pages per issue and with regular sections on recent legislation, judicial decisions, law reform proposals, international legal developments, the legal profession, and ombudsmen throughout the Commonwealth. There are notes, too, on a wide variety of legal policy and related topics, book reviews, and a useful compilation of references to recent articles in other Commonwealth legal periodicals.

The number for the first quarter of 1980, for example, begins a two-part series on new African constitutions; monitors the independence of St Vincent and the Grenadines; analyses the state of Australian judicature; and considers human rights legislation in New Zealand. The section on legislation monitors more than 60 Commonwealth measures, from Australia's Racial Discrimination Bill, to Bermuda's Merchant Shipping Act and Kenya's new disciplinary rules for doctors and dentists. The wide-ranging section on the legal profession includes the debate over the wearing of wigs and gowns in New Zealand, and a full summary of the report of the United Kingdom's Royal Commission on Legal Services. And, in an uncommon piece of publishing efficiency, this January 1980 issue contains a supplement — the comprehensive index to all four issues for 1979.

In short, the C L B is an indispensable reference tool, not only for informed legislators, draftsmen and law reformers, but also for the judiciary and practicing lawyers.