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PROTEST — WHAT PROTEST?

Many lawyers will have read Mr Gideon Tait's book *Never Back Down*. In it he describes police tactics at the "Battle of Harewood" as follows: "I will always remember the sight of my men moving together, shoulder to shoulder, chanting, knees and elbows working, to demoralise and disperse radicals intent on damaging the American installations . . .".

That description sticks in the mind. Certainly Don Dugdale remembered it for he quoted it in a review of the *New Zealand Civil Rights Handbook* — and he can be assured he is not alone.

Now we have it again. Not once, but week after week. In the newspapers, battered heads and bloody faces; and on the breakfast news, threats to obey or be batoned.

But after a while the mind becomes inured to all this. Gradually that mindless chant of "move move move" ceases to depress and instead presages the beginning of another battle of wits between protesters and police. Long batons, riot shields and red patches stir the blood for the first blow. Children watch television, not for rugby but for the protesters. That is no exaggeration. Policing has become another body contact sport.

For what? We are told it is for the principle that our sportsmen should be free to choose with whom they will play their sport.

The present government has said it will not interfere with that. If so, this so called principle stands alone as the only one that has not been subjected to government interference; for in this imperfect world of ours no other principle remains without exception. Freedom of speech and freedom of assembly are both hedged with limitations while even the greatest of all, the right to life, yields to the needs of self-preservation.

A principle stands as an ideal to which we may and should aspire. But it does not stand alone. Any principle stands in conflict with others — my wish to speak freely; yours to preserve privacy — and in conflict with reality. It is the highest function of a government and of the law to balance these conflicts. To the extent that a government refuses to act it is demonstrating either impotence or incompetence.

In the case of sporting contacts one specific exception has been formally accepted by our government. It is the exception contained in the Gleneagles Agreement. This imposes an obligation on the signatory governments to withhold any form of support for and take every practicable step to discourage sporting contact with South Africa. As with most laws, this simply provides a measure of the minimum obligation. There has been equivocation over whether the rugby union was asked by the Prime Minister to withdraw the invitation. The South African team is flying by Air New Zealand. The tour earnings and broadcasting fees remain exempt from tax. The taxpayer is footing the bill for police protection and military support. Given all that, then, visas apart, critics of government action seem to have every justification for suggesting it stops short of compliance with even the minimum obligation of Gleneagles.

The sporting visit principle has been fully preserved — but at what cost?

— Violence has broken out from time to time. This violence was inevitable given the high feelings each way, and utterly predictable. For the Government to wash its hands of it and talk piously of law and order is just like introducing a dog with a bone to one without and then wondering at the consequence.

— Thousands of ordinary citizens have

found long batons and riot gear (acquired for protection we were told) being used to police them. They have found it frightening and even terrifying. It is a new dimension of policing.

— With the naming of the fifteen "radical subversives" by the Prime Minister dissent and subversion have been nudged a little closer together. The involvement of the Security Intelligence Service lines yet another Government gun against the protesters. That the Prime Minister should add such a pop-gun report to the other artillery is a measure of how far he is prepared to go in his attempts to discredit and repress the anti-tour protest movement.

— There is a policing cost that will certainly exceed the earlier wildly optimistic figure of $3 million. With the country so evenly divided on the issue that is a high price to pay to entertain one half and enable an enterprise to take place that is as much commercial as sporting.

— There is the case of the other New Zealand sportsmen who, in pursuit of their right to play sport with whom they choose, may find no-one wanting to invite or visit them.

There are also consequences of greater moment.

What we may ask is the future of dissent? There has been a growing feeling of late that our highly centralised authoritarian system of government does not have ears, and that dissent is tolerated because in the final analysis its expression is so hedged with legal constraints as to render it largely ineffective. Opinion polls before the tour indicated the magnitude of the opposition. During the tour we have seen protesters in their thousands from every conceivable age-group and occupation turn out in the most inclement weather; normally law-abiding citizens have broken the law; others have engaged in quite uncharacteristic acts of non-violent civil disobedience (such as blocking streets) and still others have accepted the prospect and indeed actuality of personal injury in support of a deeply held belief.

The government has responded positively by providing riot squads and military support. It has made no concession whatsoever to the protesters. The tour is continuing. A hard line is being taken with international critics. What sort of democracy is it that can so ignore such a body of opinion? If it cannot be moved by such protests as we have seen, what will it take?

Then there is the matter of preserving law and order. Essentially this has proved to be a euphemistic way of saying that a number of normally dormant and uncertainly expressed provisions in the Police Offences and Crimes Acts will be used to justify the use of force to stop conduct that is not approved of. It is the rallying cry of the conformist. Its highest expression is found in countries so politically opposed as South Africa and Soviet Russia.

By crying law and order the Government has avoided the need to consider the claims either of protesters or, for that matter, of those who favour the tour. Action to restore law and order and so enable the tour to proceed becomes self-justifying. Protest and lawlessness are effectively confused.

A lot of trust goes into making our society work. The Police have very loosely defined powers and within wide limits are trusted to exercise them fairly. Considerable trust is placed in that fragile concept, the rule of law. Now, before the tour the Prime Minister announced that it was up to the Police whether or not it was called off. This was tantamount to lining up the Police against the protesters, and the Police have been able to call on the resources of the State to ensure they win. There have been claims that excessive force has been used, and that the baton has replaced arrest and the Courts. This the Police deny. But whatever the rights and wrongs very many people who would not normally come into contact with the Police will adhere to the belief that there was excess and will look on the Police as the executive arm of authority rather than an integral part of our society. A small change in emphasis, a decline in trust, and a sad loss for all.

Some say the wounds of the Springbok tour will take years to heal. Others see strength and benefit in healthy protest. Whatever the truth, there will be no benefit until governments are prepared to take a less arrogant stance and look on protesters as something other than a threat to be suppressed. Ignoring a powerful swell of opinon has but served to polarise the viewpoints, to render future accommodation more difficult and, by focusing concentrated attention on South African apartheid as the great evil, to distract needed attention from our own very real race problems at home in New Zealand.

Similarly, with our international relations. It would be a strange result if, in pursuing the freedom of our sportsmen, we turned our backs on the liberties of mankind. Yet this is what we threaten. Unilateral withdrawal from the Gleneagles Agreement: withholding contributions to the Commonwealth Secretariat: this is the language of conflict.

The Prime Minister is compiling a dossier on human rights violations in other Commonwealth countries. Were this to be used to encourage in those countries the freedoms we espouse in our own it would be laudable. But were it held as a threat to those who criticise New Zealand it would be shameful.

New Zealand has a respected place within the Commonwealth. Using the skills of diplomacy (which are also the tools of dissent) New Zealand is in a strong position to work internationally through the Commonwealth and other international forums for better human relations. Certainly if we wish to see the freedoms we value spread we cannot isolate ourselves. Yet this is exactly what a hardline approach will do. It is not the way to consensus. All that will happen is that international attitudes will polarise and harden just as domestic attitudes have.

The whole question of human rights and individual freedom can easily be bogged down in the trivia of why sports boycotts and not economic boycotts? and whether another country's human rights record is as impeccable as one's own. But if a person really cares for human rights, and if a country genuinely supports them, then each should show it. It is what we, not others, do that is important. In the end — it just comes down to making that choice.

TONY BLACK

FAMILY COURTS — AN INTERVIEW WITH JUDGE TRAPSKI

On 1 October the new Family Courts will commence operation under the leadership of Principal Family Court Judge Peter Trapski. Since his appointment earlier this year Judge Trapski has been tramping the country to discuss with those likely to be involved with the Courts how they will operate. In one respect in particular he left no room for doubt. The Royal Commission on the Courts had made it very clear that change was needed. Judge Trapski is determined that change there will be and he is looking to his fellow Judges and practitioners and all others involved to share in making this Court work.

In this interview with Tony Black Judge Trapski discusses his Court.

Why the need for something different?

The Family Court had its genesis in the Report of the Royal Commission on the Courts. One-third of the submissions to that Commission were on the topic of family law. All agreed on the need for reform. In other words a lot of people when given the opportunity were saying to the Courts through the Commission — we don't like the way you deal with our family problems.

In broad terms how will the Family Courts differ?

The substantive law they will apply remains largely unchanged. The main differences will be in procedure and attitude. By and large the parties coming before the Family Court will be people under stress. They will also be people who at the end of the day will usually need to maintain a continuing relationship, especially where children are involved.

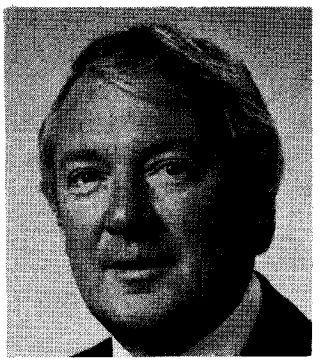
At present these people come to the Courts to have decisions made for them. Under the new structure they will be encouraged to make the decisions themselves through the processes of conciliation, mediation and counselling.

How would you reply to those who say conciliation is a waste of time where the parties are determined to separate anyway?

Simply that they are confusing conciliation with reconciliation. As was said in the Royal Commission Report, reconciliation is just one possible outcome of conciliation. The purpose of conciliation is to help the parties build a new relationship so they can themselves deal rationally with matters arising from

Peter Trapski, Principal Family Court Judge

Judge Trapski, aged 46, is married with five daughters. He commenced his legal career as a legal staff officer with the New Zealand army in Malaysia after which he joined his father's firm (then Trapski and Dowd) in Mt Manganui. He was appointed to the Bench in May 1972 and after 18 months in Wellington was transferred to Rotorua in January 1974. Rotorua will remain his home base. Water (sometimes frozen) based activities — swimming, water-skiing, boating and skiing provide relaxation and he has always been involved in church activities.



a marriage break-up. I come back to the point made before that most will still need to maintain a continuing relationship, and it is more important to settle the foundations of that new relationship than it is to formally and legally sever the old one.

That last proposition really epitomises the difference between the old and the new approach?

Yes it does.

The Judges in the Family Court will be involved with conciliation?

Very much so. They will chair the mediation conference and that will put them right into the arena.

What is a mediation conference?

Under s 13 of the Family Proceedings Act 1980 a Family Court Judge may call a mediation conference to identify the matters at issue and to try to obtain agreement between the parties on the resolution of those matters. I hope that most cases will be settled by mutual agreement at that stage and that few only will go on to a full hearing.

What will happen at a mediation conference?

Let me go back a step. Proceedings before the Family Court will be commenced by a very simple application form which will briefly set out, as in the case of divorce petitions, who the parties are, the facts, the statutory grounds, and what is sought. It will not be supported by affidavits as at present.

Why not?

Because those lengthy blow-by-literal-blow marriage histories add very little, sometimes nothing, to the proceedings — after all, what empirical evidence is there in a custody dispute? — and only serve to focus attention on all that was bad in the marriage. They are a focal point for continuing dissension, and all committed to writing.

So instead?

The mediation conference will provide an opportunity for the parties to get together with the Judge to sort out what the dispute is really all about. I emphasise that the conference is for the parties and provides an opportunity for them to tell the Judge what they want him to know. It will not be an opportunity for them to argue with each other.

Do you mean they may not be legally represented?

The Act specifically authorises legal representatives to be present to assist and advise parties. They do not have to be there.

That is not to say lawyers are unwanted. On the contrary they have a valuable function. In cases where they appear I believe they will perform this function best by recognising that the needs of parties for assistance will vary, that an important objective of mediation is to enable *the parties* to reach agreement themselves if at all possible, and that they will help best by taking a less prominent part in the proceedings than would be the case in other Courts, and leaving matters as much as possible to the parties.

What will happen in a mediation conference?

Procedures will be informal and the conference will take place in a room that has none of the trappings of a traditional Court-room. The parties and the Judge will be seated at their own tables with a

stenographer off to one side so there is no distraction or interruption in the exchange between Judge and parties. Wigs and gowns will, of course, not be worn by anyone and all will remain seated throughout. Basically the parties will simply be invited to tell their story.

The Royal Commission Report refers to specialist Judges, and from what you have said these Judges will function in a different way from others. What qualities do you look for in Family Court Judges?

I look to those who have a proven performance in the field and who are known and acceptable to those involved in family practice. They must be 100 percent committed to counselling, mediation and a non-adversary approach, and also to the development of a Family Court system that is uniform throughout the country in its procedures.

The last point raises the question of judicial independence, does it not?

In no way. Uniformity of practice and procedure does not impinge on independence. It is merely a means of ensuring everyone knows the form proceedings will take throughout the country, and therefore does not feel uncomfortable in the Family Court. Of the Judges prepared to accept Family Court responsibilities, all have accepted those qualifications as being desirable.

Family law practice is accepted as stressful and emotionally demanding. Will Family Court Judges have relief?

Yes. 25 percent of their time will be spent in the general jurisdiction of a District Court for just that reason. They will also be encouraged to take time out and return to "ordinary" work for a period.

As well as specialist Judges will you also be calling on specialist support services?

Of great importance will be those involved in counselling and in conciliation. But other experts I would look to include are psychologists, psychiatrists, paediatricians, accountants — essentially those whose expertise can aid the parties to resolve their problems.

Are these people willing to participate?

The response from these professions has been excellent. There is great enthusiasm to work with the new Family Court.

You include accountants. What have you in mind there?

Problems arise in property and maintenance that are outside the ready skills of most Judges and the legal profession. I believe independent accountants can be of great value in a number of situations. For example, where small businesses are involved, and the very common case where one spouse has possession of the family home, but the other wants some money out. What then becomes a fair division in the light of inflation, how is this best achieved, and how does it bear on maintenance?

How will these specialists relate to the Court? How will their reports be dealt with? Could you comment first on conciliators and counsellors?

Counselling will work or else it will not. Apart from the result — success or failure — they will not report back to the Courts. The parties' confidences must be respected. It would be wrong for the Court to obtain a report from a person involved in counselling without the consent of the person counselled.

And where a report is called for — on children for example?

In this case what is being sought is an objective appraisal by a specialist. The report would form part of the evidence to be used in mediation. The parties would see it and it would provide a discussion point.

And at the hearing of the case?

The author of the report would give evidence and be subject to cross-examination.

He will be appearing on his own and not under the wing of counsel?

Yes. But bear in mind that we are moving from an adversarial to an inquisitorial approach, with the Judge taking a more active role but still maintaining his independence and more importantly being seen to maintain it.

If cross-examination showed up shortcomings in the report, would the author have an opportunity to restate or revise his opinion?

Where necessary he could well be asked to present a supplementary report covering matters raised at the hearing.

Are you to some extent cutting through the myth that a Judge knows only what is clearly explained to him three times in Court?

You could put it that way. I think the Family Court Judges will be well able to evaluate a report but especially in the light of cross-examination.

The Judges will need to be conversant with the different disciplines?

Yes.

Who will pay for these specialists?

The Court has power to order payment by the parties. I envisage this power being used more frequently, as the services will be for the positive and long-term benefit of the parties. I think it is reasonable that they, rather than the State, should foot at least part of the bill in many cases.

It has been suggested that this move to conciliation and the use of specialists will rob lawyers of work. What do you think?

I would rather look at it as relieving lawyers of responsibilities that have been thrust upon them because there has been no one else. It will better enable each specialist, including the lawyer, to operate effectively in the areas in which they have been trained. This should also lead overall to better economics. The task of lawyers in the mediation conference to assist and advise the parties really focuses on two important roles of counsel.

How will the parties know what is going on?

Both spouses will be informed irrespective of whether they have taken formal steps.

And what of dissolution? Will it be by post?

The dissolution of a marriage is a milestone in a person's life. I believe both spouses should have the right to be present when the marriage is dissolved and should be informed simply and clearly of the event. It is not necessarily a case where a legal representative need be present. I certainly consider the old system whereby, in an undefended divorce, one spouse depended on the other spouse's solicitor for information to be unsatisfactory.

How will the interests of children be looked after?

The Court has power to appoint counsel to represent children.

In the past there have been different practices as to the appointment of counsel with the power to appoint being exercised more generously in some centres than in others. How will the Family Courts operate?

The Family Proceedings Act directs the Court to appoint counsel to represent a child where it consideres counsel should be appointed. I think this requires a Judge to positively consider in each case whether counsel should be appointed and to act accordingly.

When will this consideration be given?

I would prefer it to follow on from the mediation conference. After all the first point to ascertain is whether custody is in issue. But it would also enable a Judge to explain to the parties why the appointment is being made. I think this is important, because counsel representing a child will operate best with the co-operation and goodwill of the parents. It is desirable that he should start off on the right foot.

There has also been uncertainty expressed as to what the function of counsel for the child is. Is he an advocate, an investigator or a mediator? What do you look for?

He or she is a little bit of each. First and foremost he is there to represent the interests of the child. The child is his client and is in the same position as any other client but with some qualification as to how far a child's instructions are to be followed. Age obviously comes into it and counsel would need to exercise some judgment over this and look more widely at what is in the child's best interests.

Beyond that his function is to ensure that all relevant facts are placed before the Court. He will need to make his own enquiries and see people such as teachers to get some idea of the child in his or her environment. He would also communicate the child's preferences to the Court.

It may will be that in the course of his enquiries he is able to mediate suitable arrangements for the child.

So overall he is advocate, investigator and mediator and I would add one other function — that of protector. I think it is important that a child be protected from excessive psychological testing and the like.

Practice has differed from centre to centre as to how counsel for the child should be remunerated. What are your thoughts?

I would like to see counsel offered a brief at a fee at an agreed hourly rate according to his or her experience and the needs of the case.

Turning now to lawyers — what do you expect of them?

It is very clear to me that the Family Court must be different. It must be a new Court, not a legal sham; not the old under a new name. So the main thing I would ask is that all who appear before the Court share in my determination to make the Court work along the lines I have described, which is along the lines the Beattie Report recommends.

There will be problems, though — What if a lawyer is instructed to take a hard line by a client who sees an advantage?

If he has accepted instructions then he must follow them. This will not be the only problem either. The eternal conflict between speed and conciliation will remain and there will be others. No formula will cover everything. We must all mould the procedure to suit the individual parties. It is their particular needs that must be considered in the light of legal necessities.

What final word would you have, then?

I would simply ask all who come before the Family Court — parties, lawyers, specialists — to look upon themselves as part of a team formed to solve the problems of this man, this woman and this child.

A CLOSER LOOK AT CHILDREN IN THE CARE OF THE DIRECTOR-GENERAL OF SOCIAL WELFARE

By ANN CORCORAN, Senior Social Worker, Fostercare and Adoption, Department of Social Welfare

As from 1 July 1981, every child who comes into the care of the Director-General of Social Welfare either by a Court Order under s 31 or s 36, or by an Agreement under s 11 of the Children and Young Persons Act must, no later than three months after coming into care, have a written plan prepared for him/her.

The most important aspect of the new scheme is that it carries with it an expectation that social workers will, wherever possible, meet together with all the people concerned in the child's life to formulate the plan and that all the people involved, that is the child/young person, the natural parents, the foster parents or residential workers as well as the social worker, will undertake tasks aimed at achieving the long-term goal. It is this involvement of all the people concerned as part of the working team that, from overseas experience, leads to a more positive approach to the needs of the child and, in most cases, an earlier indication of the potential for change within the child's environment.

The format of the plan is set down on Departmental Form SW 515 with the following headings and explanations:

Goal — the special long-term casework objective such as Return Home.
The Target Problems — are those problems which impede the goal being achieved at this time.
The Short Term Objectives — summarises what needs to happen in the next six months towards achieving the Goal.
Tasks — are the specific actions to be undertaken to achieve the short-term objectives.

The plan is reviewed at six-monthly intervals. Annually a panel consisting of the Assistant Director (Social Work) from the local Departmental Office and a person from the community with a known interest in and concern for children, appointed by the Director-General of Social Welfare, will review the plans and see that the Department's policy for planning and the involvement of all the parties in the planning process is being implemented. This review panel is not a statutory body and has no legal powers; it is strictly an advisory body.

In implementing such a scheme the Department is publicly recognising in a positive way its responsibility to the children in its care, while at the same time giving the people concerned in the child's life an opportunity to accept responsibility for change while recognising that at the same time a great deal of support from Departmental social workers will be needed for all parties.

The legal profession can contribute significantly to this process by advising their clients of the Department's commitment to planning and making them aware of the need to co-operate with social workers in working out a positive and realistic plan for the future.

TRIBUTES TO SIR DOUGLAS HUTCHISON

A ceremony was held in the High Court at Wellington on 31 July in honour of the late Sir Douglas Hutchison who died on 20 July. Sitting with the Right Honourable The Chief Justice, Sir Ronald Davison GBE, were two Judges of the Court of Appeal, five Judges of the High Court, and two former Presidents of the Court of Appeal, Sir Alexander Turner and Sir Thaddeus McCarthy.

Opening the ceremony, Sir Ronald referred to the fact that it was 33 years ago almost to the day that James Douglas Hutchison was appointed a Judge of the Supreme Court at the age of 54. Sir Ronald recalled the words of Mr H R C Wild QC, later to become Chief Justice, at the gathering of practitioners attending the last Court sitting of Sir Douglas before his retirement in 1966:

> "In all this long service there has been, if I may say so, a characteristic constancy about the quality of your Honour's service. I feel sure that the citizens who have come into your Court, whether as witness, accused person, juror, litigant, or merely bystander, thought the more of our system of justice by reason of the patience, the courtesy, the thoroughness and the moderation they have seen in you as a Judge."

After referring to Sir Douglas Hutchison's "unfailing courtesy to all parties, witnesses and counsel; his patience with young counsel taking their first steps in the practice of the law; his constant encouragement to them; his ability to put a nervous witness at ease; and his firmness and humanity displayed in dealing with offenders", Sir Ronald continued:

> "But although retirement as a Judge in 1966 marked the end of one phase of Sir Douglas' life, it also marked the beginning of another. He was arbitrator or umpire in a number of major arbitrations and Chairman of the Commission which enquired into the proposal to raise the level of Lake Manapouri.
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> "For twelve years of his retirement he was Chairman of the War Pensions Appeal Board during a very important period of its work. He was, too, the first Commissioner of Security Appeals to have been appointed, and served in that office from 1970-1977. His was indeed a long and active life.
>
> "He enjoyed his retirement. He kept in regular touch with his old friends in the law, both of the profession and of the Bench. Until shortly before his death, at the grand old age of 87, he was frequently to be seen of a Friday, lunching at his club and sharing a story with his friends.
>
> "He rarely missed being present at any Court function which retired Judges were invited to attend. He was present in Court and sat on the Bench for the last time at the ceremony held in the Court of Appeal only a few weeks ago to mark the passing of Sir Alfred North.
>
> "Sir Douglas Hutchison will be missed by us all. To Lady Hutchison and Sir Douglas' family, we extend our sincere sympathy in their loss; the loss of a fine gentleman — an honoured servant of his country."

Mr D P Neazor, Solicitor-General, then paid tribute on behalf of the Government to the life and work of Sir Douglas. In the course of his remarks Mr Neazor said:

> "When sitting Sir Douglas appeared to young counsel reserved and perhaps remote, but that was not unhelpful, for his attention was devoted to the case with which he was dealing without his appearing to be troubled by the personal inadequacies of those who appeared before him. He was not unkind or impatient, but appearance before him encouraged counsel to stick to the point and to exercise a proper judgment about what were really soundly arguable points.
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> "As a Judge he appeared to hold pretty strictly to the view that his function was to interpret the law and not to make it, nor deliberately to develop it to a significant degree. That approach comes through strongly in his reported judgments, which read as clear, unadorned statements of his application of settled principles."

Mr Neazor concluded:

"In his lifetime Sir Douglas made no apparent claim to be treated in any special way. It is nevertheless only proper that at the time of his death it should be recalled that his service quietly and diligently rendered to the Crown did not pass unnoticed. It is my privilege that it should

fall to me to do that and in doing so to add the sympathy of the Government to Lady Hutchison and Sir Douglas' family."

Mr J T Eichelbaum QC, President of the New Zealand Law Society, then spoke on behalf of all practitioners. After describing Sir Douglas' distinguished career as a practising lawyer, and the long and conscientious service which he gave to the profession, Mr Eichelbaum continued:

"As a Judge, no one could have done more than Sir Douglas to uphold the dignity of the judiciary and project its image in its most favourable form, and its most traditional, to the public and the profession. News of his death brought back a flood of memories, all kindly, to those who had been fortunate to appear in his Court. He was patient, thorough, unfailingly courteous, and sound both on facts and in law. He was not a disciplinarian; the example he set was such that this was never necessary. There was a characteristic constancy about the quality of his work. The formal resolution recorded in the books of the New Zealand Law Society at the time of his retirement referred to his Honour's most signal qualities on the Bench: sound judgment, dignity and human understanding.

"Sir Douglas' life and abilities had many other facets. He gave sterling service to his country as a soldier. A fine all-round athlete, he gained major honours in several sports. After a strenuous working life, he was spared to enjoy many years of retirement, being typically active almost to the end.

"The lawyers of New Zealand extend their sympathy to Sir Douglas' wife and family. Their sadness will be tempered, as ours is, by the knowledge that the name of James Douglas Hutchison stands secure as that of one of New Zealand's most respected figures in the law."

The final speaker was **Mr B D Inglis QC**, President of the Wellington District Law Society, who summed up the sentiments of the Wellington Bar in the following words:

"Sir Douglas Hutchison was everyone's model of what a Judge should be. He was unfailingly courteous, completely fair, calm, with a natural and unforced dignity, and had a presence that evoked ready acceptance of his authority and of his role. He attracted affection as well as respect. That is how we, as members of the Wellington Bar, remember him."

CONFERENCE OF AUSTRALASIAN AND PACIFIC OMBUDSMEN

This Conference will be held in Wellington at the Legislative Council Chamber, Parliament Buildings, from 28 September to 2 October. On *Tuesday 29 September* the sessions will be open to members of invited groups, including the legal profession, and among the speakers on that day will be the Chief Justice of New Zealand and the Australian Commonwealth Ombudsman.

A predominant theme will be the relationship between the Ombudsmen and the Courts — a matter of particular interest to lawyers.

Further particulars are available from the Office of the Ombudsman, PO Box 10152, Wellington (Tel: 739-533).

CONSTITUTIONAL LAW

MINISTERIAL APPOINTMENTS — STILL "THE STARTLING REALITY"

By PHILIP A JOSEPH, Barrister and Solicitor*

1. Introduction

Part 2 of this year's NZLJ published the writer's article arguing the illegality of New Zealand governments.[1] This was submitted prior to *Ualesi v Ministry of Transport*[2] in which Quilliam J heard, and rejected, argument that the Hon C C A McLachlan had not been validly appointed Minister of Transport on 12 December 1975. Although not the writer's argument presented, it is perhaps tempting to assume that this decision answers the writer's argument also, even as it awaited publication. However the question asked of Ministerial appointments in New Zealand is unanswered despite this decision. Not only was the argument presented in *Ualesi* correct for the *wrong* reasons, but also Quilliam J encountered too many difficulties in holding as he did for this decision to foreclose the enquiry.

This paper examines, in the light of what has already been published, the grounds on which His Honour so held.

2. The Appeals

These were three appeals against conviction under the Transport Act 1962 involving the one question of law: namely, whether the Transport (Breath Tests) Notice 1978[3] authorising the evidential breath test administered to the appellants was valid. Section 57A of the Transport Act requires this Notice to be issued by the Minister of Transport. Supposedly in exercising this office, Mr McLachlan signed the Notice on 27 November 1978.

However counsel submitted that Mr McLachlan's appointment as Minister of the Crown had not in fact been made since he was not, upon his "appointment", a member of Parliament. Section 6(1) of the Civil List Act 1950, since re-enacted, provided: "No person shall be appointed as a Minister of the Crown . . . unless he is at the time a member of the House of Representatives" (s 9(1) of the Civil List Act 1979 substitutes, without materially altering the legal requirement, "member of Parliament" for "member of the House of Representatives"). Counsel contended that upon the dissolution of Parliament the House of Representatives ceases to exist and does not again come into existence until the date fixed for the return of the writs. At the 1975 general election that date was 19 December, seven days following the incumbent government's resignation and the administering of the oaths of office to Mr McLachlan. Accordingly, "[t]he argument for the appellants is that his appointment was made seven days before the day on which the new House of Representatives came into existence, and that as there was at that time no House of Representatives there could not have been any members of it."[4]

For this proposition counsel relied on s 12 of the Electoral Act 1956:

> "12: Duration of House of Representatives — The House of Representatives . . . shall, unless Parliament is sooner dissolved, continue for a period of three years, computed from the day fixed for the return of the writs issued for the general election of members of that House of Representatives, and no longer."

Counsel submitted that by operation of this provision the House of Representatives has a life which commences the day the writs are made returnable, and that only from this day can those elected be members.

3. The Decision

His Honour held the House of Representatives does not cease to exist upon the dissolution of Parliament and, in any event, that a candidate becomes a member of the House the day the returning officer

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[1] *The Startling Reality: Toward Unconstitutional Government* [1981] NZLJ 26 (submitted June 1980). See also the writer's alterations, [1981] NZLJ 112.

[2] [1980] 1 NZLR 575, dated 27 August 1980.

[3] SR 1978/310.

[4] Supra, note 2, at 576 per Quilliam J.

declares his election. In this case there was no evidence to show the date upon which the declaration of Mr McLachlan's election was made. Nonetheless, applying the maxim *Omnia praesumuntur rite esse acta* his Honour held Mr McLachlan to be a member of the House prior to 12 December 1975, thus satisfying the legal prerequisite for ministerial office.

4. Analysis

(a) The grounds for decision

In preference to counsel's interpretation, Quilliam J reasoned that s 12 of the Electoral Act 1956 is "purely a temporal provision" prescribing the maximum period between elections:

> "It does that not by fixing a starting date but by reference to a finishing date. It provides that the House shall 'continue' for a specified period rather than it shall commence on a particular date."[5]

However, whereas this may have disposed of counsel's principal argument it did not dispose of the appeals since — on Quilliam J's own reasoning — the possibility remained that the House does for a time cease to exist. Indeed, while it may not be permissible to deduce from s 12 a starting date for the commencement of the House, that section unambiguously imposes a "finishing date". Quilliam J conceded: "I recognise that it is not easy to reconcile the view I have expressed with the provisions of s 12 . . . which refer to the House of Representatives continuing 'for a period of three years . . . and no longer'." Implicit in the reasoning which enabled his Honour to reject counsel's argument, then, is that which counsel was contending: that the House *does* for a period cease to exist. Quilliam J ultimately rejected that possibility but, it is submitted, not without difficulty.

The sequence in which his Honour determined the issues is significant. His Honour purported to find, first, that the House continues to exist throughout and, second, that membership dates as from the returning officer's declaration. In fact his Honour's first finding was simply a consequence of the second. For instance:

> "A question which I shall need to consider later is the moment at which a member is to be regarded as elected. But whatever the answer to that may be I think that once a member has been elected his election can only be to the House of Representatives. . . . I cannot accept that members may be elected to a House which does not exist or which may only come into existence at some later date. *Once, therefore, there are members elected it is necessary to conclude that there exists a House to which those members have been elected.*" *(sic)*[6]

This reasoning is curious since the premise on which counsel based his argument, which premise Quilliam J had to accept, is that if the House is for a period without legal existence then for that period it can have no members. Consequently, it is necessary to first determine whether — and for what period — the House may or may not exist *in order* to determine when membership can arise. Quilliam J, however, though purporting to follow that sequence, reversed it, thereby assuming what he was first required to determine. In effect, he equated election to the House with membership (thereby assuming also the answer to the second question he was "deferring"), and then deduced that there must exist a House "to which those members have been elected". In so doing, his Honour overlooked the status of member *elect* until such time as the Governor-General's proclamation summoning and assembling a new Parliament is executed. It is explained in the article (citing Erskine May, statute and judicial authority) that until this prerogative power is exercised neither Parliament nor the elected House has legal existence.

However Quilliam J continued, citing in support s 11 of the Electoral Act 1956. In fact all this section does is define the constitution of the House, confining membership (whensoever that arises) to those elected on the basis of single-member electorates:

> "11. Constitution of the House of Representatives — The House of Representatives . . . shall consist of —
> (a) The members elected for the General electoral districts . . ., being one member for each such district; and
> (b) The members elected for the Maori electoral districts, being one member for each such district."

It is noteworthy that the section makes no reference to the time at which the House is constituted and legally in existence, nor does it provide that those elected are members from the time of election. Yet to quote Quilliam J:

[5] Ibid, at 577.

[6] Ibid, at 579, emphasis added.

"The House consists of the members elected (s 11) and accordingly as soon as the first member has been elected it needs to be accepted that there is a House to which he has been elected. I revert to my earlier view that the House never ceased to exist but simply could not function and had no members. If it did cease to exist, however, then it was revived as soon as there was a member."[7]

With respect this reasoning takes the matter no further. In particular:

(1) The first and third sentences simply reiterate the assumption that election to the House is synonymous with membership; nowhere in the judgment is this explained.

(2) It is then deduced, as above, that there must exist a House once a candidate is elected. This deduction is no more valid than the assumption on which it is based. Indeed to make this deduction on the basis of the membership question is to place the cart before the horse, which is criticised above.

(3) Given that no explanation accompanies the "earlier view" referred to, the statement "that the House never ceased to exist but simply could not function and had no members" is a further assumption, not a reasoned conclusion.

(4) Consider, for instance, his Honour's final sentence. The possibility this acknowledges is an admission that the reasoning given cannot account for the continuance of the House between dissolution and the election of the first "member": "but I do not think that this of itself is a reason for saying the House cannot continue in existence", his Honour believed.[8]

(5) Finally, contrary to the view expressed, s 11 cannot have the effect of reviving the House "as soon as the first member has been elected". This section not only stipulates that the House shall consist of "[t]he members elected"; it also constitutes it numerically according to the total General and Maori electoral districts, "[there] being one member for each such district". Consequently the House cannot be constituted and in existence by operation of this provision until the *last* of the ninety-two members has been elected (s 11 is cast in peremptory terms, "The House of Representatives . . . shall consist of —

(a) The members elected . . ., being one member for each . . . [electoral] district").

This interpretation must be preferred. But more important is that s 11 ought not to be applied at all for this purpose. Otherwise it would mean that the House ceases to exist immediately a member vacates his seat in any of the ten ways provided by s 32 of the Electoral Act 1956; that is, no longer would its total membership satisfy the numerical requirement of s 11. In that event the statutory timetable for the holding of a by-election for that seat,[9] coupled with the usual delays, would result in an interval in the region of three months before Parliament could again proceed with its business. Yet it is the practice of the House when in session to continue regardless of vacancies. Moreover, s 12 defining the duration of the House decrees that every House "shall, unless Parliament is sooner dissolved, continue for a period of three years. . . ." This contemplates only two methods by which the House *can* cease to exist: namely, by dissolution or by expiration of time. Contrary to the significance Quilliam J was prepared to accord s 11, it does not contemplate that the House ceases to exist when a member vacates.

This last point exposes a further flaw. Section 44 of the New Zealand Constitution Act 1852 reproduces — but does not displace[10] — the prerogative power of dissolution, expressly delegated to the Governor General in New Zealand by Cl X of the Letters Patent 1917. It is exercised to dissolve the General Assembly, his Honour said: "It is not, in terms, to dissolve the House of Representatives." Observing that the House is but a component of the General Assembly, his Honour concluded that the exercise of that power "does not necessarily" have the result of dissolving the House. Yet this is precisely the effect of s 12 (for which there is Court of Appeal authority moreover)[11] decreeing that every House shall have a life of three years *"unless Parliament is sooner dissolved"*.

[7] Ibid, at 580. See also at 579.

[8] Ibid, at 579.

[9] See the Electoral Act 1956, ss 72-75.

[10] See *Simpson v Attorney-General* [1955] NZLR 271, eg at 280-81.

[11] See *Simpson v Attorney-General*, ibid, at 284 per Stanton and Hutchison JJ discussing "the dissolution or expiry of a particular House of Representatives"; *Police v Walker*

(b) The authorities

Counsel cited two authorities, both of which are discussed in the writer's article.

First, in *Simpson v Attorney-General* Barrowclough CJ upheld the validity of a number of statutes "notwithstanding the fact that the House of Representatives, which had passed them, ceased to exist before notification by the Governor-General of his Assent thereto . . ."[12] Stanton and Hutchison JJ in the Court of Appeal affirmed Barrowclough CJ's ruling: ". . . Section 56 [of the New Zealand Constitution Act 1852] may not be so read as to declare it unlawful for the Governor-General to give his unqualified Assent one day after the House of Representatives has ceased to exist."[13] And in a separate judgment McGregor J asked: "If any one of the component parts of the General Assembly is not for the time being in existence, can there be done any legislative act of the General Assembly?"[14]

McGregor J differed from his brethren in doubting whether there could be such an act. However, the material point here is that *Simpson* abounds with references to the House ceasing to exist pending the 1946 General Election. Perceiving the need to distinguish *Simpson*, Quilliam J explained: "It must be observed, however, that the Court of Appeal in that case was not concerned with the status of members of the House of Representatives and certainly not with the kind of situation which is suggested here."[15]

That is true. But if the Supreme Court and the Court of Appeal did not regard the House as having ended at the time the statutes received the Governor-General's Assent, on what basis were these Courts determining whether the statutes had been validly passed?

The second case is *Police v Walker*.[16] The question was, who possessed authority following the dissolution of Parliament on 30 October 1975 to revoke the Maori land-marchers' licence to remain on Parliament grounds? The Court of Appeal explained why it was not the Speaker who was invested with that authority:

> "When a House of Representatives . . . is in existence, whether in session or not, . . . the Crown allows the House to occupy and control the land. That control would normally be exercised through the Speaker or his deputy."

This is significant, for the instruction to vacate was given on 23 December 1975. This means that, as at 23 December, eleven days *following* the appointment of Mr McLachlan as Minister of Transport, there was no House in existence. This is the reason indeed why the Minister in charge of the Legislative Department was, on 23 December, seized of the requisite authority. "[W]hen no House of Representatives is in existence," the Court of Appeal explained, "the control and occupation of the land are delegated by the Crown as owner to the government department having the function of servicing Parliament and administering the Legislature Act 1908." The Court of Appeal noted that the Prime Minister is concomitantly appointed Minister in charge of that Department, and that it was in this capacity that Mr Muldoon issued the instruction to vacate.

On these facts the Court of Appeal's decision is conclusive, there being no House in existence at the time of Mr McLachlan's appointment. However Quilliam J simply repeated his comments regarding *Simpson*,[17] preferring to confine *Walker* to the threshold question whether the House at any time ceases to exist:

> "These references by the Court of Appeal to the House of Representatives ceasing to exist were not, in my view, necessary for determination of the matters in issue in those cases. I believe I am free therefore to reach a different conclusion . . . ."

On the contrary, even for purposes of that question the existence of the House was the very point on which the appeal in *Walker* turned. If in existence the House would occupy and control the land through the Speaker. Yet the Court of Appeal held that the Speaker, elected for the duration of the Parliament, "ceases to hold office when . . . the House by whom he has been chosen . . . is dissolved".[18] Consequently, were the House in existence on 23 December it is doubted whether anyone could have exercised the authority to revoke the licence; for not only was there no Speaker, but also "[a]ny authority from the dissolved House

[1977] 1 NZLR 355, at 360 and 363 discussing the non-existence of "the dissolved House".

[12] Ibid, at 276 (S Ct).

[13] Ibid, at 283.

[14] Ibid, at 285.

[15] *Ualesi v Ministry of Transport*, supra, note 2, at 577.

[16] [1977] 1 NZLR 355 (CA) (appeal against conviction on a charge of wilful trespass under the Trespass Act 1968, s 3).

[17] Supra, corresponding to note 15.

[18] Supra, note 16, at 362.

would presumably cease with the dissolution, . . . while the incoming House had not even met at the relevant date."[19] Clearly, then, only upon the finding that Quilliam J believed was unnecessary could the Court of Appeal have found the requisite authority in the Prime Minister as Minister in charge of the Legislative Department.

Finally, it should be mentioned that, while the writer respectfully agrees with the finding in *Walker* regarding the non-existence of the House on 23 December, the decision is nonetheless per incuriam if one accepts the writer's argument that Mr Muldoon could not have been validly appointed Minister in charge of the Legislative Department on 12 December 1975.

5 Conclusion

With reference to counsel's argument before Quilliam J, the writs for the 1975 General Election were made returnable on or before 19 December, four days *prior* to the date on which the Court of Appeal in *Walker* held the House to be without legal existence. This confirms the view that, of the various post-election events which may be thought to revive the House, there is but one that can be supported: and that is the assembling of the new House pursuant to the Governor-General's proclamation summoning Parliament.

To repeat what is explained in the article, neither Imperial nor New Zealand statute has altered in New Zealand the special consequences of the exercise of the royal prerogative dissolving and summoning Parliament. The material consequence here is the interregnum when there is neither a Parliament *nor* a House of Representatives. To hold that the House cannot be dissolved countermands Court of Appeal authority, negates the purpose for which dissolution is effected ("to reconstitute the House according to the people's wish"),[20] and is contrary in fact to what provisions such as s 12 of the Electoral Act 1956 acknowledge.

However, whether the prerequisite for Ministerial appointment be membership of Parliament (as under the present legislation)[21] or of the House (as was the case in 1975),[22] the fact that it precludes appointment prior to Parliament assembling can be demonstrated independently of the law hitherto examined:

(1) Section 13 of the Electoral Act 1956 reads, "Members of the House of Representatives shall be known and designated by the title 'members of Parliament', and in this Act and all other Acts the term 'member of Parliament' shall be construed accordingly."

ie Members of the House of Representatives **are** Members of Parliament

(2) Section 4 of the Acts Interpretation Act 1924 defines "Parliament" as being "the House of Representatives in Parliament assembled".

ie Parliament **is** the House of Representatives in Parliament assembled

Combining (1) and (2):

Members of the House of Representatives **are** Members of Parliament
and **are** Members of the House of Representatives *in Parliament assembled*
but are not Members of the House of Representatives *when not in Parliament assembled*

The only means of challenging this equation is to assert in accordance with the introductory words to s 4 that the definition of "Parliament" in the Acts Interpretation Act 1924 is inconsistent with the context in which that term is used in s 13. Section 4 begins:

> "4. General Interpretation of Terms — In every Act of the General Assembly, if not inconsistent with the context thereof respectively, and unless there are words to exclude or to restrict such meaning, the words and phrases following shall severally have the meanings hereinafter stated, ..."

The difficulty, however, is that s 13 contains no such words excluding or restricting, or otherwise manifesting a context inconsistent with, the term "Parliament" as defined by that Act. Indeed, our common law inheritance secures that meaning even in the absence of s 4 — hence the interregnum in Parliament's existence between dissolution and the assembling of the new House. This precludes, therefore, any suggestion that the s 4 definition is simply a drafting convenience which Courts are at liberty to ignore in construing "Parliament" in the normal statutory context; specifically, as used in s 13.

[19] Ibid, at 363.
[20] See Joseph, supra, note 1, at 32 (discussing *Simpson*).
[21] Civil List Act 1979, s 9(1).
[22] Civil List Act 1950, s 6(1).

Finally, can it not also be argued that, while s 13 acknowledges the de facto status of member of the House, it excludes any comparable *legal* status — of member of the House — in designating such persons "members of Parliament"? To accept this construction would certainly simplify matters, for no one would deny the legal impossibility of being a member of Parliament during the interregnum in question: specifically (to quote Erskine May) "[the] interregnum between the dissolution of a Parliament and the meeting of its successor during which there is no Parliament in existence. . . ."[23]

[23] *Erskine May's Parliamentary Practice* (1976, 19th ed), at 259. See further, Joseph, supra, note 1, at 31-2.

TOWN PLANNING

IS YOUR SLIP SHOWING? — REFUSING BUILDING PERMITS UNDER THE LOCAL GOVERNMENT ACT 1974

By KEITH BERMAN LLB, Dip TP, MNZTPI

The Local Goverment Act 1974 in s 641(2) (inserted in 1979) provides:

> "Notwithstanding anything in any bylaw made under Section 684 of this Act, if in the opinion of the Council:
>
> (a) The land on which a building is proposed to be erected or altered, or any part of the land, is not suitable for the purpose of erecting the building or making the alteration, as the case may be; or
>
> (b) The land, or any part of it, is subject to erosion or subsidence or slippage, or inundation by the sea or by a river, stream, or lake or by any other source; or
>
> (c) The erection or alteration is likely to accelerate, worsen or result in erosion or subsidence or slippage, or inundation by the sea or by a river, stream, or lake, or by any other source, of other land, —
>
> the Council shall refuse to grant a permit to erect the proposed building or to make the alteration, unless the Council is satisfied that provision has been made or is to be made for the protection of the land from erosion or subsidence or slippage or inundation."

The section was considered by the Planning Tribunal (Number 1 Division) in *Alpe and Semini v Rodney County Council* (1981) (decision A46/81 to be reported) in an appeal by five landowners against the refusal by the Council of building permits for their beach front properties at Orewa on the ground that the land is subject to erosion by the sea.

The Tribunal examined the long-term changes and the random storm-induced changes of the beach. It accepted expert evidence of the gradual 60-year retreat of the beach front and the lowering of the beach profile, a slow rise of mean sea level and the aggravation of sand loss by wave deflection from artificial sea walls. They accepted that an acute danger exists to the beach-front sections. The Tribunal held the three parts of the subsection to be disjunctive and paraphrased it as follows:

> "The Council shall refuse to issue a building permit if in its opinion:
>
> (i) the land or any part of it is not suitable for the erection or alteration of the building, for any reason other than erosion, subsidence, slippage and inundation; or
>
> (ii) the land or any part of it is not suitable for the erection or alteration of the building because it is subject to erosion or subsidence or slippage or inundation , unless provision is made or is to be made for the protection of that land from erosion or subsidence or slippage or inundation; or
>
> (iii) the erection or alteration of the building will accelerate, worsen or result in erosion or subsidence or slippage or

> inundation of *other* land, unless provision is made or is to be made for the protection of that *other* land from erosion (etc)."

Thus the Council could not rely on the ground that the land was "not suitable", because erosion by the sea was the only problem complained of. The refusal had to stand or fall under (ii) above.

The appellants argued that the phrase "subject to erosion" means that actual erosion must be occurring, and not that there is the mere possibility of likelihood or erosion. The Tribunal preferred to adopt a *Shorter Oxford English Dictionary* definition of "subject to" — "liable to the incidence or recurrence of an action process or state". It saw its function as follows:

> "We are not called upon to find whether erosion on the sections is a future possibility. What we are called upon to decide is whether the sections are now exposed or open to erosion to a sufficient degree to justify the refusal of building permits; or, to put the matter another way, whether the situation is such that the sections should be protected from erosion before building permits are issued."

The Tribunal further held that the term "the land" must mean more than the mere space upon which the building will stand.

The various appellants' land fronted different parts of the beach. In respect of two appeals the Tribunal noted that the life-span of the proposed building exceeded 50 years and that it was probable that within 50 years those lots would have suffered serious erosion. It unanimously dismissed those two appeals.

As regards the other three appeals, the majority of the Tribunal considered that, although there were 14 to 16 metres of land at present in front of those appellants' sections, they were sufficiently endangered to warrant the dismissal of the appeals. The Chairman dissented, taking the view that the reservoir of sand in front of those lots is such that they are not *now* so subject to erosion that a building permit should be refused.

The Tribunal appears to have put an interesting gloss on the strict wording of the section. It considered the life-span of the proposed building, which was in excess of 50 years, to be a factor to be considered, and stated "the matter must be considered in the light of the expected lifetime of the buildings proposed". The implication is that if the application had been for, say, a holiday home of limited life-span, or a relocatable house, the withholding of the permit might not have been justified. This question will be further considered below.

The decision of the Tribunal (Number 3 Division) in *Mathew v Auckland City Council* (1981) (decision no A61/81) provides an example of the application of s 641 to a difficult clifftop site in Glendowie, Auckland. After discussing expert evidence, the Tribunal was satisfied that the site was subject to slippage, but in terms of the proviso to s 641(2) held that provision could be made for the protection of the land by entirely practical drainage works. It left the parties to agree if possible on conditions under which the building permit would be issued.

The Tribunal gave helpful guidance on the meaning of the term "the land" and stated:

> "We think that when considering 'the land' in the context of s 2(a) and (b), one must have regard, not only to the land upon which the proposed building itself will be placed, but also to the land which will be used for purposes directly associated with the servicing and the use and enjoyment of that building."

Thus it may be that in a certain case some of the land within the title boundary is subject to subsidence, but not the land adjacent to the building. In such case a building permit could not be withheld under s 641(2). Each case needs assessment on its merits.

The Tribunal then discussed the provisions of s 641(4) which provides:

> "Section 304 of this Act (relating to the giving of security by a subdividing owner) shall, with the necessary modifications, apply in any case where under subsection (2) of this section the council grants a building permit subject to any condition imposed for the protection of the land from erosion or subsidence or slippage or inundation, as if it were a condition imposed on the approval of a scheme plan."

Section 304 empowers the Council to require an owner to enter into a bond for the performance of any condition. The bond is a registrable instrument under the Land Transfer Act 1952 and when registered is a covenant running with the land and binding on subsequent owners.

There are clearly limitations on the use of the bond. As it is to secure the *performance* of a condition, it can be used only where the owner is required to do something, and not simply as a means of notification. If the Council wishes the bond to remain registered against the title it is important that the condition impose a continuing obligation. For example, the obligation "to construct" stormwater

drains would expire on completion of those drains, and the registered instrument could be discharged from the title. The obligation "to construct and maintain in working condition" such drains would create a condition which required continuing performance and could remain registered against the title. Thus by careful wording of the conditions it may be that in certain cases a Council could indirectly achieve notification to prospective purchasers of its land stability concerns.

It is difficult to see how s 641(4) and s 304 could be used to help the appellants in the *Rodney County* case. In that case the Tribunal considered what might be the object of the section. Counsel for the respondent suggested that it "was enacted as a result of the disastrous landslip which occurred at Abbotsford and in order to shield Councils from liability from damages". The Tribunal was of the view that:

> (it) "is to ensure that when an owner of land applies for a building permit he is informed by the Council of any factors known to Council which in the Council's opinion made the land inappropriate as a building site, and to ensure that there is adequate evaluation of these factors. (It is not for us to say whether the section places an obligation upon the Council before it issues a building permit to make specific investigation as to whether land is suitable as a building site in order to discover any previously unknown factors, or whether it is sufficient for it to evaluate any factors already known to it.)"

It is submitted that the section is equally concerned to protect the innocent subsequent purchaser of a land and building from buying a future castle in the air. The original informed owner of a building with a limited life-span may be prepared to accept the distant prospect of a shrinking building lot. The subsequent uninformed purchaser may be less happy about the simultaneous demise of building and land. Although it appears that the land of some of the Rodney County appellants could reasonably accept a relocatable building, the terms of s 641(2) permit a decision based only on a present day assessment of the land's stability, and not on the proposed building's life-span. It is suggested that neither the Council nor the Tribunal (having found that the land is subject to erosion and cannot be protected), have a discretion to permit a building of short life-span. Subsection (4) is limited to where the Council is satisfied that provision can be made for protection of the land. It could not be used to permit the erection of a relocatable building subject to a condition for its removal in certain circumstances. It may be that a case exists for amending s 641 to allow such buildings in appropriate cases so as to mitigate the undoubted loss such affected owners will suffer.

The writer understands that some Councils are issuing building permits subject to the condition that the owners indemnify the Council against resulting loss or damage. It is submitted that such condition is unauthorised by statutue and unlawful. The terms of s 641 are mandatory and Councils cannot avoid their responsibility by such means.

Clearly Councils are taking seriously the lessons of Abbotsford, *Johnson v Mt Albert City* [1979] 2 NZLR 234 and its forebears, and the obligations imposed by s 641. The anguished cries of section owners and the conflicting opinions of land stability experts will be heard again before the Planning Tribuna'

SPOTLIGHT ON OFFICE PLANNING

By RENATE BLOCK BE(Arch) FRAIA

Ms Block is an office planning consultant with many years experience in the field. Among her recent projects were the replanning of lawyers' offices in Australia and the planning of Butterworths' new office in Wellington — referred to at the end of this article.

Background

In the early sixties those pristine friendly-looking German office layouts appeared on my desk. It seemed that offices were after all meant for people, and that the insights on how those people worked could lead to revolutionary changes for office buildings. The offices in reality were a joy to behold. The Schnelle Brothers and their Quickborner team had invented *Buerolandschaft* (it became known here as *office landscape* — a literal translation). They had done their homework meticulously. A textbook of rules, regulations and procedures was published. It was the office planner's bible: follow these rules and all will be well: a place for everything and everything in its place. For the first time office planning was done in earnest, and was carried out methodically.

Looking back one must admire the genius of wrapping so many multi-faceted elements into a neat marketable package. Disregarded, however, were the different characters of organisations. Think of the diversity of tradition, style and structure of an insurance company, a newspaper office, a partnership of lawyers, an advertising agency, a partnership of accountants, a building company, a government office, a research group — the number of variations of requirements is endless.

At close inspection these early *office landscapes* appeared to have a sameness about them — very large spaces with many clerks, all equal — quite unlike our scene here.

We did learn soon in the 1960s that office planning must be taken seriously. Planning must be done to meet short-term and long-term objectives; and the ultimate users of the buildings must be involved in the planning process.

The rapid development did stimulate a great deal of research into operations and methods, and into the social aspects of work; it also coincided with a new thinking on ergonomically correct office furniture and the upgrading of the whole office environment all over the world. *Office landscaping* was the forerunner of the *office planning* for the eighties. It helped us to understand the need for flexibility of layout and the provision for technological and organisational change.

Facts and figures

The increase in the volume of office work in recent years has resulted in a shift in the workforce as shown in the table below:

Workforce	NZ 1971	NZ 1976
Office	39%	44%
Factory	41%	38%
Farm and services	20%	18%

It means that a large proportion of the New Zealand workforce is sitting behind a desk rather than working out in the field, on the construction site or in the factory. That this trend is likely to continue is indicated by the fact that in America already 50% of the workforce are working in offices. In that country the productivity in factory, farm and services has doubled in the last twenty years, while productivity in offices has increased by a mere 5%. Those figures may be similar for New Zealand.

One explanation may be that the current capital investment per person in the office worker is around $3,500; in the factory worker, between $20,000 and $30,000; and in the farm and services worker about $40,000 to $50,000. Couple these figures with the global costs of an office building and the mind boggles.

The global costs of an office building represent all costs arising out of the use of a building during its lifespan of fifty years. These divide roughly into:

95% Salaries of office workers
2% Maintenance, operations and cost of capital invested
3% Construction cost

When looking at these figures, the decision about the amount of care and the effort to be devoted to

planning the right type of office space and work environment takes on much greater importance. A thorough analysis of users' needs — personal and corporate — becomes a paramount requirement. People are indeed the most valuable resource in any organisation.

The building shell lives for fifty years, but the only constant in an office organisation is change. To accommodate change the building shell must make it possible to keep planning options open, as it would be an illusion to think that we know what we may need in the next decades. The planning effort for the inside of the shell of the building must fulfil the precise requirements of today and must leave some leeway for the changing needs of tomorrow. Studies have shown that less than 20% of the floor is taken up with the actual work surfaces and that workers are absent from their workstation between 15% and 30% of their time for meetings, business travel, study leave and holidays.

Other important factors to consider are that the cost of *energy*, *people* and *office space* is increasing while the cost of *office equipment* and *communications* is decreasing.

Today's Realities

"You can only keep your officers as tidy as a battleship if you have as much power as an admiral."

The balance of power in office organisations is changing. Clerks are replaced by professionals. These people make greater demands for the personalisation of the workplace and for participation in the decision-making and planning processes.

The firm brief from the people at the top has become a vehicle of the past. The new breed at the top are more willing and more able to become *facilitators* and *catalysts*, helping others to make good decisions and to get on with the job. Contrary to popular belief, this process usually saves time and avoids major blunders in the short and long run. Priorities are declared at the beginning; ideas, decisions and proposals are tested and unbugged at the early planning stage ensuring a carefully considered solution to the multi-faceted problem.

The realisation that office work is an ongoing information process encourages us to link separate devices — like computers, word processors, telephones, facsimile printers, copiers and files — to speed the processing of information. These better communication links make it no longer necessary to run large enterprises from one big headquarters building. Consequently there is no need for office workers to travel great distances to and from the centre of the cities as regional decentralised offices can be created and linked by communication networks.

Future Trends

We will see buildings of higher standards and quality in the future. We will recycle other buildings — like warehouses, bowling alleys and houses — for office purposes. We will see the paperless and automated office and learn to use keyboards rather than pencils. The computer will no longer be the glorified bookkeeper, but become the new assistant and tool for management and the professional workers.

The travelling business executive will take the plug-in terminal on trips and will keep in contact with the computer back home. Offices will have fewer desks but more terminals, meeting tables and armchairs.

We will find more diversity, more sharing of power and more individual initiative in planning and decision making. It is the lifestyle of our *post-industrial society* as defined by Toffler.

Office buildings were until recently classified as *hard buildings*, the user having no control over the environment, particularly the light level and the supply and temperature of air. It appears that soon our office buildings will be classified as *soft buildings* when the *technodrant* which the Europeans have developed is introduced to New Zealand. This is a desk-height column allowing every person individual control over light and air, but it also includes the vital link to power and communication facilities.

The Process of Office Planning

The challenge of office planning lies in analysing both the organisation and the building shell and ensuring an optimum match — for now and for the uncertain future.

Often an organisation may only need replanning of the existing offices; on other occasions the leasing or buying of newly constructed or existing office space proves more advantageous; or the construction of a custom-made office building may be decided upon as the only sensible answer. All these buildings must be tested for location, plan-shape, establishment cost, power and telephone distribution, lighting, sun control, acoustics, access and relation to markets, clients, transport and public amenities.

Some buildings are eminently more suited to a specific organisation than others; this can be measured by careful analysis. The testing of the building shell is more concerned with the long-term

future, and tends to be decided by management.

After the selection of the building shell the next step is the fitting out of the building. Here the concern is with the short-term future and the fulfilling of specific and detailed requirements. It is necessary at this stage to set up a task force with managers and office staff; and it must include the office planner. A definition of tasks statement clarifies necessary actions, roles and responsibilities. A *PERT* network*, a cousin of the *Critical Path Method*, identifies the bottlenecks and sets targets and deadlines. An early office survey, taking stock of all furnishings and equipment, is carried out by staff to get the ball rolling. A budget has to be established and monitored for the length of the process. It is important to determine communication patterns and examine the existing records management and administrative procedures. This is the opportunity to update the office practices and to introduce new aids.Priorities will have to be declared as the budget always places restrictions on expenditure. Old furniture may be reused, but it is likely that some new items have to be selected.

After visiting showrooms, inspecting other organisations, and talking to people in other new offices, furniture and equipment must be shortlisted for final selection. It is particularly useful to set up trial *work-stations* for testing by staff. A range of sample chairs should be tested by all users.

The next step is the *graphic inventory* consisting of a catalogue of all the selected furniture and equipment, showing the layout of every work-station, and recording furniture details and finishes, and power and communication requirements.

After the acceptance by management of the *graphic inventory* the layout planning for the whole office space is about to begin. It is a political and repetitious process requiring great care and devotion until every worker is satisfied. The logistics of causing the least interruption to the organisation becomes the prime purpose now, if the existing office is to be renovated.

If the organisation moves to another building, visits to the new space by all employees become important, so that the change-over runs smoothly. Most people find change difficult even if it is for the better; familiarity with the new situation will pave the way.

After the move or renovation it is vital to have a settling-in period of four to eight weeks before adjustments and fine tuning of the layout begin. The on-going management of the space, after the departure of the office planner, is easy if participation in the planning process gave people the confidence and the insights into the aims of rational office planning. In our experience, most offices find it necessary to call in the office planner at 18 to 24 months' intervals to help with the planning of major changes.

* Programme Evaluation and Review Technique.

Recent project in Australia

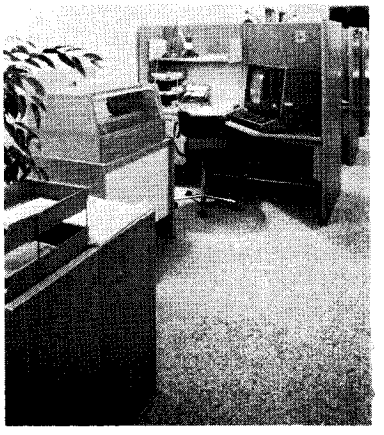
In 1969 I planned a new office for a partnership of barristers and solicitors. Twelve years later I was called in again to replan and upgrade the offices. The organisational needs had altered dramatically during this interval. The volume of work had grown, the number of partners remained static, but the organisation changed considerably. The staffing had been restructured by adding a new word processing division. It is run in three sessions. All partners and senior lawyers have dictating equipment linking them directly to it.

The secretaries of yester-year had become the personal assistants of today, with greater challenges and responsibilities. These people have taken away from the partners many of the administrative tasks and freed them to get on with their professional work.

The changes to more sophisticated equipment had been gradual: from a cord switchboard and intercom system to a computerised, reprogrammable PABX system. From the ledger machine to the computer. From the manual typewriter to the electric typewriter. From a wet copier to a dry, high speed, collating copier. From shorthand note taking to dictating machines. Completely new were the telex printer, the facsimile printer and the word processors.

I recalled my first impression of the old offices before the partnership moved to their present location: antiquated, over-crowded offices with ancient furniture and inadequate filing facilities and work surfaces. There were piles of paper everywhere including the floor, windowsills and chairs — but people were hard to find.

Now these lawyers have employed as their helpers the tools of advanced technology — and this has freed them and their staff from many mundane, repetitive and tedious tasks. The office layout and work-stations had been designed for the conditions of the 1970s. It was now important to update and upgrade the work environment in step with the new technology. The changes seem for the better. Many of the dull, monotonous tasks are taken over by modern equipment, and the people can concentrate



their energy on the work which only a human, creative mind is able to perform.

Recent Project in New Zealand

Last year, Butterworths asked me to help them with their move to Cumberland Place in Wellington. At that stage the building architect had completed the working drawings and specifications for revamping an existing building, the developer was poised to start and the Council was ready to issue a permit. It was not an ideal time to start office planning, but a quick ad lib layout confirmed the feasibility, and we were still in time to change interior finishes to suit the installation of the recommended furniture system.

We upgraded the carpet and replaced the plasterboard ceiling with an acoustically absorbent material. The lighting installation was altered to provide a general light level of 200 Lux which is the right level for working at VDUs (visual display units) and saves energy; in addition, we provided task lighting with desk lamps to bring the light level at the work surface to 550 Lux. We installed a sound-conditioning system with *pink noise* to mask unwanted sounds and obtain speech privacy.

As usual, I did my planning work at the old offices of the client. It seems to me a very effective and efficient way of planning with people, and learning about an office organisation. Communication channels are open, instant and personal. Staff participation was informal and low-key. Some were more interested in the exercise than others.

We still blush at the memory of leaving a furniture showroom in a shambles, when we tried to find out whether we could easily disassemble and rearrange the furniture system.

The planning process was a copybook example of the new breed of management being the facilitators and catalysts for good decisions by others in the organisation. The photographs give an impression of the new layout.

The settling-in period is now over. Some minor changes had to be made, but generally the company are alive, well and running — getting on with their work as publishers to the professions.

Note. Copies of a selected bibliography prepared by the author are available from the publishers on request.

CONFERENCE PAPERS

"MIND YOUR BUSINESS" — A "PRO'S" REPLY

By M P CREW, Barrister

The paper presented at the Triennial Law Conference entitled "Mind Your Business" by Ralph Wylie was one of those selected for videotaped panel discussions, in consequence of which a copy of Mr Wylie's paper has (it is understood) been sent to all members of the profession. It is for this reason only that it is not being published in the Journal, for it is obviously a paper of the highest interest to all lawyers, and sets out views which have been the subject of lively, and even passionate, debate within the Law Society in the past year.

The reaction voiced to this paper, both when Mr Wylie presented it and in the panel discussion screened on TV One on 26 July, was in general significantly favourable to Mr Wylie's thesis. The opposition tended to be based on issues of practicality rather than principle. However, the robust rejoinder from Mr Crew which we publish below meets Mr Wylie's underlying argument head-on. Because we believe that Mr Crew's remarks will strike a chord with a number of practitioners we think it right they should be given an airing. The subject is one of continuing concern, and it is to be hoped that those who read Mr Crew's rejoinder will be prompted to re-read Mr Wylie's paper and give fresh consideration to which side they are on.

I accept that it may be rash for a barrister to presume to comment on the practical aspects of commercial and conveyancing matters. May I however risk being thought presumptuous and comment on the issues raised by Mr Ralph Wylie in his paper to the New Zealand Law Conference entitled "Mind your Business — the Pros and the Cons".

Mr Wylie's thesis is encapsulated in the following quotations from his paper:

> "At the least, it is highly desirable that [a practitioner] should not take any active part in the conduct of the affairs of [a family] business". (page 3)
>
> "The essence of a profession is the use of the skills acquired in qualifying for that profession for the benefit of others, not for the benefit of oneself". (page 3)
>
> "There are a number of obvious dangers from practitioners indulging in business or speculative activities. On the assumption that such activities are successful, it is likely that as a corollary some other person will have been disadvantaged, and the lawyer becomes a prime target, as he always is, for criticism". (page 3)
>
> "If at the end of the day the practitioner acting for both A and B in a mutual transaction cannot honestly say for himself 'I did everything I possibly could for A' but can merely say 'I think a fair result was obtained for A and B', I suggest he has not fulfilled his duty as a solicitor". (page 5)
>
> "The ideal solution would be for solicitors to get out of the money-lending business". (page 8)
>
> "To some the practice of the profession of law has become simply a money-making occupation". (page 9)
>
> "The moment we begin to use our professional skills or knowledge acquired through our professional practices for our own personal gain rather than in the service of others, we begin to prostitute our profession". (page 3)

The quotations are not, I think, an unfair selection. It would appear from them that Mr Wylie objects primarily to:

1. The relatively common practice whereby solicitors act for vendor and purchaser in simple conveyancing or commercial transactions where all matters are agreed between the parties, and the allied but endemic practice of one firm of solicitors acting for both lender (mortgagee) and borrower (mortgagor) in a loan transaction; and
2. Practitioners involving themselves in bus-

iness ventures to make money, and regarding their practices as just such business ventures.

It seems to me that each of Mr Wylie's objections is rooted in what I would term, without disrespect to him, primarily a Victorian view of the legal profession and its social function. I use the term "Victorian" in an historical not a pejorative sense. The difficulty with Mr Wylie's objections, in my view, is that society, technology and economic life have all become immeasurably more complex since the principles on which Mr Wylie bases his views were developed. Why should the ethics and attitudes of the legal profession alone remain static when those of society at large have changed and developed? It is in my view positively dangerous that we as lawyers should mark time while the rest of society march resolutely ahead into the future — for the simple reason that they will eventually leave us behind and, ultimately, learn to manage without us.

I used in the last paragraph the term "ethics". The flaw in my argument, the reader may suggest, is that professional ethics are, like morals, immutable, eternal, changeless. There is however a world of difference between the moral prohibition "thou shalt not kill" and Mr Wylie's principle "thou shalt not act for both parties in a conveyancing transaction". The second seems to me essentially a pragmatic necessity born of the deeds system of title to land in England in the days before the sophisticated filing and record (soon to be computerised) systems we have today. When establishing the validity of a title was a skilled and complex business, fraught with risk and the possibility of error, it was clearly wrong for the vendor's solicitor to act also for the purchaser. An absolute prohibition against ever acting for more than one party was probably appropriate. We are however now in the age of the Torrens System and free access to definitive records in the Land Registry Office. Is an absolute prohibition still appropriate today when there is no risk element in most simple conveyancing matters and both parties agree that they should use the same lawyer to save costs? The last point is important. If the legal profession does not learn to hold its costs in conveyancing matters, it will deserve to be subject to the competition of State — or even worse, commercial — conveyancing offices.

I take a similar view of contributory mortgages, facilitating the lending of one client's money to another. Mr Wylie comments in his paper on this practice being a uniquely New Zealand institution. That being accepted, it must also be accepted that it is a practice that the legal profession has developed to serve needs left unsatisfied by other financial institutions. It is a clear instance of the profession adapting to changing needs and circumstances. It is therefore a healthy development. There is nothing wrong with it merely because it was not done 100 years ago. To suggest that the practice should cease because it is sometimes abused seems akin to advocating the banning of aeroplanes because they sometimes crash.

Mr Wylie's second ground of complaint is that it is wrong for lawyers to make money from matters other than law and (perhaps even worse) to regard their practices as a means of making money. He seems, from the third passage which I have quoted, to regard business success as vaguely indecent, possibly immoral. In a passage I have not quoted he deplores the involvement of lawyers in running companies in which they have "substantial and material" interests as shareholders. At the same time, however, he approves of practitioners becoming directors of public companies or substantial private companies in which they do not have a shareholding.

This distinction between small and large companies is curious and, in my view, untenable. It depends on the notion that those practitioners, generally the aristocrats of the profession, who hold office in public companies and substantial private companies, do so out of an altruistic desire to give service to the community at large. It must however surely be recognised that most do so for the pragmatic (and hardly disinterested) reason that directorships lead to contacts with commercial people and organisations which bring in work to their firms.

I doubt that, in the days in the 17th, 18th and 19th centuries when the basic doctrines of English law were developed, lawyers came from, or acted for, to any extent any group of people in the social scale other than what was called "the middle class" and those above them. The law was a gentleman's profession which looked after its own by providing adequate incomes for those fortunate enough to be able to practise.

There are now clients who are carpenters and trade union officials and lawyers who are their sons and daughters. As part of the change in the social framework which has taken place in the last 100 years or so, the law has become increasingly less the preserve of the gentleman with moderate private means. Many lawyers, including I say without shame myself, regard a career in the law as desirable very much for its financial rewards. I venture to suggest this has probably in any event always been the

case. Law is not nowadays a secular priesthood, if indeed it ever was. To prohibit the lawyer from the private business interests which all other professionals — engineers, architects, accountants — enjoy, will be to depress most severely the quality of those prepared to enter the profession. And what indeed is wrong with a lawyer whose practice leads him to see a commercial opportunity taking advantage of that opportunity to make money? The answer must be, surely, that there is nothing wrong with it so long as he does not act against the interests of his existing clients.

Let me say in conclusion that I have much sympathy with many of Mr Wylie's comments. I can appreciate that his work on the Disciplinary Committee of the New Zealand Law Society gives him much insight into areas of conflict between professional duty and private gain. I accept that the governing body of the profession, the Law Society, has as a primary and proper function the maintenance of professional ethics amongst its members.

I differ from Mr Wylie in my firm belief that professional ethics are not absolute and timeless, but are relative to particular social and economic circumstances. Lawyers are not an institution in themselves, but merely a body of people who exist to serve the changing needs of the public.

Basic to Mr Wylie's paper is the notion that there are changes within the profession which are creating problems which come before his committee. His solution is to reinforce the traditional ethics of the legal profession, to go back to the past to cope with the problems of the present. I suggest that the ethics of the profession probably need revising to cope with the changes that have occurred and will continue to occur in legal practice as a result of changes in technology and in society. If professional ethics more closely parallel the realities of legal practice, there may well be less work for Mr Wylie's committee.

It may well have been correct 100 years ago to express the view that any practitioner who uses his professional skills or knowledge for his own personal gain is prostituting his profession. If that is still correct today, then how many of us are prostitutes?

Epilogue

As a matter of courtesy Mr Crew sent Mr Wylie a copy of the above article. In his reply Mr Wylie wrote:

"Thank you for your letter of 31 July. I very much enjoyed reading your comment on my Dunedin paper, and although of course I cannot agree with it I find it refreshingly different. While I do not think that I can go along with the notion that professional standards must change with the times, I at least find that a much more positive approach than that of so many of the profession, who still pay lip service to the old standards but refuse to recognise the possibility that they may be ignoring them in daily practice.

I shall be very happy to see your article in the Law Journal and do not feel that I would want to reserve any right of reply."

AUCKLAND UNIVERSITY CENTENARY

The University of Auckland will celebrate its centenary in May 1983. The year as a whole will be marked as a centennial year, but many events will take place during the "focus" weekend 6-9 May, 1983. Some will be formal, like the Honorary Degrees ceremony, others less so. Highlights for past students will be the reunions planned by departments and faculties and also by halls of residence. Those seeking further information should write to the Registrar.

CORRECTION — "Wind, Sand and Water"

Professor Brookfield's article on p 365 of the August issue contained two editorial errors for which we apologise. Both occur near the foot of the first column on p 366. First, the heading, **"Does an accretion attach to the leasehold estate?"** should be deleted. Secondly, the fourth line of that paragraph should read, "ad medium filum or of the whole of the lake bed and (ii)".

CONTRACT
INDUSTRIAL LAW

JUSTIFYING INDUCEMENT OF BREACH OF CONTRACT

*By JOHN HUGHES**

In this article the author addresses himself to the vexed questions of justification as a defence to the tort of inducement of breach of contract and the relationship between New Zealand's industrial legislation and the common law action, which were raised once again in **Horgan v The Canterbury Clerks' Cashiers' and Office Employees' Industrial Union of Workers** *(unreported, High Court, Christchurch, 26 February 1981, A 151/77).*

The facts

The plaintiff was employed at a Technical Institute and was covered by the New Zealand Clerical Worker's Registered Collective Agreement to which her employer was a signatory. The Agreement contained the usual unqualified preference clause obliging every worker whose employment was subject to the Agreement to become and remain a member of the union, and providing that employers bound by the Agreement committed a breach if the worker failed to do so. The plaintiff was a member of the union when she joined the Institute but resigned from it with two other workers after becoming involved in an unofficial rival group, the Technical Institutes Ancillary Staff Association (TIASA). At the time TIASA still awaited registration as an industrial union and had no legal status under the Industrial Relations Act 1973.

The union notified the employer that the plaintiff was being employed contrary to the unqualified preference clause, and the Institute wrote reminding her of her obligation to join and requesting her to apply for membership without delay. In the meantime, other clerical workers at the Institute came into conflict with the plaintiff and took industrial action over her failure to join the union (a strike which Roper J held "was not initiated, and was certainly not desired, by the Union"). The plaintiff was advised by both her employer and the union either to join the union and resign when TIASA achieved official status, or to seek exemption from membership as a conscientious objector under s 103 of the 1973 Act. When she refused and the union wrote to the employer threatening proceedings for breach of award, the plaintiff was dismissed. She sued the union for inducement of breach of contract and intimidation (the latter head of claim was abandoned at trial).

*Faculty of Law, University of Canterbury.

The legal issues

(a) Breach and causation

It was alleged that the union was guilty of direct inducement of breach of contract, that tort where "the intervener, assuming he knows of the contract and acts with the aim and object of procuring its breach, will be liable if he directly intervenes by persuading A to break it" (*Thomson v Deakin* [1952] Ch 646 at p 670 per Lord Evershed). It was obvious in this case that the union knew of the contract of employment. Had there been a breach? It is unclear from the judgment whether the dismissal was summary or whether proper notice had been given. At one time the tort was not committed if the contract had been terminated by notice, it being thought necessary to prove breach (*Allen v Flood* [1898] AC 1). Lord Denning's reformulation of the principle in *Torquay Hotel Co Ltd v Cousins* [1969] 1 All ER 522 to include interference by preventing or hindering one party from performing the contract (even where this does not amount to breach) has achieved limited academic acceptance although "there must be some doubt as to the proper ambit of the tort" (J D Heydon, Paper 5 of *Negligence and Economic Torts — Selected Aspects*, (ed T Simos) Sydney, 1980, at p 147).

Nevertheless, even accepting the concept of hindrance short of breach, can a defendant be said to have hindered the performance of a contract where one party properly terminates that contract on notice (particularly if, as here, there seemed good grounds for doing so in the plaintiff's disobedience to

a reasonable and lawful instruction)? In *Greig v Insole* [1978] 1 WLR 302 Slade J was content to assume that no tort is committed by a defendant who induces a person to exercise a lawful right to rescind a contract (at p 333). Further it might have been argued that the unqualified preference clause was incorporated in the plaintiff's contract of employment by virtue of s 231 of the 1973 Act and that in this sense the union's actions were aimed at enforcing the contract rather than hindering its enforcement. In this event all that the plaintiff was deprived of was the opportunity to vary the terms of her contract by, say, claiming exemption as a conscientious objector, an option she had already refused. There was no question here of the union intending or being reckless as to breach, in which case Lord Denning has suggested there may be liability even on the occurrence of a lawful termination (*Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at p 701). Although the issue of breach was not discussed in any detail in the judgment of Roper J, His Honour may have been referring to the need to prove the necessary intention on the defendant's part under *Emerald Construction* when he remarked that "Mrs Horgan's dismissal was not the purpose of the union's actions, and in fact it is quite clear that it did not desire and tried to avoid that consequence".

(b) Justification

On the assumption that the union's actions did amount to "direct" interference, and Roper J was led to "question whether the plaintiff succeeded on that score", His Honour went on to consider whether the union's action was justified. Here the classic test is that of Romer LJ in *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1903] 2 KB 545 (at pp 574-575) that ". . . regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and . . . to the object of the person in procuring the breach". Although frequently cited, the generality of the test has led Courts to develop rather more distinct classes of justification. Romer LJ himself referred to the impossibility of laying down any general rule as to the nature of the defence (p 573). One such class briefly noted in *Horgan* was reliance on duty arising from "public interest", where New Zealand Courts have broken new ground in the economic torts. In *Pete's Towing Services Ltd v Northern Industrial Union of Workers* [1970] NZLR 32 Speight J held that "as well as advancing the interests of his members, a union official has a duty to keep his union out of trouble" and that where "inducement was not being used as a sword to procure financial betterment but as a shield to avoid involvement in industrial discord" the plea of jusification will stand. In *Northern Drivers' Union v Kawau Island Ferries Ltd* [1974] 2 NZLR 617 Mahon J had at first instance suggested that the union "blacking" of a hydrofoil which was being used without the requisite ferry licence might be justified since the action could be seen as "endeavouring to compel enforcement" of a tribunal order (even though His Honour accepted that the union's motive here was "union solidarity", the defendants not being a party to the original dispute). In the same case the Court of Appeal recognised that, in proceedings for a final injunction, it would be "permissible to take into account a moral duty resting on an industrial union to protect the interests of its members" as justifying commission of the tort. Whilst such statements part company with the *South Wales Miners* case, where Lord Lindley stated the orthodox view that acting in pursuance of a duty to its members was no justification for a union in inducing breach of contract, they mark a distinct trend in the approach taken to the issue by New Zealand Courts in recent years (perhaps made necessary by the absence of any Trades Disputes legislation in this country). In the present case analogies might have been drawn with both *Pete's Towing Services* and the *Island Ferries* case, since the union was embroiled in a dispute not of its making and might also be seen to be attempting to enforce a legal obligation.

However, it was the legal obligation upon which Roper J based his finding that the defence of justification had been made out. Citing Darling J in *Read v Friendly Society of Operative Stonemasons* [1902] 2 KB 88, that advancement of one's own interests in this context must involve "exercise of an equal or superior right in themselves", His Honour stated that is was "certainly open to conclude that [the union] was exercising 'an equal or superior right' ". The Union "was justified in its actions". In so holding Roper J appeared to adopt Professor Wedderburn's argument that, although it has been held in the past that it is no justification to show that a union has only pursued its duty of enforcing a collective agreement (the *South Wales Miners* case), the union might be justified in doing so today by bringing into play the principle of justification from inconsistent contracts (ch 11, *Clerk and Lindsell on Torts* eds. Sir A L Armitage and R W M Dias, London, 1975). In concluding that the union was exercising "an equal or superior right", without further

elaboration His Honour quoted Buckley LJ in *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310 at p 337:

> ". . . No doubt there are circumstances in which A is entitled to induce B to break a contract entered into by B with C. Thus, for instance, if the contract between B and C is one which B could not make consistently with his preceding contractual obligations towards A, A may not only induce him to break it, but may invoke the assistance of a Court of Justice to make him break it."

(c) The scope of the Tort

The decision in *Horgan* leaves unresolved the problem of whether the tort of interfering with contractual relations might be committed in the absence of actual breach. In *MacKenzie v MacLachlan* [1979] 1 NZLR 670 Moller J, after an extensive review of the academic writings following the *Torquay Hotel* case, found it to be "clearly arguable" that interference short of breach was actionable (although this was in the context of an application to strike out a writ as disclosing no cause of action, a jurisdiction to be "sparingly exercised"). The boundaries of such interference remain uncertain, though it seems safe to assume that liability ought not to lie where the contract may be terminated at will or on notice and such termination occurs, unless the defendant intended or was reckless as to breach (J D Heydon, *Economic Torts*, (2nd ed), London 1978 p 35). Nevertheless, the action remains a potent weapon against most forms of strike activity in New Zealand. *Horgan* is unusual in that the union was clearly anxious to accommodate the plaintiff within the limits of the legislative provisions as to membership, and Roper J was able to draw a clear distinction between action on the union's part and strike action by its members: in the context of industrial action generally (where an injunction will usually be sought) there has recently been said to be "real practical difficulty in knowing how to attribute any particular breach of contract to incitement by the unions as opposed to the voluntary act of employees" (*Express Newspapers Ltd and Another v Keys and Others, The Times*, May 9 1980, per Griffiths J.)

Titbits from "Problem Page" by Marcus Howard in the New Law Journal, 2 April 1981

I am a solicitor aged 45 and am tired of being called sergeant by young counsel whom I meet at the local Magistrates' Court where I have been practising for twenty years. Have you any recommendations?
CB *(London)*

I am sorry to say this is becoming a common problem. Nowadays more criminals look like police, police look like solicitors, solicitors like barristers and the latter like Judges. I can only suggest you insist on being called inspector. You should have at least reached that rank. Or ask if the enquirer is the probation officer. This latter goes down particularly well with counsel in robes at the Crown Court.

I have recently given advice to an elderly lady and have not charged her for it. I am hoping that this sort of behaviour will help build up my practice. Do you agree?
BR *(Wood Green)*

No I don't. I remember a solicitor who did just that with one lady who, he thought, would eventually come to him for her conveyancing. He was forever advising about her cat and indeed took to carrying her shopping in the street. He did not see her for a few months and when he met her by chance he asked where she had been. "I've moved out of the district," she replied, "I'd have liked to ask you to sell the house for me but I couldn't keep on having you do things for nothing."

Why is it that my case is always last in the morning's list except on the days I am late when it is first?
JG *(Sheffield)*

This is the legal variant of Murphy's or Sod's Law. This law propounds the theory that if you drop a piece of bread on the carpet it will always fall butter side down, except when the bread is dropped for the specific purpose of proving the law.

INDUSTRIAL LAW

PICKETING AND THE LAW

2: MAINTAINING THE INDUSTRIAL EQUILIBRIUM

By F J L YOUNG*

The first part of this article, which appeared in last month's issue, examined the practice of picketing in industrial disputes. In this part overseas practice (notably that of British Columbia) is considered and questions relating to the New Zealand approach are raised.

In the writer's opinion, current legislation dealing with picketing is inadequate to handle a complex problem which involves important non-legal considerations. The approach of the Police Offences Act (to be re-enacted in the Summary Offences Bill) is essentially negative. It concentrates on preventing offences against the individual. It does nothing to improve the realities of organised industrial life. Such legislation could not be expected to do otherwise. A more positive approach is likely to be found in modern and innovative industrial relations practice and law. This requires acceptance of the fact that picketing is part of industrial life (although normally a very small and rarely encountered part).

Picketing is evidently of no great significance in the industrial relations systems of a number of countries. An exception seems to be in Britain, but there the malaise probably lies not in the practice of picketing but in the inability of the system of industrial relations to adjust to change. Elsewhere the ground rules are clearly established and generally accepted. In the Scandinavian countries the basic agreement approach[1] standardises rules and procedures governing industrial disputes. In West Germany picketing is lawful provided it does not result in the breaking of a collective agreement. In the United States the law protects picketing to communicate information, but does not permit obstruction of entry into struck premises or the picketing of neutrals. American practice also spells out ground rules where picketing involves trade union recognition and common sites disputes (ie disputes where several employers operate on a common site and only one of them is party to the conflict). It should be noted that in all these countries pickets are treated on a par with other citizens in criminal matters.

The British Columbia Experiment

Canada's province of British Columbia provides an interesting case of a recent overhaul of industrial law in general and of statutory provisions on picketing in particular. Some years ago British Columbia had an unenviable reputation for industrial unrest. Responsibility for industrial law was fragmented. The province's Labor Relations Board dealt with disputes over trade union recognition and the right to negotiate. The Courts frequently became involved in industrial disputes as employers sought injunctions to restrain strikes and picketing. Private arbitrators dealt with disputes of right. Public servants were involved in a range of other issues. Not suprisingly, the industrial relations system lacked cohesion. Defiance of an inadequate law sent quite a number of trade union leaders and their supporters to jail.

In the early 1970s a conscious effort was made to clear up this difficult situation. A wide ranging and well thought out Labor Code was introduced to cover industrial relations matters. The role of the Labor Relations Board as the expert body in industrial relations was enhanced. The involvement of the Courts in industrial conflict was almost eliminated. This was done by giving the Board authority to issue "cease and desist" orders where one or both parties to a dispute defied the Code. The Courts could only intervene if it was alleged that the Board

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[1] A basic agreement is a national agreement negotiated between the central organisations of employers and workers. It forms Part I of every collective agreement. It provides a wide range of principles and procedures for handling different categories of industrial dispute, emergency work and public interest issues. The national Labour Court is used (infrequently) as a backstop if negotiations become "stranded".

itself had violated the Labor Code or stepped beyond its powers.

The Board has in fact developed quite a reputation for itself by resolving difficult disputes through informal hearings or mediation. Its technique has been to deal with the source of the conflict and so remove any reason for defiance of the law. The jailing of trade union leaders and their supporters has become a non-issue. All this is another story which is not the subject of this article. Sufficient, however, has been said to indicate the positive atmosphere in which British Columbia approaches picketing.

The Labor Code

The provisions of the British Columbia Labor Code dealing with picketing are set out at the end of this article. They point to a careful balancing of individual and organisational needs. The "why", "when", "where" and "how" analysis discussed in the previous article has clearly been employed. The "why", "when" and "where" issues are all spelled out if not directly stated. The majority of instances in which the "how" issue appears are not present. Such situations are covered in the Canadian Criminal Code which applies to all the country's provinces. The Criminal Code incidentally provides certain protections for persons engaged in lawful industrial action. It protects trade unions as such against actions for conspiracy in restraint of trade. Their members are given certain protections against actions for criminal breach of contract, mischief and conspiracy as a result of involvement in an industrial dispute. The Code's prohibition of intimidation protects peaceful picketing. It states that "a person who attends at or near or approaches a dwellinghouse or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section".

The way picketing is defined in the British Columbia Labor Code points to realistic thinking by policy makers. It shows an awareness of the need for strikers to communicate with other parties who may deal with the struck enterprise. The actual provisions of the Code governing picketing show a similar understanding of problems which grow out of the practice. As a general rule picketing is permitted at all locations and places of business of an employer involved in a lawful stoppage. The picketing of neutrals (third parties not involved in the dispute) is prohibited. A third party cannot claim neutrality if assisting a struck employer. The performance of work, the supplying of goods, or the furnishing of services otherwise done by that employer removes the third party's neutrality. The person or organisation involved becomes an ally of the employer. An ally is a legitimate target for picketing.

These rules confine picketing to situations in which there is a lawful stoppage. The Code establishes five conditions which must be met for a stoppage to be lawful:

- *There must be no collective agreement in effect between the parties* ie disputes of right cannot involve a stoppage, as an alternative procedure (grievance arbitration) is provided for their settlement. A lawful stoppage must be associated with a dispute of interest.
- *The party initiating the stoppage must have made a bona fide effort to negotiate a collective agreement.* This condition can be partly met by complying with the following three requirements to the extent possible.
- *The party initiating a stoppage must hold a strike vote or a lockout vote and obtain majority support for its action from those who vote.*
- *Notice of a strike or lockout must be given at least 72 hours in advance of its commencement.*
- *If mediation is under way, no stoppage may take place until the parties involved have been advised that the Mediation Officer has formally withdrawn from the process.*

Failure to comply with any of these conditions may result in the Labor Relations Board ordering the stoppage to be halted.

In short, picketing is specifically permitted under the British Columbia Labor Code when a deadlocked dispute of interest leads to a lawful stoppage. It may occur wherever the employer concerned operates. It must not involve uncommitted third parties, neutrals. Neutrals who assist a struck employer become his allies and are thus subject to further picketing. The Code does not prohibit an employer or his allies from attempting to operate during a stoppage but it does ban the use of professional strike-breakers in its provisions concerning unfair labour practices. Pickets are protected against legal action for petty trespass, interference with contractual relations and civil conspiracy in the course of lawful stoppages (vide: extracts from the Labor Code at the end of this article).

The British Columbia approach to picketing may not appeal to all parties. It does, however, seem to have certain merits. It clarifies the blurred area

between individual rights and organisational needs in modern industry. It attempts to balance the rights and obligations of parties involved (or contemplating involvement) in an industrial stoppage. For those raised in an interventionist tradition of industrial relations, it underlines another matter. In a democracy, the role of government in industrial relations involves maintaining an industrial equilibrium, not taking sides.

Relevance for New Zealand

How far can the ideas and practices described in this article be transferred to New Zealand? Persons experienced in industrial relations are well aware of the danger of attempting to transfer one country's practice holus-bolus to another country. The institutional arrangements found in British Columbia (the Labor Relations Board and the structure of collective bargaining) belong to a different environment from that found in New Zealand. As such they have little relevance to the problem of picketing here. The significance of British Columbia's experience to New Zealand, it may be argued, lies elsewhere. As a reasonably clear statement of principle, the Labor Code provides guidelines against which New Zealanders can test their own practice. This may well result in a decision that a particular principle is inapplicable in our country and needs reformulation to meet local needs. It may equally well show current practice here devoid of anything but a pragmatic response to a poorly understood problem. Both results could open up the way to social innovation in industrial relations, something which has been lacking for a very long period.

The real question at issue in New Zealand today can be stated quite simply. Does the community wish to continue with industrial arrangements which cause conflict to explode suddenly over the issue of picketing as it did in early 1981? If it does not, hard thinking and analysis of the real issues involved are needed to move on to firmer ground. This could start with a careful examination of s 33 of the Police Offences Act (or its successor). How far does this section of the statute reflect the industrial realities of the 1980s? Whilst it may deal with the "how" of picketing, what useful guidance can it give to citizens in terms of the "why", "when" and "where" issues? As it does not do so, is it desirable that the Industrial Relations Act should also remain silent on a practice like picketing which is part and parcel of modern industrial life? If the Arbitration Court is one of the focal points in the New Zealand system of industrial relations, are there not strong grounds for placing the issue of picketing within its jurisdiction rather than elsewhere?

The possible involvement of the Arbitration Court in matters of picketing raises one final consideration. A simple amendment to the Industrial Relations Act giving the Court additional jurisdiction is of questionable merit. Picketing, in this writer's opinion, has become sensitive only because more urgent matters have been ignored by the community. Here perhaps the British Columbia experience has a message of direct relevance. The formulation of the Labor Code in 1973 represented a complete shake-up of industrial relations law and practice. Traditional approaches were not abandoned but they were streamlined and made relevant to the needs of the late 20th century. Picketing was only a relatively minor matter in the total picture.

THE LABOR CODE OF BRITISH COLUMBIA

provisions regarding picketing (definitions and ss 3(2)(d) and 84-89)

DEFINITIONS

"picket" or "picketing" means watching and besetting, or attending at or near a person's place of business, operations, or employment for the purpose of persuading or attempting to persuade anyone not to

(i) enter that person's place of business, operations, or employment; or

(ii) deal in or handle the products of that person; or

(iii) do business with that person,

and any similar act at such place that has an equivalent purpose;

"professional strike breaker" means a person who is not a party involved in a dispute whose primary object, in the opinion of the board, is to prevent, interfere with, or break up a lawful strike;

UNFAIR LABOUR PRACTICE

3 (2) No employer, and no person acting on behalf of an employer, shall . . .

(d) use, or authorise, or permit the use of, a professional strike breaker or an organisation of professional strike breakers . . .

PICKETING

84 A trade union, or other person, may, at any time and in any manner that does not constitute

picketing as the word is defined in this Act, communicate information to any person, or publicly express sympathy or support for any person, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by that person.

1973 (2nd Sess), c 122, s 84

85 (1) A trade union, a member or members of which are lawfully on strike, or locked out, or any person authorised by the trade union, may picket, as the word is defined in this Act, at or near

(a) the site or place of the lockout or lawful strike;

(b) all other sites or places of business, operations, or employment of the employer, including

(i) any place where an employee of that employer is carrying on the business of that employer, whether the place is owned or controlled by the employer or not; and

(ii) any place that the employer operates or where the employer does any thing forming part of the operation of his business; and

(c) the place of business, operations, or employment of an ally of the employer.

(2) Subsection (1)(b) does not apply where a collective agreement is in force between the trade union or another trade union and the employer at the site or place referred to in subsection (1)(b) whose employees are on strike, and the board, in its discretion, prohibits picketing.

(3) For the purpose of this section, "ally" includes a person who, in the opinion of the board, in combination, or in concert, or in accordance with a common understanding with the employer, assists an employer in a lockout, or in resisting a lawful strike.

(4) A person who performs work, supplies goods, or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied, or furnished by the employer, shall, unless he proves the contrary, be presumed to be an ally of the employer.

1973 (2nd Sess), c 122, s 85; 1975, c 33, s 20

86 Where two or more persons carry on business, operations, or employment at a common site or place and there is a lockout or lawful strike by or against one of them, and picketing is taking place, the board may, on the application of any interested party, or on its own motion, in its discretion, give directions respecting the picketing so as to reasonably restrict and confine the picketing to the person causing the lockout, or whose employees are on strike.

1973 (2nd Sess),c 122, s 86; 1976, c 26, s 6

87 No action or proceeding lies for

(a) petty trespass to real property to which a member of the public ordinarily has access; or

(b) interference with contractual relations; or

(c) interference with the trade, business, or employment of another person resulting in a reduction in trade or business, impairment of business opportunity, or other economic loss

arising out of strikes, lockouts, or picketing permitted under this Act.

1975, c 33, s 21

88 Except as provided in this Act, no trade union or other person shall picket in respect of any matter or dispute to which this Act applies.

1973 (2nd Sess), c 122, s 88

89 Any act done by two or more persons acting by agreement or combination, if done in contemplation or furtherance of a labor dispute, is not actionable, unless the act would be wrongful without any agreement or combination.

1973 (2nd Sess), c 122, s 89

THE MINING ACT 1971

By G A HOWLEY, Barrister

The Mining Acts have been tinkered with since the original Mining Acts of the nineteenth century, and the 1925 Act kept being tinkered with until the 1971 Act was passed. Most people who have had anything to do with that Act seem agreed that it failed to provide either what people had hoped, or what was necessarily best for the country. The Mining Amendment Bill now before the House represents more tinkering with the Act, and it is clear that what is needed is to scrap the Act altogether and have another look at mining from a new viewpoint. Mr P M Salmon in your July issue has taken just such a new look, and his argument is that, instead of merely changing our system of granting rights and privileges, and granting people rights to object, we should look at the basic system and ask, why do we need to have licences at all? I am in complete agreement with the way he suggests that mining should be dealt with. However, he appears to be under some basic misapprehensions as to the present Act.

In his section on Land Ownership Problems, he complains that "it is not consistent with current and traditional attitudes towards land ownership, that minerals contained either on the surface or below the surface of privately owned land should be given to someone else." He then goes on to say that he can see no reason why mining shouldn't be dealt with like any other land use, that is by private arrangement with the land owner without the need for any licensing. This appears to me to suggest that the law at the moment is that one cannot do this.

1. The Necessity for a Mining Privilege

Mr Salmon seems to suggest that mining in New Zealand cannot be carried out purely by private treaty without the necessity for a mining licence. "Why," he asks, "should not these activities be carried out without the need for obtaining any sort of license or right but just with the permission of the owner of the land concerned?" In fact, any owner of freehold land who has obtained his title other than through freeholding what was formerly Crown leasehold can either mine himself, or grant others permission to mine on his land, without any necessity for a mining licence. Section 7 of the Mining Act provides for this in an oblique way, but s 41 provides for it specifically. There is a statutory exception in respect of coal. Section 7 of the Coal Mines Act 1979 provides that no mining of coal can take place anywhere in New Zealand on any kind of land without a licence. There is no similar provision in the current Mining Act. In addition to this, a person can also mine in New Zealand without a mining privilege, by way of tribute agreement under s 123. Admittedly, a tribute agreement can have effect only when one of the parties has a mining licence, but the point is that the person who is ultimately mining the land does not need any mining privilege himself. A tribute agreement is reached purely by private treaty, subject to the Minister's consent, with the holder of the licence. All other mining in New Zealand is done as Mr Salmon suggested it should be and that is by agreement with the owner, which in most cases is the Crown. While I would concede at once that the necessary processes for recording the agreement, the way that one has to go about reaching final agreement, and proof of that agreement with the Crown, are unnecessarily cumbersome, the fact is that finally any mining is done only with the agreement of the parties.

2 Ownership of Minerals

With the exception of s 37 of the Mining Act, I know of no right in law which would support the proposition in Mr Salmon's article that minerals contained either on the surface or below the surface of privately owned land may be given to someone else. It is, of course, *possible* that this might happen pursuant to s 37, but I would imagine that it would be a rather exceptional case where the Minister could find privately owned land where there were minerals both in sufficient quantity and of sufficient importance to be able properly to declare the extraction of them to be in the national interest. The fact that they are precious metals or, as they are sometimes known, the royal metals, does not give any right to the Crown or anyone else to go in and extract them from privately owned land. All it means in practice is that if such metals *are* mined from privately owned land they are supposed to be sold to the Crown. These remarks apply equally to freehold titles issued after an alienation of former leasehold from the Crown. By virtue of s 8 of the Mining Act all minerals in such land belong to the Crown but these minerals cannot be mined without the consent of the owner of the land by virtue of s 36. I would

suggest, that far from being inconsistent with current and traditional attitudes towards land ownership, this is merely a continuation of a very old principle, namely that any land owner may sell or otherwise transfer to another person his interest in that land, reserving rights to himself.

3. The Right to Mine

As mentioned above, while perhaps taking issue with some points in Mr Salmon's article, I agree that as a general principle the process of obtaining a right to mine is far too cumbersome. I would submit that the interests of all parties to a mining application would be best served by forgetting about any kind of licence and instead, when any person wished to prospect or mine, it be done by private treaty between him and the owner or, in the case of leased land, the applicant, the owner and the lessee. Once agreement had been reached an application would be made under the Town & Country Planning Act and the procedures pertaining under that Act should then be followed. I believe that a necessary amendment would be that environmental groups be given an automatic right of objection and hearing on any such application. The Planning Tribunal should be the sole authority either to grant or refuse the application under the Town & Country Planning Act, thus conferring on it effective authority to grant or refuse permission to mine.

Conclusion

I submit if this were done then the rights of all parties involved in any mining application, plus the country as a whole, would be much better protected than they are now, and a much less cumbersome and more expeditious means of arriving at the decision regarding mining would obtain.

As Mr Salmon pointed out, there is no logical reason why mining should not be treated like any other land use, and be dealt with accordingly.

I would hope that, if this system were adopted, then in areas of the country which have historically been "mining" areas the local or regional scheme would provide that such areas have mining as a predominant use.

In such cases, no application for consent would be necessary, but a very much shorter Mining Act could provide for terms and conditions to be implied in the mining agreements. Such terms and conditions would be those now variously imposed by the Department of Energy, the Crown Lands Department, and, where water is involved, the Regional Water Board. These generally provide for repairing damage, filling holes, restoring land after mining, the use of water, and protection of the land. If this were done, the Department of Energy could devote its time and manpower to inspecting mining works from the point of view of seeing that conditions were being complied with and safety standards were met. These are tasks which are now the responsibility of the Department but, because of the time taken up with an ever-increasing administration burden, ones which it is unable to perform efficiently.

Mr Salmon comments:

"In the above article Mr Howley makes the point that mining can in fact be carried out by private treaty. However, he appears to gloss over the rather draconian powers of the Act that can be invoked if it is not possible to make a private arrangement with a land owner. As I understand the matter, the concern of the Federated Farmers particularly is with those provisions of the Act that enable mining privileges to be obtained whether or not the owner of the land gives his consent. One would imagine that the existence of these provisions might encourage some farmers to consent to mining operations rather than risk having their land declared open for mining pursuant to s 37."

EVIDENCE

WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

By C B CATO, Barrister

In recent months, the issue of waiver of legal professional privilege has been before the Courts in England and in this country. A report commissioned for the purpose of legal advice or for the "appreciable purpose" of litigation may have great importance in litigation. It is therefore vital that a party's legal advisers do not unwittingly waive privilege by partial publication in such circumstances that the privilege is lost. As the Court of Appeal in *Great Atlantic Insurance Company v Home Insurance Company* stressed:

> "A useful purpose would be served by the appeal if it reminded the profession that all communications between solicitor and client where the solicitor was acting as a solicitor were privileged . . . and that the privilege should only be waived with great caution."

On the fourteenth day of the trial, which involved litigation for a substantial sum of money, argument over the inspection of an otherwise privileged memorandum was heard. The plaintiffs had commissioned an insurance expert to investigate certain insurance business. This report was not privileged. However, the expert subsequently discussed the matter with the plaintiff's American legal advisers. As a result, the American advisers prepared a memorandum setting out in the first two paragraphs an account of discussions between the expert and their representative. The memorandum then continued with additional matters which, according to the affidavit of the plaintiff's English solicitors, dealt with "questions of strategy". By mishap, although it had been intended to claim privilege for all but the first two paragraphs, no privilege was expressly claimed for the rest of the memorandum.

In his opening speech, counsel referred to the first two paragraphs unaware that the rest was not the subject of a claim for privilege. The defendant asked to sight the remaining part of the memorandum.

The Court of Appeal held, first, that the whole memorandum was privileged. The fact that litigation was not then contemplated was irrelevant, since the plaintiff had sought legal advice from its American attorneys and the document had come into existence for this purpose. However, the Court went on to hold that the privilege had been waived. Although severance would have been possible if the memorandum had dealt with two or more different subjects and could have been divided up into separate memoranda, the Court was unwilling to interfere with the trial Judge's discretion to order production, since the later part of the memorandum, for which protection was sought, dealt with the same subject matter as the opening paragraphs which had been read out.

The rationale for the decision was that any use of part of a document without disclosure of the rest might be unfair or misleading. Further, in the opinion of the Court, when counsel introduced the document into the record there was thereby an effective waiver of his client's privilege. Moreover, the Court doubted whether there was any discretion to relieve the plaintiffs from their error, but in any case, this was not a case for such relief.

The Great Atlantic Insurance Case was considered by Barker J in *Chandris Lines Limited v Wilson & Horton Limited* (6 May 1981 Auckland Registry). In this case, an action for defamation had been commenced by the plaintiff in respect of allegations made about sewage damage caused to passengers' property in the liner "Ellinis". Having been notified that an apology was required the defendant commissioned an analyst to examine property. After a writ had been received an apology was published. This included reference to the results of the analysis, which were favourable to the plaintiff. Subsequently, the defendant claimed privilege for the production of this document. Although prepared to hold that the document would have been privileged, His Honour, Barker J considered that, since the defendant had advised the world it had the report, and had disclosed part of its contents, an order for production should be made. Barker J noted, however, *Buttes Gas & Oil Co v Hammer & Ors (No 3)* [1980] 3 All ER 475 and observed that a "bare reference to a document in a pleading does not waive any privilege that may attach." This was not the case, however, here.

Hence, just as a solicitor must be careful to ensure that copies of otherwise privileged information do not get into the hands of an opponent, for privilege enures only for the original, (*Calcraft v Guest* [1898] 1 QB 179), so also a solicitor must be aware that a partial disclosure may amount to a waiver of privilege, sometimes with possibly disastrous results.

CONFERENCE PAPERS
CRIMINAL LAW

CAUSATION IN A SCOTTISH HOMICIDE CASE

By R H DICKSON

The author, a Glasgow Solicitor, acts for the Medical and Dental Union of Scotland.

Scottish Law

Scotland has always been proud of its separate legal system, which many people do not seem to realise is totally different in many respects from that which prevails in England. The right to have a separate legal system in Scotland is enshrined in the Act of Union 1707 and still, on many fundamental matters, the British Parliament requires to pass separate Acts of Parliament for Scotland and for the remainder of the United Kingdom. The law of intestacy, the rights and obligations of property owners, the divorce law and many aspects of the criminal law are totally different north of the border, as some people have found to their cost. It is apparently perfectly permissible in England to publish personal details, including the photograph, of somebody accused of an offence, before the conclusion of the trial, whereas in Scotland it is not. One of the independent television companies recently learned this lesson to its cost when it was fined 61,006 pounds for contempt after publishing, on the eve of her trial, the picture of a hospital sister charged with killing two of her patients. I should explain that the 6 pounds arose from the fact that while the directors of the company were being upbraided in Court a traffic warden was booking their car for illegal parking.

The difference between the Scottish and English legal system extends to their Courts also. There is no right of appeal in any Scottish criminal case to the House of Lords or the Privy Council and a decision of the House of Lords in an English criminal case is no more than persuasive to the Scottish Court of Criminal Appeal; thus if you are involved in a car accident in England and, in order to steady your nerves, thereafter take a drink, once you have stopped driving, provided it can be shown that you have not taken the drink with a view to defeating the breathalyser legislation, then, no matter how high your blood alcohol count may be when the police finally arrive at the scene, you cannot be charged with driving with an excess of alcohol in your blood or, as one of my clients put it, too little blood in his alcohol. In Scotland the position is totally different. Despite the fact that the House of Lords had already reached a decision in the English case which I have just mentioned (*Rowlands v Hamilton* [1971] 1 WLR 647) a Scottish Court refused to follow their example and convicted a driver in similar circumstances on the basis that he, the driver, was unable to prove that the excess of alcohol had arisen solely from his post-accident drink (*Ritchie v Pirie* 1972 SLT 2). It is therefore clear that in Criminal Law the Scottish Courts intend to maintain an independent outlook even if the source for the law, as in this case, the Road Traffic Act 1960, is common to both countries.

The Finlayson case

(a) The facts

It was against this background that many lawyers and doctors watched with interest the trial of a youth named David Finlayson who appeared in Court in October 1977 charged with culpable homicide. Culpable Homicide, I should explain, is the Scottish term for what is probably more com-

monly known as manslaughter.

David Finlayson appeared at the High Court in Edinburgh on two charges of possessing dangerous drugs with intent to supply them to somebody else contrary to the Misuse of Drugs Act 1971 and in respect of these charges the facts were quite clear. It was the remaining charge which was to arouse the interest of so many. That charge read, "That you, on 4 August, 1977 in the house occupied by Francis Joseph Sinclair of 10C Downie Place, Musselburgh inserted into the person of David William Wilson, 11 Woolsley Crescent, Edinburgh a syringe containing morphine and diazepam, both being noxious substances, and recklessly injected into the person of the said David William Wilson a mixture of said noxious substances in quantities dangerous to health and to life in consequence whereof he died and you did kill him". To this charge Finlayson pleaded not guilty and as the evidence in the trial emerged it became apparent what his line of defence was to be.

That he had possessed these drugs was in little doubt. He admitted that he had had the drugs, and in any event there was evidence from a third party of his possession of them. That he had injected them into David Wilson was also in little doubt. Again there was an admission from the accused in a signed statement which he had made when he was arrested, but while this would have been insufficient in law, because the Scottish Courts demand corroboration, there was support for the statements in the presence of the drugs in the body at post mortem, and in evidence given that Wilson had a total fear of injections and could not bear to look while one was being administered, let alone try and administer one to himself. In the circumstances, based on the medical evidence, it was clear that somebody had given Wilson an injection and the only two people in the room were Wilson himself and Finlayson.

Thus Finlayson was willing to accept that he had had the dangerous drugs and that he had injected them into David Wilson. What he did not accept was that he had thereby "killed him" and to find the answer to this problem the jury had to look at the medical evidence. This fell into two parts, first the effect of a mixture of morphine and diazepam on the body if injected in the quantities apparently used in this case and, secondly, the circumstances leading up to the certification of death and the subsequent post mortem. It was clearly shown to the Court that an injection of these substances in these quantities would result in deep unconsciousness and depressed breathing, and this depressed breathing would result in the brain being starved of oxygen. Because Wilson had been unconscious in a sitting position for at least 12 hours before he was found, and because of his depressed breathing, there had been sufficient lack of oxygen to the brain to cause swelling in the brain, so that the part of it controlling breathing was compressed against the skull and the damage according to the medical evidence became irreversible. In the words of the doctors he suffered brain death. The medical evidence, however, was that for a period his heart was kept beating by use of a ventilator, and that ultimately it was decided, after consultation amongst various medical personnel and also after speaking to David Wilson's parents, to turn off the ventilator and to let nature take its course. It was this action on which David Finlayson relied in his defence, as his argument, put simply, was that whatever he might have done, he had not caused this person's death, which had resulted from the turning off of the life support machine, and that, had the machine been allowed to remain, the evidence was that there was no reason to believe that David Wilson's heart would not have continued to beat for an indefinite time.

(b) The judgment

Had there in effect been an entirely new cause of death, a break in the chain of causation, or something so fundamental as to justify the Court in acquitting Finlayson on the grounds that, whatever he might have done, he had not "killed" Wilson?

The case was certainly the first one of its kind in Scotland and appears to have been the first one in Britain. Only recently has medical science progressed to the extent that doctors can maintain the heart for an indefinite period when there has been irreversible brain damage and the patient is in effect in a vegetable state and will remain so. For the first time a Court was being asked to consider the question of whether a doctor, by stopping the process and by withdrawing the one method of keeping the heart beating, was not interfering so substantialy with the course of events as to break the chain of causation.

There has been one case in England (*R v Smith* [1959] 2 All ER 193) in which a Court had to consider the circumstances which arose when incorrect medical treatment was given to a patient suffering from a stab wound and the patient subsequently died. The evidence in that case suggested that, if the correct treatment had been given, there was a 75 percent chance of a successful recovery. In that case the Lord Chief Justice, Lord Parker, had concluded that "if at the time of death the original wound is still

an operating cause and a substantial cause then the death can properly be said to be the result of the wound albeit that some other cause of death is also operating". Although this decision was of course not binding in Scotland, it undoubtedly was of some assistance to the Judge in *Finlayson's* case, in giving him a possible bench mark to work from if the principles laid down in the case of *Smith* were to be regarded as similar to the principles which applied in Scotland.

In fact the Judge quoted from Lord Parker's decision in his summing up to the jury and then appeared to take the matter even further, when he stated that, "an act which breaks the chain of causation must be quite unwarrantable, something which can be described as quite unreasonable in the circumstances and in the context of the medical field something amounting to malpractice or a grave lack of skill on the part of the doctor". This direction in effect demolished the defence completely, as it was clear from the evidence that the decision to switch off the life support machine had been taken after careful consideration and was clearly a decision which, under no circumstances in the context of the medical field, could be described "as something amounting to malpractice or a grave lack of skill on the part of the doctors". In the light of that direction and the evidence which they had heard, the jury convicted David Finlayson and he was sentenced to six years' imprisonment.

(c) The appeal

He appealed against his conviction on the grounds that the Judge had misdirected the jury by failing to put before them the correct parts of Lord Chief Justice Parker's judgment; that he had taken the law of Scotland in relation to causation far further than it had ever been taken before; and that, given the circumstances of this case, he should have withdrawn it from the jury, directing them to acquit the accused on the basis that there had been a break in causation.

The Court of Criminal Appeal in Scotland who heard the appeal were referred to the whole decision in the case of *Smith* and in particular to Lord Parker's approval of Lord Wright's definition of the circumstances required to break a chain of causation in the case of *The Oropesa* [1943] 1 All ER 211. In that case Lord Wright had expressed the view that to break a chain of causation "it must always be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic". If that test was to be applied in the case of Finlayson his counsel argued that he would be entitled to be acquitted on the basis that there had been a new cause coming in disturbing the sequence of events which was extraneous and extrinsic.

The argument failed and the conviction was upheld. In delivering the judgment of the Court the Lord Justice General of Scotland, Lord Emslie, stated:

> "It was conceded by the appellant that the decision to discontinue life support was in all the circumstances a perfectly reasonable one. It follows accordingly that the act of discontinuing the machine can hardly be described as an extraneous or extrinsic act within the meaning of these words as they were used by Lord Wright in their context, far less can it be said that the act of discontinuing the machine was either unforeseeable or unforeseen, and it certainly cannot be said that the act of disconnecting the machine was an unwarrantable act. If the definition or test of Lord Wright is read properly, then the key to the test is to be found in the word unwarrantable; once the initial reckless act causing injury has been committed, the natural consequence which the perpetrator must accept, is, that the victim's future depended on a number of circumstances including whether any particular treatment was available and, if it was available, whether it was medically reasonable and justifiable to attempt it and to continue it".

It is these words "and continue it" which have added a new dimension to the law on causation. The position has progressed considerably from the tentative step taken in *Smith's* case, and Scotland for its part appears to have leapt further than Lord Wright seems to have intended England should, if one reads the whole of his judgment.

The decision was naturally of considerable interest to the medical profession and gives another slant to the problems for the lawyer which advances in medical science bring with them. So long as medical science continues to progress it will continue to give more hope to mankind and more headaches to the legal profession.

COMPANIES

DISINTEGRATION OF A SMALL PRIVATE COMPANY

By MARK RUSSELL

The author, a Lecturer in Law at the Universty of Canterbury, examines the implications of a recent High Court decision on an application to wind up a small private company on the "just and equitable" ground.

A sole trader who requires extra finance to keep his business afloat may prefer to raise the necessary funds by taking on a sleeping partner, rather than approach specialist lending institutions. In adopting this course he will no doubt expect the sleeping partner to be content merely to provide funds, and to leave him free in effect to conduct his venture as before. However, even sleeping partners may have expectations beyond this, and may wish to have sufficient say in the running of the business to ensure that their investment is not jeopardised. It is when these expectations are threatened that trouble can arise.

The recent case of *Re Gerard Nouvelle Cuisine Ltd* (M1664/80, Auckland, 11 June 1981, Holland J) affords a good example of what can happen in such circumstances when the association between the parties has become a limited company and relations between the active and the sleeping shareholders deteriorate. The case also serves as a reminder of the sort of situation which will entitle a member of a small private company to petition for a winding up on the "just and equitable" ground (s 217(f)).

C, a chef, held the lease of certain premises. He had done considerable work to develop the premises as a restaurant. However, his financial resources had run out, and one of his creditors was petitioning for his bankruptcy. His solicitor, G, advanced him money to pay off this creditor.

Subsequently, the parties agreed to jointly incorporate a company to carry on the business of the restaurant. The share capital was to be divided equally between C on the one hand, and G and his wife on the other. After the date of incorporation, the shareholders executed a deed which recited the share capital structure. The deed also provided that should the company require more capital at a later date G and his wife would make advances "ranking in priority to any other creditors". Finally, the deed provided that all three shareholders were to be directors, and that the day to day running of the business should be C's sole responsibility.

G and his wife subsequently made considerable further advances to the company. However, when G prepared a form of debenture in favour of himself and his wife, C refused to approve it, or, indeed, any other debenture.

Not surprisingly, this caused a total breakdown in relations. G and his wife were excluded from the restaurant. G withdrew his approval to the drawing of cheques by C on the company's current account. C then opened a separate account for the company's receipts and expenses. In summary, any mutual trust that may have once existed had totally disappeared by this point.

G and his wife petitioned for the winding up of the company under s 217(f) of the Companies Act.

Holland J found that the facts as shown clearly entitled the petitioners to a winding up order, in accordance with the principles established in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, per Lord Wilberforce at 499. However, although a prima facie right to an order had been established, nevertheless the requirements of s 220(2) had to be satisfied. That section basically provides that a winding up order on the just and equitable ground shall be refused where the Court is of the opinion that the petitioners are acting unreasonably in seeking a winding up order rather than some alternative remedy. In the instant case the petitioners had a majority at meetings of directors. They could therefore have passed a resolution that the debenture in question be executed. However, as the learned Judge pointed out, this might have led to action being taken by C, who might conceivably have petitioned for winding up under s 217(da) of the Act. That subsection, which was inserted by the Companies Amendment Act 1980, provided an additional ground for winding up where, inter alia, the directors "have acted in their own interests rather than in the interests of the company as a whole" (see [1981] NZLJ at 152). That being so, it was held that the peti-

tioners were not acting unreasonably in this context. Neither would it have been reasonable for the Court to have ordered that C should buy the petitioners out under s 209, since C simply did not have the resources to do so.

What was the significance of the fact that G was still acting as C's solicitor when the deed was executed? In the *Ebrahimi* case (supra), Lord Cross, at p 507, had pointed out that a petitioner on the just and equitable ground must come to the Court with clean hands. Holland J found that G had not taken sufficient steps to ensure that C had had independent advice about the deed. It might be noted at this point that this was held to be a ground for a winding up order on the just and equitable ground in *Re North End Motels (Huntly) Ltd* [1976] 1 NZLR 446. However, in the instant case, the lack of independent advice had nothing to do with the breakdown in relations. The causes were the disproportionately large amounts of finance which G and his wife had been required to contribute, and the refusal of C to give a debenture. Therefore the "clean hands" principle was not relevant in this case.

Conclusions

As the learned Judge himself noted, all concerned in the company would suffer loss through a forced sale by the liquidator. However, there was no feasible alternative. The law has come to recognise that in the case of small private companies regard must be had to the bases upon which the parties orginally contributed their capital to the concern. With a small number of members, one such basis, indeed the crucial one, is the mutual trust and confidence which they have in each other. The improvement of s 209 by the 1980 Amendment has gone a long way towards providing adequate alternative means for resolving disputes between members, but there must always remain cases, such as this one, where a winding up is inevitable. Still, the Courts will remain vigilant in their concern to see that this drastic step is not taken lightly.

Holland J deferred entering judgment for four weeks, so as to give the parties one last chance to come to some settlement. When the case came on again it was argued that s 220(2)(b) of the Companies Act 1955 prevented the bringing of a petition for winding up by the directors, without a special resolution for winding up having been passed by the company. The Judge held, however, that the subsection did not apply when the petition was brought by the directors qua contributors and not qua directors. With respect, this is clearly correct, especially in the light of the newly-added power for a majority of directors to bring a petition — see s 15 of the Companies Amendment Act 1980.

ACCIDENT COMPENSATION ACT 1972

Notices of Appeal to Appeal Authority — Practice Note

1. The Appeal Authority Judges have received a number of objections from the Accident Compensation Corporation regarding the form of Notices of Appeal against Review Decisions lodged by some solicitors. Often these notices are quite uninformative, saying that the grounds of appeal are that "the decision is wrong in fact and in law".

2. Section 163(2) states that "the Notice of Appeal shall state with particularity, the grounds of appeal and the relief sought." There is thus a statutory obligation on appellants to indicate with some detail the grounds of appeal. There are, of course, good practical reasons for this. Unless the Corporation knows which issues are to be argued and which abandoned, it can waste a good deal of preparation time. Similarly the Appeal Authority, who reads the papers before the hearing, should be given a clear indication of the issues.

3. In future, the Judges of the Appeal Authority will insist that s 163(2) be complied with. Notices of Appeal lodged by solicitors which do not comply will not be accepted until they do. No particular formality is required but, as with pleadings, there should be a clear indication of the matters which are to be argued. It should also be noted that the Notice of Appeal should be lodged within 21 days of the decision of the Hearing Officer.

4. When appellants are not represented by counsel, the Registrar may use his discretion about accepting a form of notice which would not be accepted from counsel.

A P BLAIR
W M WILLIS

INCOME TAX: EXPENSES DEDUCTIBLE AGAINST INCOME FROM EMPLOYMENT

By JOHN PREBBLE, a Wellington practitioner

The Recent Cases

In two recent cases, members of the legal section of the police have challenged the rulings of the Commissioner of Inland Revenue in respect of the deductibility of certain items of expenditure that the objectors claimed were incurred in the course of gaining their income. In *Taxation Review Authority Case 18* (1980) 4 TRNZ 199, the objector was attending university classes leading to the LLB degree. His studies had not yet led to an increase in salary although, by virtue of a general determination by the Commissioner of Police, they might well do so in the future. In the second case, *Quin v CIR* (1981) 4 TRNZ 269 (Chilwell J) the taxpayer had also been studying for the LLB degree, but his studies had led to promotion and an increase in salary. Items in respect of which deductions were claimed in either or both of the two cases were: clothing and drycleaning; textbooks, stationery, and compulsory university students' association fees; travel to university in order to attend classes and examinations; expenditure in respect of a study in the home of the first objector, used for his university studies, such expenditure being calculated as a proportionate part of the total outgoings on his house. By s 105(2) of the Income Tax Act 1976:

> ". . . every taxpayer who in any income year derives assessable income which consists of income from employment shall be deemed to have incurred an amount of expenditure or loss in gaining or producing that income from employment equal to the greater of —
>
> "(a) . . .
>
> "(b) the total expenditure or loss incurred in respect of the items of expenditure specified in the Fourth Schedule to this Act . . . ."

The relevant clauses of the Fourth Schedule of the Income Tax Act are:

> "(3) Expenditure incurred in the purchase, maintenance, or repair of any protective clothing or footwear, uniform, or special clothing in the nature of a uniform . . . or any other clothing where the Commissioner is satisfied that the requirement for such other clothing is due to abnormal conditions arising from the nature of the occupation of the taxpayer.
>
> "(4) . . .
>
> "(5) Expenditure incurred —
>
> "(a) For the purpose of obtaining a degree or other qualification where, as a direct result of the obtaining of that degree or other qualification, the taxpayer receives or is entitled to receive an increase in income from employment:
>
> "(b) In attending refresher courses . . . .
>
> "(c) In meeting the costs of travel and accommodation in connection with the matters referred to in paragraph (d) of this clause.
>
> "The maximum deduction allowable under this clause for any income year shall be $400.
>
> "(6) Expenditure or loss incurred on travel in the course of the taxpayer's employment . . . .
>
> "(7) Expenditure or loss incurred in respect of the use of a private dwelling in connection with the carrying on of the employment of the taxpayer where a room or other defined area in that dwelling is used wholly or principally for that purpose . . . .
>
> "(8) Expenditure incurred by the taxpayer for the purposes of, and as a condition of, his employment, not being expenditure of any of the kinds referred to in any of the foregoing provisions of this schedule."

Clothing and drycleaning

Although the objectors were from the uniformed branch of the police, as members of the legal section they were expected to wear lounge suits. Indeed, they received a certain allowance towards expenditure on plain clothes. If they were to succeed in their respective claims, it was necessary for them to bring their cases under cl 3 of the Fourth Schedule. Thus, since the clothing involved was clearly not a uniform or protective clothing, it was necessary for them to establish that the requirement for their lounge suits was "due to abnormal conditions arising from the nature of [their] occupation". Both the Taxation Review Authority and Chilwell J rejected the suggestion that the wearing of a lounge suit could be regarded as abnormal. Accordingly, the taxpayers' claims failed in respect of

both purchase and drycleaning of the suits.

In respect of this issue, the two cases may be compared with the subsequent decision of Chilwell J in *Beckett v CIR* (1981) 5 TRNZ 12. The taxpayer here was another member of the uniformed branch of the police. He, also, was required to wear plain clothes, but for different reasons. He was attached to the Wharf Police Station in Auckland, which has no detective section. Consequently, the taxpayer was engaged alsmost full time in investigative work, in the course of which he was obliged to wear plain clothes. The nature of the work on which he was engaged was such as to cause far more wear and tear on his clothes than would be the case in respect of, say, a policeman engaged on administrative duties. For example, the taxpayer sometimes had to undertake searches in restricted and dirty parts of buildings and houses. During the tax year ended March 1978, the taxpayer spent $405 on the purchase of clothing for his police duties. He was paid $236.04 by his employer as a plain clothes allowance. The Commissioner is empowered to apportion such allowances into taxable and "reimbursing" sections. Section 73(2) provides:

> Subject to this section the Commissioner may from time to time determine whether and to what extent any allowance in respect of or in relation to the employment or service of any person constitutes a reimbursement of expenditure incurred by that person in gaining or producing his assessable income, and the allowance shall to the extent so determined be exempt from tax.

The Commissioner had made a number of general rulings in respect of plain clothes allowances for policemen. For the 1978 tax year, the effect of these rulings was that approximately fifty percent of the value of a plain clothes allowance would be taxable, and approximately fifty percent exempt. In the case of this particular taxpayer, the result was that $109.20 was regarded as a reimbursement of employment related expenses, and that the balance of $116.84 was assessed to the taxpayer as taxable income. The taxpayer objected to this.

The logic of the taxpayer's position indicated that in calculating his assessable income he should have claimed to deduct the whole of the $405 that he had spent on clothing for police work. However, his original objection related only to the $226.04 plain clothes allowance, or, more specifically, to the portion of that sum that had been taxed. His argument before the Court was therefore confined within this narrower compass.

Chilwell J determined without difficulty that the Commissioner's general ruling under s 73(2) could have no effect in this case. The Commissioner had not turned his mind to the circumstances of this particular taxpayer. A general apportionment on approximately fifty-fifty lines would not do.

Chilwell J therefore proceeded to make the apportionment himself. He was entitled to do this by s 33 of the Act. Broadly speaking, this section empowers the Court to make such determination as the Commissioner could have made himself. On the facts, Chilwell J found that the whole $226.04 constituted a reimbursement of expenditure incurred by the taxpayer in gaining his assessable income. Accordingly, the whole plain clothes allowance was exempt from tax.

Chilwell J was at pains to point out the differences between *Beckett v CIR* and the earlier case of *Quinn v CIR*. In *Beckett v CIR*, the special duties of the taxpayer meant that, in gaining his assessable income, he caused much greater wear and tear to his clothing than the ordinary person, or the ordinary policeman, working in ordinary clothes. Chilwell J also pointed out that s 73(2) had not been raised in *Quinn v CIR*. However, it may be that this second point is not a matter which distinguishes the two cases. In *Quinn v CIR* the issue was whether, pursuant to the Fourth Schedule of the Act, the taxpayer's requirement for his plain clothes was "due to abnormal conditions arising from the nature of the occupation of the taxpayer". It might be thought that the same elements which suggested to Chilwell J that in *Beckett v CIR* the taxpayer had incurred expenditure on clothing because of the nature of his work could lead a Judge to come to a similar conclusion in a case that turned upon the provisions of the Fourth Schedule.

Students Association fees, stationery, and textbooks

Since the LLB studies by the objector in *Quin v CIR* had led directly to an increase in salary, the Commissioner had in fact allowed him to claim a deduction in respect of stationery and textbooks. The objector in *TRA Case 18* was not so successful, because his studies had not yet led to an increase in salary. At p 211 of the report, the Taxation Review Authority considered the meaning of "the taxpayer receives or is entitled to receive an increase in income from employment". Clearly, "receives" means just that. The learned Taxation Review Authority went on to hold that "entitled" means

"entitled in possession", and not merely entitled at some future time. This may well be the correct interpretation of para 5(a), but if so it surely means that the words "entitled to receive" add nothing to "receives", because, at least generally speaking, a person who is entitled in possession to income is in the same position as someone who in fact receives that income. Certainly, if a taxpayer is entitled in possession to income, even though he has not received it in fact, he is taxable thereon — see s 75 of the Income Tax Act 1976.

Travel to attend university classes and examinations

Both taxpayers argued that their travel expenses were deductible pursuant to cl 5(a), since they were incurred "for the purpose of obtaining a degree . . .". The first objector would have been unsuccessful in any event, for the same reasons for which his claim in respect of students association fees failed. However, both the Taxation Review Authority and Chilwell J rejected the claimed deductions on a more general ground. This was that cl 5(c) specifically refers to travel expenses, and allows the costs of travel in connection with the matters referred to in para 5(b) to be deducted, but makes no reference to para 5(a). Clause 5 must be read as a whole. The travel costs allowance must be intended to apply only to the matters under cl 5(b). Otherwise, cl 5(c) would be unnecessary.

Home office

The first objector claimed to deduct a proportionate part of the outgoings of his house in respect of a room that he had set aside in the house for his university studies, founding his claim on cl 5(a). His claim was rejected by the Taxation Review Authority for the same reasons as had applied in respect of the students association fees. That is, there was insufficient connection between the expenditure for the purpose of obtaining the degree and an entitlement to an increase in income.

The question remains open as to whether a claim in respect of a home study can ever be brought under cl 5(a). On the words of cl 5(a) taken alone, this expenditure clearly qualifies: the study is used for the purpose of obtaining the degree. Authority is to be found in *Quin v CIR*, where Chilwell J held at p 273 that if cl 5(a) is taken in isolation its terms are wide enough to cover travel to a university in order to attend classes leading to a degree, assuming of course that the taxpayer is able to establish the necessary connection with an increase in income. But because of the existence of cl 5(c) the interpretation of cl 5(a) had to be narrowed as explained in the previous section of this article. The issue in the present context is whether cl 5(a) should be similarly narrowed to exclude expenditure on a home office because such expenditure is contemplated in cl 7. Of course, the argument that cl 5(a) might be limited by cl 7 is not as strong as the argument that cl 5(a) is limited by cl 5(c), because of the obviously closer connection between the various parts of cl 5 than between cl 5 and cl 7. The better view appears to be that cl 5(a) is not in fact limited by cl 7. Although he does not say so expressly, this appears to be the opinion of the learned Taxation Review Authority, as expressed in *TRA Case 18*.

The question of whether home office expenditure can be claimed in a proper case under cl 5(a) is not without significance, for two reasons. First, under cl 7 expenditure must be incurred "in connection with the carrying on of the employment of the taxpayer". Thus it is debatable, and indeed unlikely, that a home office used to pursue the taxpayer's studies is covered. Although he may be improving his prospects and income, in studying the taxpayer is probably not carrying on his employment. Secondly, the limitations imposed under cl 5 and cl 7 are different. Under cl 5 the maximum deduction allowable in any income year is $400. Under cl 7 the maximum deduction allowable is 15 percent of the total outgoings of the taxpayer's dwelling. Depending upon the amount of expenditure he incurs which is deductible under cl 5(b) and (c), the taxpayer may find that in his particular circumstances the allowance permitted under cl 5 is more generous than the deduction under cl 7.

Confidentiality in Tax Cases

The three cases *TRA Case 18*, *Quinn v CIR*, and *Beckett v CIR* illustrate the somewhat anomalous position that, where a taxpayer's objection is heard by the High Court his affairs may be published for all to see, but where it is heard by the Taxation Review Authority the taxpayer is not named and every effort is made to prevent his identity becoming apparent from facts mentioned in the case. It does not seem reasonable that, just because a taxpayer has his objection heard by the High Court, or takes an appeal to the High Court, his affairs should become public knowledge.

In the cases now under review, there is a further consideration to be borne in mind. Messrs Quinn and Beckett are expressly named as the objectors in the High Court, but, also, it might well be possible

for anyone interested to discover the name of the objector in *TRA Case 18*. The report of *TRA Case 18* is published under the authority of reg 12(1) of the Taxation Review Authority Regulations 1974, which provides:

> Every Authority may from time to time compile and publish reports of matters brought before it and of its decisions thereon, and any Authority may authorise any person to compile and publish such reports, but no such report shall contain the name of the objector or other particulars which are likely to identify the objector and which, in the opinion of that Authority, can be omitted from the report without affecting its usefulness or value.

It is understood that opinions of the Taxation Review Authority are usually drafted in the first instance without taking account of any requirement of confidentiality. However, before the opinions are printed, they are edited by the publishers of the tax reports. Editors go to great pains to protect the identity of the objector by referring to parties, witnesses, counsel, towns, universities, and so on by alphabetical letters. However, the fact remains that the objector in *TRA Case 18* was a member of a very small part of the police force, the Legal Section. Moreover, he was one of only three who had not completed the LLB degree examinations. The objector bought his house in 1973, and in 1977 he was working at police headquarters, presumably in Wellington. No doubt, any of the objector's colleagues in the Legal Section could have identified him, as could many other people who must be familiar with his work.

In a small country like New Zealand it is difficult to balance legitimate needs of the public to read the judgments of tax Courts against the reasonable expectation of a taxpayer that his affairs will remain confidential. It is probably inevitable that confidentiality will be breached from time to time. Such a breach is authorised by reg 12(1). Where a report contains particulars which are likely to identify the objector, but which in the opinion of the Authority cannot be omitted from the report without affecting its usefulness or value, the terms of the regulation authorise the publication of such matter.

WORDS

Overview and Oversee

"Overview" is a vogue word. It finds no menton in the 1974 Edition of the *Shorter Oxford English Dictionary*, and many purists frown on it. However, suggesting as it does a wide-ranging look at some broad field of activity, I believe it fills a need and will in due course find general acceptance. A good test in these cases where a new word is in the chrysalis stage is to look for a satisfactory alternative. Some readers may think of one: I can't.

"Oversee", on the other hand, is clearly recognised as an alternative for "supervise". However, anyone with a feeling for words (and this should include all lawyers) may experience unease when reading, for example, in issue 72 of the Wellington Law Society's *Council Brief*, that Sir Clifford Richmond "oversaw the reorganisation of the Court". I think there are two reasons for this — first that "see" is an unequivocally intransitive verb, and its use in transitive form jars. More important perhaps is the semantic confusion between the noun form "oversight" meaning supervision and the same noun used in its normal meaning of inadvertence. This is because the latter use of "oversight" derives from the verb "overlook" in the sense of "inadvertently ignore". If I *overlook* some aspect of a problem this amounts to *oversight* on my part. Perhaps this case represents an exception to Fowler's generally admirable advice to prefer the Anglo-Saxon word to that derived from Latin, and we should eschew "oversee" in favour of "supervise" or some similarly appropriate term such as (in the *Council Brief* extract above) "preside over". However, the noun "overseer" seems firmly established as an alternative for "supervisor", and I recommend we continue to grant it standing.

Peter Haig

BAD LANGUAGE AND THE LAW

By ANTHONY GRANT, Barrister

Law reaches so far into a community and no further. It does not condemn unspoken thoughts. It does not, as a rule, condemn unkindness. If it did, the country would become preoccupied with law suits.

Something which hovers tantalisingly close to the reach of the long arm of the law is bad language. Those whose tongues form offensive words may be sued for libel. They may be prosecuted for using obscene, profane or indecent language. Or they may only be met with mild reproach or even laughter.

There is in the law an anomolous situation that a word spoken on one occasion may cause the speaker to be convicted of a criminal offence, whilst on another occasion the use of the same word will bring no legal censure at all. How can the law be so uncertain? When *should* the criminal law intervene when faced with bad language? Should the law be involved with it at all?

These questions become more relevant when the various cases on this topic are considered. To highlight the issues, all the cases dealt with in this article are concerned with the same word. *The Shorter Oxford Dictionary* gives its date of birth as 1503 and states that it was until recently regarded as a taboo word and rarely recorded in print.

Use in the 19th Century

There is no doubt that to print that a man used the particular word when he did not is likely to expose the printer to an action for defamation. On 23 January 1882 *The Times* carried a report of a speech made by the then Home Secretary, Sir William Harcourt QC, at Burton-on-Trent. If the editor of the paper did not receive a writ for libel as a result of the report it was only his subsequent profuse apologies which saved him.

The article ran:

> I saw in a Tory journal the other day a note of alarm, in which they said, "Why, if a tenant-farmer is elected for the North Riding of Yorkshire the farmers will be a political power who will have to be reckoned with". The speaker then said he felt inclined for a bit of fucking. I think that is very likely. (Laughter). But I think it is rather an extraordinary thing that the Tory party have not found that out before.[1]

A few days later the paper reported that "No pains have been spared by the management of this journal to discover the author of a gross outrage committed by the interpolation of a line in the speech of Sir William Harcourt ... and it is hoped that the perpetrator of this outrage will be brought to punishment".[2]

The great pains were unproductive. About 6 months later the phantom struck again: this time it was the publisher of a book which was advertised under the column "New Books and New Editions" who was presented with the opportunity of suing the editor for libel. As printed the advertisement ran:

> A New and Cheaper Edition, fully Revised, price 6s. EVERYDAY LIFE in our PUBLIC SCHOOLS. Sketched by Head Scholars. With a Glossary of some Words used by Henry Irving in his disquisition upon fucking, which is in Common Use in those Schools. Edited by CHARLES EYRE PASCOE. With numerous Illustrations. Church Times — "A Capital book for boys". Record — "The book will make an acceptable present".[3]

Later Usage

In recent years it has appeared ever more frequently. By the 1960s it was being used in such "important" books as Eldrige Cleaver's *Soul on Ice* and in a great range of lesser literature, particularly in the so-called underground press which flourished in America and Europe in the late 1960s and early 1970s. The word became so popular that it appeared in pop music (Steely Dan's 1973 song "Show Biz Kids", for example), in poetry[4] and in serious literature. And its use today is so widespread that there is scarcely a publication which does not print it from time to time.

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[1] P 7, col 4.

[2] *The Times*, Friday, January 27, 1882, p 9, col 6.

[3] *The Times*, Monday, June 12, 1882, p 8, col 2.

[4] See for example, the poem by Arthur Ginsberg, the public reading of which gave rise to the unsuccessful prosecution in *Wiggins v Field* (1968) 66 LGR 635 DC. The offensive line was "Go fuck yourself with your atom bomb".

Arising from the greater use it was bound to happen that the Courts would be asked to determine whether its use was lawful.

The American Cases

Amongst the many people in the corridor of the Los Angeles County Courthouse on 26 April 1968 was a young man who wore emblazoned on his jacket the words "Fuck the Draft". Women and children were present and the authorities decided to prosecute the man, Paul Cohen, for "disturbing the peace by offensive conduct". He was convicted but he appealed all the way up to the Supreme Court.[5] In a majority decision it was declared by the Court that the first and fourteenth Amendments to the Constitution must be taken as disabling the States from punishing public utterance of the word "fuck" in order to maintain what they regard as a suitable level of discourse within the body politic. Cohen had been wrongly convicted.

The use of the word in a different context was considered by the Supreme Court in *Papish v Board of Curators of the University of Missouri* 93 S Ct 1197. Barbara Papish sold various papers on her University campus. One of the matters which upset the University was an article in one of the papers headed "Mother Fucker Acquitted" — a reference to a radical New York organisation with the unusual name, "Up Against the Wall, Mother Fucker". The University used a bylaw which prohibited "indecent conduct or speech" to expel her and the Supreme Court decided to hear her appeal. The Court held that the article was not constitutionally obscene and ordered that she should be reinstated.

In America, it therefore seems that it is unconstitutional to prevent the use of the word.

The New Zealand Cases

The New Zealand Courts have taken a different attitude to the word: everything is relative. Whether its use is criminal or not depends on the context in which it was used at the time of the use. The word was used several time in the play "Hair" and the producer, Harry M Miller Attractions Ltd, was prosecuted for presenting an indecent show. A jury acquitted the company of the charge.

A short while later Germaine Greer used the word at a meeting at Auckland University. She was convicted for doing so but, before her appeal from the Magistrate's decision was heard, 200 of her supporters marched on the Wellington Central Police Station and chanted the particular word (and one other) in the apparent expectation that it might assist with her appeal. Their hopes were dashed: Ms Greer's appeal failed ("If the appellant wished to use the word 'fuck' in the privacy of her own home or in the presence of friends, she was free to do so, but in the context of a public meeting the use of that word was contrary to accepted standards")[6] and her supporters were convicted too.[7]

The conduct of a University of Canterbury student on Anzac Day in 1972 gave the Court of Appeal the opportunity to consider the criminality of the word. Mr Drummond had interrupted the Commemorative Service being held in Cathedral Square by jumping on to the top of a low wall and shouting in a loud voice the words "fuck" or "fuck the police."[8] Women and children were present to hear this and he was subsequently convicted for using obscene language. The Court of Appeal upheld his conviction. Turner P had no doubt that the words used were "calculated to offend those who heard them because of their indecent, lewd or disgusting connotation" and McCarthy J seemed to have no doubt that the conviction for using obscene language was made out if the language used "offends against the contemporary standards of propriety in the community".[9]

The application of that test in Ms Elliott's case shows the uncertainties which are likely to result. She was a punk rock singer, who sang with the "Suburban Reptiles" at a rock music festival in North Auckland in 1978. The audience, which included women and children, disliked her performance and instead of receiving applause she received abuse and beer cans. Amidst the onslaught she seized the microphone and shouted to her critics that they could "get fucked". Mr Maxwell SM acquitted her of the charge of using obscene language and gave such reasons as "a rock concert is not a conservative gathering" and that "as a swear word it is certainly used frequently" in films and elsewhere.[10]

Mr Justice Holland has recently considered two further cases concerned with the use of the same word as constituting obscene language. The first case arose from an unemployment rally in the centre of Auckland. Mr Harawera had a megaphone and

[5] *Cohen v California* 403 US 15; 91 S Ct 1780; 92 S Ct 26.

[6] *Germaine Greer v The Police* unreported, Auckland Registry, M 244/72 McMullin J, p 6 (1972).

[7] *Police v Piper & Others* (1972) 13 MCD 319.

[8] *Police v Drummond* 1973 2 NZLR 263 at 264.

[9] Ibid at p 268.

[10] *Police v Elliott* (1978) 14 MCD 320 at 324.

did not shrink from speaking his mind. He said:

"What do we want? We want work!

"What have we got? We've got fuck all!"

Women and children were present and could hear this. Harawera was convicted and appealed to the High Court. Holland J said "I find it significant that the words used were 'fuck all' " and he then proceeded to adopt McCarthy J's test mentioned earlier and said "In the light of contemporary standards of propriety in the community I do not consider that the use of the term, in the circumstances where it was done here, was obscene".[11]

The second appellant, Anne Rihia, did not fare so well. She had told some police officers who were conducting an investigation in a public place: "Go on, fuck off!" Holland J said of her case, "I am satisfied that to say to a stranger or to any person in the presence of others to 'fuck off' does offend against contemporary standards of propriety in the community".[12] Her conviction was therefore upheld. It is interesting to note that in her case other persons were present in the street and heard her language but it is not said that women and children were among them; although, the defendant being a woman, it is presumably fair to surmise that other women may have been present.

The New Zealand attitude is therefore that it may be a criminal offence to use the word — it all depends on the context in which the word is used, who the hearers are, and whether the Judge thinks that contempory attitudes would regard the use of the word in those circumstances as obscene.

The Unfair Dismissal Cases

There are places where the word is so commonly used that the only difficulty is to determine its contractual significance in the context of the civil law. The Unfair Dismissal legislation in England has given rise to a great variety of cases, two of which are relevant here.

In the first, *Tanner v D T Kean* [1978] IRLR 110, an employer who told an employee:

> "What's my fucking van doing outside, you bastard! I've lent you 275 pounds to buy a car and you are too tight to put juice in it. That's it; you're finished with me."

was held not to have dismissed the employee. The Tribunal held that the employee had merely received a "reprimand".

The second case has alliterative attraction. It involved Mr Futty — a fish filleter. Futty was told by his foreman:

"If you do not like the job — fuck off!"

which Futty duly did. He then brought proceedings for unfair dismissal. Other fish filleters gave evidence concerning the meaning which should be given to the expression and after hearing these explanations the Tribunal found that the foreman's words were no more than "a general exhortation to get on with his job". There had been no dismissal.[13]

Judicial Use of the Word

When these cases first came before the Courts there was some reluctance even to use the word in the judgments. In *Cohen v California*[14] Burger CJ was so upset that the word might be used that he told Justice Harlan (who refused to say whether he would keep it out of his judgment) "it would be the end of the Court if you use it"[15] but in the subsequent case of *Papish v Mo*[16] these inhibitions were put aside.

Woodward and Armstrong in their book on the Supreme Court, *The Brethren*, give several instances of occasions when the Judges themselves have used bad language. For instance, Justice Brennan resented having to write the judgment in *Antoine v Washington*[17] (which, incidentally, he referred to as a "chickenshit case") and when Burger CJ suggested an alteration to the draft judgment, Brennan informed his clerks in exasperation, "Here is the change. What the fuck does it mean?"[18]

For the benefit of aspirants to the Appellate Bench it is salutary to record one other instance of Justice Brennan's frustrations. Burger CJ assigned to him the job of writing the judgment in *Sakraida v Ag Pro Inc*,[19] an uninspiring case known around the Supreme Court as the "cow shit case"[20] as it was concerned with a patent dispute over a water flush system designed to remove cow manure from the

[11] *Harawera v The Police* unreported, Auckland Registry, M 1550/80, 13.11.80.

[12] *Rihia v The Police* unreported, Auckland Registry, M 1212/80 13.11.80.

[13] *Futty v P & D Brekkes Ltd* [1974] IRLR 130.

[14] See note 5.

[15] *The Brethren*, Woodward & Armstrong, Simon & Schuster, 1979, p 133.

[16] 93 S Ct 1197.

[17] 420 US 194, 95 S Ct 944.

[18] *The Brethren*, p 359.

[19] 425 US 273, 96 S Ct 1532.

[20] *The Brethren*, 419.

[21] Ibid.

floor of dairy barns. He was so upset by this assignment that in a subsequent case he decided to vote whichever way would leave him in the minority "so that bastard (ie Chief Justice Brennan) can't give me cases like this"[21].

Criticism of the New Zealand Position

The Court of Appeal's test leads to considerable uncertainty. Whether the use of the word will result in a criminal conviction depends on whether the Judge who hears the case thinks that its use on the particular occasion, in the presence of the particular people who heard it, in the particular part of the country in which it was spoken, was obscene or indecent. Judges think differently about these things.

The cases show how unsatisfactory the test is:

- to use the word at a public gathering at a University is a criminal matter (*Germaine Greer v The Police*) although to use the word on the stage as a noun, verb and present participle is not (the "Hair" prosecution)
- to chant the word outside a Police Station is an offence (*Police v Piper & Others*) although it is not an offence to shout it through a megaphone in central Auckland in the expression "fuck all" (*Harawera v The Police*)
- to tell the Police to "fuck off" is an offence (*Rihia v The Police*) although to tell women and children to "get fucked" is not (*Police v Elliott*)

While it is no doubt correct that the word can be so employed as to be more offensive on some occasions than others, it is not desirable that the criminal law should be so uncertain. Those who may be inclined to use bad language publicly are entitled to have some idea of what the consequences may be. The American attitude of approving or disapproving of a particular word has the attraction of certainty and is more in accordance with the great premise of criminal law that a citizen is entitled to know what conduct will attract the grave stigma of a criminal conviction — *before* he stands in the dock.

It would require considerable courage to condemn as invariably obscene the particular word discussed in this article since its use is so widespread, but if they wished to do so the New Zealand judiciary would at least have the great advantage over their American counterparts that none are recorded as having used it.

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Aitken, G L	Wellington	27 February 1981
Archer, A G	Wellington	27 February 1981
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