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Taupo Election Petition

FOLLOWING the decision in *Re Hunua Election Petition* [1979] 1 NZLR 251, the Electoral Act 1956 was substantially amended. More recently we have had a decision in the *Taupo Election Petition* case in which much of the reasoning in *Hunua* is applied. However, despite these two cases it is difficult to detect any underlying philosophy and the general approach of the Court still lacks unity. Indeed it is hard to say, from the decisions and the Act, what the function of the Court is!

The legislation lays down in fairly mandatory language what voters are to do. The Court, to save the vote, has in many cases regarded the language of the statute as directory only, and called in aid the savings provisions in the Act if at all possible. So when considering whether a special voter had properly followed the prescribed procedure, the Court looked at the particular provision in the regulations and decided whether it was directory or whether the omission was covered by a saving provision: Add up the individual decisions and the result is a well and truly gutted regulation.

On the other hand, when dealing with issues involving a wider consideration of the Electoral legislation, and contemplation of the legislative intent (the presumed philosophical underlay) the reasoning of the Court becomes less convincing and the results at odds with the more liberal save-the-vote approach otherwise taken. An example of this is the resolution of the situation where Islanders have enrolled on both Maori and General rolls.

Special votes

Turning now to specifics. First, the special vote declaration. Regulations 18-20 describe the content of the declaration and specify how it is to be taken and dealt with. There are eight matters to be completed. Three have not yet been put in issue (statement of electorate; residence; name and occupation of voter). Omissions in respect of the remainder were put in contention in *Hunua* and *Taupo* and dealt with as follows:

> *Every person . . . shall indicate . . . the ground . . . on which he is claiming a special vote.* (Reg 18(1)).
>
> We regard reg 18(1) as directory and would not deprive the voter of his right under s 100 to vote by special vote if it can be proved aliunde, in a case where the ground is not indicated in the declaration, that nevertheless a ground or grounds did exist.

Where a declaration was filled in by the issuing officer but the grounds were not inserted, s 115(1A) (no vote shall be disallowed through omission of an official) was applied and the vote saved.

> *Every declaration . . . shall be signed by the person making it. . . .* (Reg 18(2) and (3)).

An argument that failure to sign was saved by s 115(1A), as the Returning Officer was under a duty to ensure the declaration was signed, was rejected. No reason was given beyond the bald statement that "the voter's signature is essential if the person who voted is to be identified and is so fundamental to the right of a special vote that the failure of the voter to sign the declaration invalidates the vote".

> *Every witness to a declaration shall. . . sign the declaration;* (Reg 18(5)).

Again the signature of the witness is mandatory except where the witness is an identifiable issuing officer who, although failing to sign, has affixed his official stamp. In that case it was saved by s 115(1A).

> *Every witness to a declaration shall . . . indicate his qualification. . . .* (Reg 18 (5)).
>
> Where a declaration otherwise valid failed to identify the authority of the witness to take the declaration we permitted evidence to be called to establish such authority, and if satisfactory proof was given that the witness was an authorised person we allowed the vote.
>
> *Every witness to a declaration shall . . . insert his full name and address in the declaration. . . .* (Reg 18 (5)).

In the *Hunua* case this, as with the voter's signature, was treated as mandatory but with the same issuing officer saving.

> *Declaration not dated.*

The forms of declaration provide for dating. In *Hunua* omission of the date was not held sufficient to invalidate any special voting.

It may be considered strange that failure by a (non-issuing officer) witness to add name and address will be fatal, but failure to state his qualifications may be cured by later evidence; that failure by a voter to sign will be fatal, but failure to state the grounds for claiming a special vote may be cured by subsequent proof. But there is an internal logic. Generally those matters necessary to identify the voter and the witness are being regarded as mandatory but other matters are not.

We might well ask ourselves whether this distinction is either necessary or desirable when viewed in the wider context of the Electoral legislation. In the first instance the information required by the regulations is necessary if the issuing officer or returning officer is to be able to decide

whether a special vote has been validly cast. Remember they are concerned with counting votes. If the information is not there, then they cannot decide whether or not a vote is valid and to be counted. The functions of electoral officers are minutely prescribed and their discretion is very limited.

This is not so in the case of a Court hearing an election petition. It has power "to inquire into and adjudicate on any matter relating to the petition in such manner as it thinks fit" (s 162(4)). It is also to "be guided by the substantial merits and justice of the case without regard to legal forms or technicalities" (s 166). Indeed as is obvious from the foregoing it is this power that enables votes that are not regular on their face to be cured on the basis of further evidence.

The Court has not gone further (as the holdings on signatures, etc show) and allowed all defects in procedure preliminary to the casting of a vote to be cured. Whether it should, or whether it can, take that extra step is for others to argue. That that step has not been taken means that different classes of voters are being treated in different ways. The difference in treatment afforded to special and non-special voters is illustrated by another situation arising in the *Taupo petition.*

Differential treatment of voters

A number of votes were disallowed as having been cast by voters who were said to have lost their residential qualification. Those votes were subsequently allowed by the Court on the basis of evidence presented to it. The point here is that those voters, not being special voters, at no stage identified themselves by signature. They signed nothing when they voted. They were able to come along and give whatever evidence was necessary to establish the validity of their vote. Contrast this with special voters. Identifiable special voters (for example, those whose names only are filled in on the declaration) do not have the same flexibility in establishing the validity of their vote. They must also show compliance with certain procedural requirements (signing declaration, etc).

Either we have a voting system based on residential qualifications or we do not. If we do, then the function of a Court hearing an election petition should surely be to cut through the procedural layers to the bald questions of whether a person was qualified to vote and whether he had clearly indicated the candidate for whom he wished to vote. At present, for whatever reasons, we have a situation where procedural voting requirements are, to a variable extent, barring this inquiry and placing one category of voters in a position of disadvantage when compared to another.

In broad terms the approach taken by the Court to special voters is to regard compliance with the procedural requirements as a condition precedent to casting a valid vote, but to favour the voter by holding certain provisions to be directory only and by holding some non-compliance to be covered by the savings provision. This desire to save votes is welcome and indeed suggests a willingness on the part of the Court to take the approach suggested in the last paragraph if it felt it could.

Islanders and dual registration

It is hard to detect the same vote-saving approach in *Hunua* and *Taupo* to the vexed question of Islanders who have enrolled on both the Maori and General Electoral Rolls.

Here the result of the decision is to deny an Islander who is registered on both rolls a valid vote. He cannot properly vote in a Maori electorate because he is not a Maori. He lacks the qualification to register. He cannot vote in a General electorate because he is registered in another electorate. The pros and cons were fully argued in *Hunua.* Registration procedures cannot be entirely ignored for voting rolls properly compiled in accordance with clearly defined procedures are at the heart of an orderly voting system. But for those who urge the dominance of franchise plus clear indication of voting choice as the prime considerations it is a pity that enrolment procedures stand in the way of recognising and giving effect to the substance — for one thing we can be sure of is that if ever the result in a Maori electorate is questioned any detectable Islander vote will be questioned and disallowed. When there is a case of dual enrolment, one being invalid and the other valid, it is a pity that the valid enrolment could not be saved. The argument presented by Mr Thomas in the *Hunua petition* certainly suggested a way.

Ballot paper — candidates' names not inserted

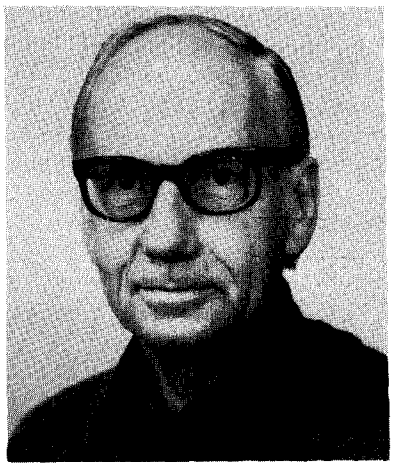
Sometimes it might be thought that the desire to save votes can be carried too far. In the case of five special voters the issuing officer did not insert the names of all the candidates in the ballot paper as required by reg 15(2). This was held to be a genuine error on the official's part. The voters had been shown a list of candidates and themselves filled in the name of the candidate for whom they wished to vote. This irregularity was saved by s 115(1A). Few would be perturbed by the result. However, it had been argued by Mr L H Southwick QC that the omission of a candidate's name was a fundamental breach which rendered the ballot paper a nullity which could not be saved. Unfortunately the Court did not discuss this point. It simply held that the ballot paper (with empty box for names) was in the prescribed form and therefore not a nullity. The omission on the part of the official was saved, it being ". . . the clear intention of Parliament that an omission by an official should not invalidate any special vote and hence the provision of s 115(1A) in respect of special votes."

The reason for regarding as unfortunate the Court's failure to deal with the fundamental breach argument is that it involves two matters that go to the heart of our electoral system. First it bears on the manner in which voters may clearly indicate the candidate of their choice. Secondly it opens for consideration the interest of candidates whose names were not on the ballot paper, and the wider public interest in fair elections. It is a strange result that non-compliance with the procedures for actually voting should not be regarded as fundamental; while procedures precedent to voting, such as signing or witnessing a declaration, should be regarded as so fundamental that failure to sign should invalidate the vote.

[Continued at foot of p 187]

A certain lawyer stood up — Donoghue v Stevenson 50 yrs on

Harold Evans



On 26 May 1932 the House of Lords, by a majority of three to two, upheld the right of the appellant Mrs Donoghue (pursuer in the Court of Session) to bring a claim against a manufacturer of aerated waters for injuries she allegedly suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail.[1] In this contributed article retired Stipendiary Magistrate Harold Evans recalls in the context of his Victoria College law studies (1934-38) this famous authority in the law of negligence; goes on to look at the career and character of him whose role in it was pre-eminent — Lord Atkin of Aberdovey; and ponders the possibility of still further development from it in a vastly altered world.

1 Introductory

I would be underrating my exercise of recollection to call it merely a pleasure. It has been pure joy. Imaginative re-entry into the 1930s has brought back, for me, none of the darker overtones of "The Depression": they were scarcely of my experience. Harsh international events waited in the wings, but they were as yet unreleased. My unclouded recall is of earliest readings of great judgments. Of lively text-books (not all were as ponderous as *Maine's Ancient Law* or as indigestible as *Garrow on Property* (Real and Personal). Of tedium relieved by Ron Meek's ready witticisms and sparkling versifications.[2] Of Dick Simpson's lightheartedness and foolery. Of Professor (Jimmy) Williams, fresh from Cambridge, with his charm and winning seriousness. And, adding Scottish spice to the mixture, of the odd legal term from north of the border: pursuer, interlocutor, relevancy, condescendence.

I had started at Victoria, straight from school, in 1934, which brought me to the Torts Class in 1936. This was well over four years after the snail had been finally laid to rest. But the story, with its happy ending in the House of Lords, could not fail even at that stage to make its impact on a politely brought up young man: an impact all the greater because the case now had a Privy Council parallel in *Grant v Australian Knitting Mills*.[3] First a dead snail where it ought not to have been, and now a pair of woollen underpants bought by an Adelaide doctor in which a chemical irritant had been negligently allowed to survive the process of manufacture. Each plaintiff having come up the hard way, succeeding only in the highest Appellate Court — in Mrs Donoghue's case *in forma pauperis*! This was the law in real life, law and justice as it should be! All cause for exhiliration.

2 The case itself

But some attempt must be made to summarise what *Donoghue's Case* actually decided. It produced not only "the general test for deciding whether a duty to take care exists" (Winfield's words), but also rejection of the fallacy that, *because* there was no contractual liability on the manufacturer's part to the plaintiff, *therefore* there could be no liability in tort. This was the fallacy that counsel for the respondent manufacturer — they being the Solicitor-General for Scotland and two juniors (one each from the Scottish and English Bars) — had put forward as their primary submission:

> In an ordinary case such as this the manufacturer owes no duty to the consumer apart from contract.

Winfield observes:[4]

> This fallacy was injected into our law in 1842 by some dicta in *Winterbottom v Wright*,[5] it was a non sequitur destined to have expensive consequences for the English litigant, and it died a hard death in *Donoghue's* case. The Judicial Committee of the Privy Council, in following *Donoghue's* case in 1935 in *Grant's* case, gave it a decent burial. In fact, contractual liability is completely irrelevant to the existence of liability in tort.

The "hard death" of the fallacy, effected as much by Lord Macmillan as by Lord Atkin, cleared the way for the latter's classic statement of the principle of liability in tort:

> In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases in the books are instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrong-doing for

which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*

The italics are Winfield's.

"The categories of negligence are never closed"

It would seem that the speeches of Lord Atkin and Lord Macmillan not only led securely to the same result for the pursuer, but complement and are consistent with each other in approach and reasoning. (Winfield, comparing the two, says "Lord Macmillan's speech is equally important and instructive"). In words scarcely less striking than those of Lord Atkin's above Lord Macmillan says:

> In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.

That final sentence is as positive, and as daring, as Lord Atkin's generalisation:

> . . . I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.

And they seem to amount, for practical purposes, to the same thing.

3 Closer encounter — the man himself

My preoccupations after 1936 were not with the law of torts (we were slow to go over to "tort"). Other subjects lay ahead. I had to complete my degree, and after a two-year period as a Judge's Associate (to Mr Justice Smith as he then was) I found myself in Air Force uniform and, in June 1941, in England for the first time. This was my Mecca, the place of my main cultural and spiritual orientation. I had "come home" — many of us felt like that — and it was natural that three months after arrival I should go on my first leave to London and, as a first priority, seek out the Law Courts. After much enquiry and search in buildings and amongst people greatly displaced and dispersed after the long months of German bombing (discontinued after 10 May) I arrived at 11 am on Friday 19 September in the King's Robing Room of the House of Lords, Westminster. There — such was my good luck — the stage was set for the second day's hearing by five Lords-of-Appeal-in-Ordinary (Lords Maugham, Atkin, Macmillan, Wright and Romer) of *Liversidge v Anderson*.[6] There I spent, as described in a letter to my father a week later, a very enjoyable hour and a half:

> I had read up the report in *The Times* the same morning, and could follow things closely. It was Sir Donald Somervell K C (the Attorney-General) whom I heard: or rather, it was Sir D S whom I heard from the Bar. The most noise came from their noble and learneds, particularly Lord Maugham, whose capacity for interrupting an argument in its early stages seems nearly as great as Sir Mick's.[7] Lord Wright graciously came to the rescue at last, observing that it might be better to have Mr Attorney's submissions first and Lord Maugham's comments thereon afterwards. Which drew a profound but rather unconvincing apology from that quarter, and they all started writing like billy-o and kept quiet. I thought the most attractive of the big five was Lord Macmillan, who displayed a patience to listen and a reluctance to interrupt which was in rather obvious contrast to Lord Maugham. Lord Wright looked the part of the "dear old man", and I should say he would be rather nice to appear before. Snail-in-the-bottle-Atkin looks a very unimportant person: and I thought he and Macmillan would be perhaps the most pleasant personally of the bunch. I left about 12.30, everything still going strong. . . .

"looks a very unimportant person"

"Looks a very unimportant person" — how deceptive are appearances, how naive could I be? For the next thing I heard — it was early in November — was how, against the sole dissent of Lord Atkin, their Lordships had adopted a construction of reg 18B of the Defence (General) Regulations 1939 which denied any right of appeal by any internee under that regulation from the decision of the Home Secretary, and left no obligation on the latter to state his reasons for internment. Lord Atkin[8] maintained:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of

> Charles I. I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the Minister.

This was too much for Lord Maugham, who on 6 November severely and publicly (in a letter to *The Times*) criticised the passage about "arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I". According to Lord Maugham, this constituted a "grave animadversion" upon counsel for which he (Lord Maugham) could find no justification in anything they had said.

The following day, in a leading article entitled "A Judge's lapse", *The Times* respectfully deplored Lord Maugham's action, saying:

> It would be unfortunate indeed if it were to establish a precedent. It might even become an issue of public policy if the effect were to discourage Judges from expressing themselves freely for fear of public attack by their brothers of the same bench.

I have referred at this length to Lord Atkin's part in *Liversidge v Anderson* as illustrative of what Lord Wright described three years later, in his tribute at Atkin's death, as his "habitual courage and independence". His death on 25 June 1944 in his 77th year — among the Welsh mountains he loved so dearly — brought to an end a life and career of highest distinction. His qualities, human and judicial, are fully and movingly described by his long-time colleague Lord Wright and by Professor H C Gutteridge, friend of more than 40 years, in "In Memoriam" tributes in the *Law Quarterly* Review of October 1944. Atkin's never-failing insistence upon the importance of first principles; his concern for the individual and especially for the underdog (it was said that in workmen's compensation cases he never gave his voice against the workman); and, above all, his "dynamic" view of the law, seen in the considerable number of his judgments which have become starting points for further developments: all these and more, noted in his two-page entry in the *Dictionary of National Biography*, went into his greatness.

4 Furtherance of development?

What now of the possibility of still further development, in the spirit of James Richard, Baron Atkin?

Donoghue v Stevenson could be characterised as a break-through in the area of individual responsibility in the English civil law system. Two years after Atkin's death another Court, at Nuremberg, proclaimed another kind of individual responsibility — also for the first time — the Court being an international one. No matter that its Judges were nationals of states which had fought and defeated the nation to which the defendants before them had belonged. Indeed, from the victor-over-vanquished situation itself, does it not all the more follow that the principles so proclaimed must henceforth govern for "victor" and "vanquished" alike? Those principles as defined by the Nuremberg Court[9] are:

(i) The very essence of the Charter (of the Court) is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.

(ii) Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Given these principles, the whole setting in which sovereign states and individuals find themselves in the world of today has undergone fundamental change. Individuals, hitherto subject only to the laws of their own particular national state, come now to be answerable in the world directly, through international law.

5 The lawyer's question anew

Who, then, in law, upon a wider analysis in this post-nuclear age, is my neighbour?

Perhaps only an Atkin, a Macmillan, or a Denning — such a list not being intended to be exhaustive — could begin to answer this question in terms meaningful to those reared in the British legal tradition. Can we, however, go so far as to say that any answer, to win credibility, will have to encompass and surmount the seemingly intractable problems of nationalism, which Arnold Toynbee,[10] writing in the 1960s and from an unashamed spiritual standpoint, already described as "a death wish"? In other words, is the world at last ready, in the very spirit of Atkin, for a less restricted reply to the lawyer's question?

Atkin, like Toynbee a deeply religious man, was willing to put his religion on the line. He would have been among the first to point out that, just as the Founder of Christianity declared "I am the light of the world", so the apologists of "The Law" still proclaim its "rule" and that "lux gentium lex". High claims indeed. Is it not possible that they are true? And that, when a great jurist asks us, as in spirit he does across the happenings of half a century, to notice "the rule that you are to love your neighbour", we are in the presence of, above all, a divine imperative?

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1 *M'Alister (or Donoghue) (Pauper) v Stevenson* (Lords Atkin, Thankerton and Macmillan: Lords Buckmaster and Tomlin dissenting) [1932] AC 562.

2 See [1938] NZLJ (Students' Supplement) pp 250-54 *Donoghue v Stevenson* and *Rylands v Fletcher*.

3 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (JC).

4 *Winfield's Cases on the Law of Tort* (1948) and *Winfield on Tort* (various editions).

5 *Winterbottom v Wright* (1842) 10 M & W 109.

6 *Liversidge v Anderson* [1942] AC 206.

7 Sir Michael Myers, Chief Justice of New Zealand 1929-1946.

8 Lord Atkin of Aberdovey (1867-1944). See "In Memoriam" tributes by Lord Wright and Professor H C Gutteridge in (1944) 60 LQR 332-340. See also *Concise Dictionary of National Biography* 1941-50 (OUP) pp 27-28.

9 *Nuremberg Judgment (International Military Tribunal) Nazi Conspiracy and Aggression — Opinion and Judgment* US Government Printing Office (Washington 1947).

10 Professor Arnold J Toynbee (1889-1975) *Change and Habit: the Challenge of Our Time* (1966).

The conveyancing monopoly and the public interest

Ruth Charters, Barrister and Solicitor

Ms Ruth Charters, a publications officer with the Consumers Institute, was involved in the preparation of the Institute's submissions on the Law Practitioners Bill. The submissions, which received extensive publicity, were highly critical of the scale of fees and the conveyancing monopoly. This article elaborates on them and is being published so that readers will have an accurate and unabridged statement of the arguments being presented by the Institute.

Introduction

EARLIER this year, the Consumer Council presented written submissions on the Law Practitioners Bill to the Parliamentary Statutes Revision Committee.

The invitation to contribute to this publication provides a good opportunity for expanding on those submissions and for correcting any misapprehension which may have resulted from the partly confused media coverage.

The Consumer Council (through its executive body, the Consumers' Institute) has clashed with the legal profession in the past about the "Scale of Professional Charges" — specifically as it applies to conveyancing fees. Since that scale remains intact, it should come as no surprise that it was the focus of much of the Council's submissions to Parliament.

Under s 16 of the Consumer Council Act 1966, it is the Council's function "to protect and promote the interests of consumers of goods and services by whatever lawful means appear to it expedient, and by so doing, to encourage the improvement and development of industry and commerce".

The Council considers that the interests of consumers are best served by ensuring the provision of:

(a) effective, efficient services at prices which are fair in all the circumstances;
(b) safe, useful products at similarly fair prices;
(c) access to full factual information about the product or service being offered (and any terms);
(d) free, informed choice of supplier; and,
(e) representation and redress when the circumstances warrant.

Two practices which threaten that ideal situation are:

- the creation of a monopoly on the supply of a product or service; and,
- collective price fixing among its suppliers.

Each of these practices eliminates or reduces the possible competition between suppliers for a share of the consumer market. The consumer may then have no choice of supplier, no choice of terms, no lever to ensure efficiency, information, value for money, or redress from the supplier. All that is left to the consumer is a choice of using the service or product, or going without. The result is often a growing sense of cynicism about the goodwill of the supplier.

In respect of scale fees, wherever they occur, the Consumer Council shares that cynicism.

In New Zealand, lawyers have an effective monopoly on all legal services. The law degree and practising certificate give clients an assurance of expertise that few can compete with. (Those who do compete — the Public Trust Office and Trustee Companies — are subject to statute.) But the monopoly on paid conveyancing services is a statutory one and there can be no competition at all (Law Practitioners' Act 1955, s 18). The Law Practitioners' Bill proposes to retain it (cl 64).

Coupled with that statutory monopoly, the New Zealand Law Society prescribes a minimum scale of fees for those services, based only on the consideration involved in the transaction.

In preparing its submissions on the Bill, the Consumer Council had to consider whether the combination of a monopoly and a collective price agreement (which is what the scale amounts to) operates in the best interests of consumers of legal services.

Collective price fixing by tradespeople, or suppliers of goods, is prohibited without the specific approval of the Commerce Commission. But the same practices by many professional bodies (including lawyers) are called scales of fees "for personal professional services", and cannot be challenged (see Commerce Act 1975, ss 23(1)(d), 27 and Second Schedule). The Consumer Council does not accept that there is any logic in that distinction.

In August 1979, Consumers' Institute published an article on conveyancing fees (issue no 164). At that time the New Zealand Law Society maintained that the scale operated as an informal brake on fees, and that if it were removed conveyancing fees would probably rise, as had happened in Britain. If the scale were abandoned, the Law Society would face "a considerable task in educating lawyers to make the not-easy conversion to time-costing so that both their clients' interests and their own are safeguarded", said the then President,

Mr L H Southwick QC.

He also told us that it was for the New Zealand Law Society to decide whether lawyers should be allowed to charge below the scale rate.

Consumers' Institute's position

(a) The minimum scale

It is doubtful whether the scale has ever been the "informal brake" claimed by the Society.

Lawyers are always permitted to charge in excess of the Schedule II scale costs where "the transaction involves some work not covered by Schedule II and the Schedule II charge does not give adequate recompense". Moreover, they have no hesitation in doing so.

During our 1979 study, members sent us 71 conveyancing bills. In 44 cases, charges had been made in addition to the Schedule II fee; it was conservatively estimated by an experienced lawyer that in 30 of those 44 cases, there was no stated justification for the extra charge.

We find untenable the proposition that lawyers should be permitted to exceed the scale where they consider it justified, yet are prohibited from going below the scale where they may wish because of the threat of disciplinary action by their Law Society.

The cynical fiction that the scale is a maximum must be put down once and for all. It is a *minimum* scale. That is, it cannot be under-cut, but it can be exceeded.

A sanctioned minimum price, artificially imposed by a monopoly, is not of benefit to a consumer. Members of the profession have no incentive to increase efficiency, promptness, productivity, or their business systems to the consumer's advantage. Any who do maximise their efficiency cannot offer a reduced price for fear of disciplinary action.

(b) Advertising

If the scale were removed, and the statutory monopoly remained, abuses through unjustifiable price increases would be less likely to occur if lawyers permitted themselves to advertise their areas of expertise and their charges. The present self-imposed prohibition in all areas of legal services deprives consumers of factual details which would enable them to make an informed choice of legal adviser.

At the time of the 1979 research, Mr Southwick commented, "Whatever the Society's decision [about abolishing the scale], I am sure it will not and should not allow its members to tout for business, because that would be in the best interests of neither the public nor the legal profession."

It would be ungracious and churlish to suggest that, if lawyers were permitted to advertise, they would then advertise misleadingly. That risk aside, it is difficult to see how giving *more* information to prospective clients could work against the clients' interests. In any event, traders are not debarred from advertising because of the risk that their advertisements may mislead the public. Instead, the acceptable limits of their advertisements are regulated.

(c) Efficient service

Since that earlier debate with the New Zealand Law Society, computer-based accounting and business systems have become the common tools of trade of even relatively small law firms. Hand-in-hand with them has come the time-costing that the Law Society thought would be so difficult to teach. Clearly, the profit motive (and the admitted workload) of many offices has brought stricter time-costing practices to the areas of work where the "fair and reasonable return" principle applies.

In the past, there were set scales for estate administration and company formation. These have now been replaced with time-costing. The transition to time-costing for conveyancing could be initiated readily. Indeed, through the now common "time-keeping" sheets, lawyers probably have accurate records of the time taken on each conveyance whether they like it or not. All that remains is for the Law Society and its members to allow that information to form the basis of the fee, or for a change in the law to compel it.

The Profession's justification

"The Scale is the fairest of them all"

At different points in any discussion, lawyers may offer conflicting arguments in support of the conveyancing scale. The first possible stance is that the scale substitutes for an hourly-rate basis and provides "certainty".

This is another cynical fiction which is invoked as and when it suits the profession. When lawyers cannot justify exceeding the scale, they need not then justify the charge they do make, other than to say "it is the minimum set by the New Zealand Law Society".

However, when excess charges are made, these must surely be calculated on either a precise or a rudimentary time-basis (taking account of the factors in Schedule I of the scale). For simpler tasks time-costing is shunned in favour of the scale, but for difficult tasks a form of time-costing is conveniently re-introduced. The sham is obvious.

The transition to time-costing for conveyancing could be initiated readily

The next position adopted is: "Anyway easy conveyancing jobs subsidise difficult ones, and that works out fairly in the long-run." (Not forgetting that it is still convenient, enforceable and, above all, "certain".)

Conveyancers cannot argue it both ways: either the scale fee is a fair price for the services given to the specific client; or it is subsidising (or being subsidised by) someone else's bill.

The documentation, complexity, urgency, expertise, and responsibility may vary greatly on two transactions with identical monetary consideration. These factors may then be identical on two transactions which bear vastly different considerations. That being so, there is no justification for using the consideration alone as a basis for calculating a binding minimum fee.

The next argument commonly advanced to us is that "conveyancing fees subsidise non-conveyancing work within the firm, and enable the firm to offer less lucrative services to the public." We have yet to hear of a lawyer explaining the size of a conveyancing fee directly to a couple by saying that it incorporates part of the cost of someone else's litigation. Nor does that argument hold up in those firms which do little or no work other than conveyancing.

In his paper "Chips Today for Jam Tomorrow" [1982] NZLJ 83 Mr Simon Chalton gave figures which showed the degree of dependence, by firms of varying sizes, on income from conveyancing and probate fees. These fees made up over 50 percent of the gross income in firms of five-six principals or fewer. (Conveyancing fees alone dominated firms of three principals or fewer).

Yet the gross annual fees of each principal in those firms was

significantly lower than those in larger firms, who depended less on conveyancing and probate work.

The challenge posed by Chalton was that all efforts must be made to minimise the dependence on conveyancing and probate fees in the long-term interests of the firm, and of the public it serves; and to make non-conveyancing work economic, self-sustaining, even profitable in its own right. Those who participated in the discussion of Mr Chalton's paper at the 1981 Law Conference were apparently receptive to the prospect.

The conveyancing scale operates only to shelter law firms from the tightening economic realities

The Consumer Council would endorse Mr Chalton's challenge. It is surely becoming clear to the profession that the conveyancing scale operates only to shelter law firms from the tightening economic realities which are battering other business concerns. So long as the conveyancing scale can be relied on to bring in the fees, there is no need to worry about the inefficiencies of any other part of the practice.

In the halcyon days of a steadier housing market and cheaper, more readily available finance (when consumers were generally less well-informed), clients were more likely to accept their conveyancing accounts with a resigned shrug. But now the conveyancing fees are less certain to arrive. While their lawyers may remain blinkered by the pages of the extended scale, home-buyers feel the recession hitting their weekly pay-packets. Now they want the bill explained, justified, in terms of the work done for them. They don't like the fee being deducted before the bill is sent, and they will say so. They will challenge the total fee and each of its ingredients, to the vast annoyance and inconvenience of the practitioner. The omnipresent excuse of "calculated in accordance with the New Zealand Law Society scale fee" is wearing rather thin, and public cynicism is growing. Lawyers must expect to bear the brunt of the resulting criticism while, as individual practitioners, they acquiesce in professional practices which are seen as serving only themselves.

Is a scale ever warranted?

In our view, the operation of a scale fee could be justified only where:

(a) it sets a true maximum, which may not be exceeded;

(b) it permits charging below the maximum;

(c) it is set by an independent authority rather than by interested parties — which makes it independent price *control,* rather than the current collective price *fixing.* (We consider the present perfunctory after-the-event "scrutiny" by the Department of Trade and Industry to be quite insufficient);

(d) it is established (and reviewed) in public, with provision for interested parties, such as representatives of consumers, to make submissions.

It should not be taken that we are generally in favour of price controls. The Consumer Council's preference is always to allow market competition to act as the best regulator of prices. However, where competition cannot or will not operate, selective price control should be applied. The Council would apply these principles throughout the whole of the market place, whether in trades, in the supply of goods, or in professional services. The present provisions which allow for price control on trade services and products, but let professions set their own terms, are inconsistent and iniquitous and operate only to the advantage of the professions.

Competition from outside?

If lawyers will not allow themselves to advertise or to compete with each other in pricing, then the Council must advocate fostering competition from outside. Such competition would soon show the truly "fair price" for conveyancing services.

In its submission, the Council proposed the establishment of a "para-legal profession". It told the Select Committee;

> It would certainly be to the advantage of consumers if solicitors, as we now know them, were given a good deal of healthy competition in the non-contentious fields of law (eg conveyancing, trusts, wills and estates, company formation). The advent of the Legal Executive Certificate points the way.
>
> There is a case to be made for establishing a two or three year diploma course or the like, at tertiary level, which would educate candidates to a high degree of expertise in one field of law. Relevant supervised practical experience either during or after the course could also be required. The candidate might then begin professional practice alone or with others in that specific field only. . . .
>
> The Consumer Council accepts immediately that proper knowledge of the appropriate law is essential to a proper legal service. But it is equally true that there is much in the work of solicitors which is fundamentally clerical. The use of new business machines and standard form wills, company and conveyancing precedents bears testimony to that.

In making this submission, the Council was looking to the future, and to the possibility of properly qualified professionals providing competition for solicitors, and choice for consumers, in areas of legal services where they have trained as specialists from the start.

The Council does not suggest that the present Legal Executive Certificate is an adequate qualification for that role. However, the existence of that course does show that new types of legal education can be developed for different purposes.

What the Council questions (and it is still only a question), is whether the current qualifications for admission to the Bar and for the right to practice are the only suitable ways in which the public may be assured of receiving adequately trained and knowledgeable service in non-contentious legal matters.

The possibility of properly qualified professionals providing competition for solicitors

The Consumer Council suggests that thought should be given to developing another qualification which might provide an equivalent assurance of specialist knowledge in one area of law.

That expertise, offered to clients at a

freely competitive hourly rate, might well provide consumers with a cheaper, more efficient, but no less reliable, service than they are presently offered by lawyers working in the same field. As our submission pointed out:

> There seems little merit in giving solicitors a statutory monopoly on conveyancing when, at graduation (or admission), a candidate's last instruction in Land Law may well have been two or three years before, and substantial re-learning will be needed in any event.

The alternative, put forward for comment, is that a partial-degree (or other tertiary academic study) and approved practical programme may provide training enough to guarantee legal services of a suitable quality, in a narrow field. The Council would not presume, at this stage, to suggest a prescription for the course content of any parts of such a scheme. It might be noted that the immediate concern of the Secretary-General of the New Zealand Law Society would indicate that a thorough knowledge of the Credit Contracts Act and the Matrimonial Property Act would be essential in anyone planning a practice in conveyancing, and the Council would agree with this.

However, the Council would not agree with any practitioner who may be tempted to suggest that only lawyers can ever achieve a suitable understanding of those two Acts, or of any other legislation. It is possible for people other than lawyers to learn.

Candidates for para-professional status as "conveyancers", "company brokers", or "wills and estate officers" (or whatever they might come to be called), would need to know enough of peripheral areas of law to recognise the need to instruct a solicitor (or refer the client to one) where contentious issues arose, or the matter touched on areas outside their own expertise (in much the same way as a conveyancing solicitor in a firm now assesses when to pass a file on to a common-law colleague, or a matrimonial lawyer passes the matrimonial property agreement on to a conveyancer, for the transfer of property to be carried out).

In order to maintain professional standards and adequate client protection, some form of regulation would soon be necessary. In its submissions the Council suggested compulsory membership or associate-membership of the New Zealand Law Society with the proviso that these "para-professionals" would be permitted to advertise and would not be bound by the Society's scale. If that were unacceptable to the present membership, some alternative would need to be devised. However it was achieved, there would need to be as sufficient trust account regulation, fidelity fund assurances, and disciplinary provisions as there are in other professional bodies. Where properly founded, a suit in contract or tort, or a prosecution for fraud or other offences, would provide badly-served clients with redress and protection equivalent to those presently available against lawyers.

The Australian experience

In Western Australia, most land is under the Torrens System. There, firms of "settlement agents" or lay conveyancers, have emerged in force, where ten years ago conveyancing was almost totally carried out by lawyers. The limitations of that state's Legal Practitioners Act prevent settlement agents from handling anything other than straightforward transfers which have no legal complications. Where these complications arise, a lawyer is then engaged.

Advice from the Western Australian Government's Bureau of Consumer Affairs informs us:

> The growth of settlement agents saw the bulk of conveyancing work going through their hands (since the bulk is straightforward transfer without complication). Naturally the loss of this lucrative area to the legal profession soon produced symptoms of alarm and an interesting development took place. A quite large number of lawyers formed their own settlement agency firms frequently with nominee proprietors (often their wives.). . . The growth of competition has substantially reduced the average fee for conveyancing by non-lawyer conveyancers. . . . Of course, some people prefer to go to a lawyer for conveyancing and the fees charged by lawyers, qua lawyers (as distinct from lawyers' settlement agencies) do not appear to have altered radically.

The settlement agents have been so successful that a "Settlement Agents Act" has recently been passed by the State Government to regulate the agencies. We understand it has established a Supervisory Board, licensing procedures (including examination requirements), trust account regulation, and a fidelity guarantee fund.

In Western Australia lawyers formed their own settlement agency firms

Would New Zealand consumers really benefit?

There are indications from Australian experience that they would. In Australian states where lawyers retain a conveyancing monopoly, notably New South Wales and Victoria, there is a continuing debate between state law societies and state consumer associations about the appropriate basis for comparing the costs of a conveyance carried out in that state by a solicitor with one carried out by a settlement agent in Western Australia, or a land broker in South Australia. The debate appears to revolve around issues of whether all the costs of both parties should be considered (including mortgage costs, estate agents' commission, and any government taxes) or only the "core costs" (eg, "vendor's solicitor plus purchaser's solicitor" cf "vendor's settlement agent plus purchaser's settlement agent").

If necessary, examples and figures could be traded in any correspondence which results from this article.

But it should at least be mentioned at this stage that in South Australia land brokers have operated side by side with solicitors for over a century. Licensed land brokers now account for 75-80 percent of the total conveyancing transactions in that state. In Western Australia, in the order of 75 percent of settlements are currently effected by settlement agents, the remainder being done by solicitors and banks. (Report of the Consumer Affairs Council of Victoria for the year ended 30/6/81, p 62.)

There, given the opportunity, consumers appear to have made a fairly clear choice. It prompts the Consumer Council to ask:

> Whose interests are really being protected by the conveyancing monopoly and the scale of charges in New Zealand's law services?

Case and comment

This feature has been resurrected, and contributions will be welcomed from readers.

Delayed registration of mortgage not fatal

Re Shoreline Homes Limited (in liquidation), McCarthy v Liquidator of Shoreline Homes Limited (in liquidation) (17 February 1982, Richardson and McMullin JJ and Sir Clifford Richmond) raised a short but crucial point. On 2 July 1979 Shoreline Homes Limited executed a memorandum of mortgage in favour of Mrs McCarthy to secure a loan of $8,000. The instrument was registered at the Land Transfer Office on 24 July 1979. Just less than one month later, on 23 August 1979, the liquidation of Shoreline Homes Limited commenced. On the application of the liquidator, Holland J held that the mortgage was voidable against the liquidator as a fraudulent preference. The decision of Holland J was reversed by the Court of Appeal.

By s 309(1) of the Companies Act 1955:

> Any . . . mortgage . . . relating to property made or done by . . . a company which, had it been made or done by or against an individual, would be deemed in his bankruptcy a fraudulent preference, shall in the event of the company being wound up be deemed a fraudulent preference . . . and be invalid accordingly.

This subsection originally referred to the Bankruptcy Act 1908, which was replaced by the Insolvency Act 1967. The Court of Appeal held in *Re Eskay Metalware Ltd (in liquidation)* [1978] 2 NZLR 46 that s 309 should be construed as referring to s 56(1) and (2) of the 1967 Act. Section 309 was itself repealed and replaced in 1980 but the instant case had to be decided under the old provision. The importance of the decision for the interpretation of the new s 309 will be considered below.

By s 56(2) of the Insolvency Act 1967:

> . . . every charge made on any property . . . shall be voidable as against the Assignee, if . . . it is made . . . within the period specified in subsection (3) of this section.

That period is specified as one month immediately preceding a person's adjudication, the relevant date in respect of a company being the date of commencement of liquidation. Thus, the issue to be decided was whether the registration of the mortgage during the one month's vulnerable period rendered the transaction voidable.

Deciding the case in favour of the mortgagee, Mrs McCarthy, the Court held that the mortgage was "made" when it was executed on 2 July 1979. At that point an equitable charge was created over the land. (*Abigail v Lapin* [1934] AC 491; *Barry v Heider* (1914) 19 CLR 197 and *Premier Group Limited v Lidgard and Another* [1970] NZLR 280). On the other hand, what happened on 24 July 1979 was that the memorandum of mortgage was registered by the mortgagee. This was not something that was done or made by the company — it was done by the mortgagee, for her own protection, and not as agent of the company. True, s 56 of the Insolvency Act 1967 speaks also of acts "suffered" by a person, but, in context, this expression refers to executions under judicial proceedings, and not to a charge made by the company. It appears to follow that, so long as a mortgage is executed before time begins to run under s 56 of the Insolvency Act, the transaction cannot be avoided under that section, even though the mortgage may, in the event, never be registered.

Section 309 of the Companies Act 1955 was repealed in 1980 and replaced by the present s 309, which is self-contained and operates independently of the insolvency legislation. In relevant part the new s 309(1) reads as follows:

> . . . every security or charge given over any property . . . by any company unable to pay its debts as they become due from its own money, shall be voidable as against the liquidator, if . . . the making . . . of the same occurs within two years before the commencement of the winding up of the company.

On the facts of *Re Shoreline Homes Limited (in liquidation)*, assuming that at the time of the execution of the mortgage the company was unable to pay its debts as they became due from its own money, the disposition would have been avoided, because the creation of the mortgage occurred less than two years before the commencement of winding up. However, the crucial point decided in *Re Shoreline Homes Limited (in liquidation)* is still of the same importance under the current language of s 309. The section refers to the "giving" of a security or charge, not to the date of its registration. Accordingly, a mortgage executed more than two years before the commencement of winding up, but not registered until after the commencement of that period, is not a voidable preference under s 309.

John Prebble

Admissibility of evidence

What are the rights of a person (a) whose house is bugged and (b) who is later subjected to a police beating? The answer to (a) is very little, and to (b) perhaps very substantial (in a symbolic sense). This was the general effect of two recent decisions of the Court of Appeal. In *R v Menzies* (6 April 1982, CA230/81), the police obtained an interception warrant issued pursuant to s 16 of the Misuse of Drugs Amendment Act 1978. The warrant authorised the interception of the communciations of a person other than the appellant; however his conversation implicated the appellant. The Court rejected the appellant's argument that the evidence was

inadmissible because the warrant was made out against the other party only. To support this argument it was contended that the police had not availed themselves of the provision in s 16 for obtaining a warrant in respect to unknown persons. The Court however observed that the appellant would have had no special protection under the common law. The common law merely conferred on the Courts a discretion rather than an obligation to exclude improperly obtained evidence. Any further protection must be expressly provided by statute. Here there were explicit protections in the Act, but they could only be invoked when the communication was intercepted outside the scope of the warrant, or when the offence was one other than drug dealing. Consequently, although the warrant did not provide for further interception of the communications of the appellant, it was held, Richardson J dissenting, that the communications could be admitted.

The police were confronted with a further problem in that their tapes were unintelligible. The Court (this time unanimously) ruled that it was permissible to furnish the jury with copies of a police-prepared transcript of the tapes as an aid to understanding their contents, both in Court and in the jury room. The packaged evidence was admitted, and the appellant's conviction on two serious drug charges was allowed to stand.

In the next set of cases — *R v Riley, McCuin and McFadyen* (17 December 1981), and *R v McCuin and McFadyen* (6 April 1982 CA 14, 16, and 19/81), the police had every reason to exude the type of frustration commonly ascribed to their fictitious counterparts on the screen. A safe containing $15,000 had been removed by ingenious means from a mountaintop restaurant in Queenstown. The safe has not been found since. According to McMullin J in the first Court of Appeal case, there were police interviews with three of the suspects. As a result of the evidence obtained by these interviews, the three were tried on charges of burglary in the District Court before a jury. In a voir dire, the trial Judge ruled the evidence of Riley as inadmissible, but was satisfied on the balance of probabilities that the confessions of the others had been obtained voluntarily. As a brief background note, the first defendant had the presence of mind to visit a medical practitioner shortly after his police interview, and it was largely the evidence of this practitioner that influenced the trial Judge. After hearing on behalf of the first defendant an application for discharge, the Judge allowed the trial to proceed, and the three were found guilty, convicted and sentenced.

In the Court of Appeal, McMullin J rejected defence counsel's contentions of procedural irregularities during the course of the trial. However, the Court adjourned, for re-argument before a full Court consisting of five members, the question of whether the trial Judge had applied the wrong standard of proof concerning the admissibility of the latter two defendants' confessions. On re-argument, it was held unanimously that the standard of proof is one beyond reasonable doubt. The Court clearly took a dim view of confessions obtained through police pressure. According to Cooke J, "[C]onfessions obtained by improper methods are excluded, not only because of their potential unreliability, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions." The convictions of McCuin and McFadyen were quashed and a new trial ordered.

The practical implications of the Court's ruling is a matter of speculation. It could be argued that the Court's disapproval of police violence is symbolic rather than real, and that the question of which standard of proof to apply revolves merely around semantics. If so, trial Judges in the future may watch their English more carefully rather than the evidence. On the other hand, the decision could be interpreted as an implied admonition to trial Judges to give more credence to what the accused has to say in respect of alleged misuse of police power. If this interpretation is taken, then, on the question of admissibility of evidence, a stand-off between the credibility of the accused and that of the police will in the future be decided in favour of the former. Finally, the decision may do little more than create procedural confusion in which every defendant tried on a serious charge brings as a matter of routine an appeal against the finding of a trial Judge on the question of admissibility.

In the final analysis, it could be argued that the Court was prepared to risk the confluence of opened floodgates in order to register its symbolic disapproval of police misconduct. Apparently, it decided that it could take the matter no further. Significantly, the Court rejected the first defendant's contention that it ought to demonstrate its disapproval in a more practical manner by ordering a discharge.

Exemplary damages

In two judgments delivered in tandem, the Court of Appeal accepted the right to sue for exemplary damages. In *Donselaar and Another v Donselaar and Others* (19 March 1982 CA145/77) the Court distinguished between ordinary (ie compensatory and aggravated) damages and exemplary damages, and noted that the two serve essentially different purposes. The former is to compensate the victim. The object of the latter is to punish and deter. Further, exemplary damages could be awarded in cases where no ordinary damages are awarded. Here, the Court held that the Accident Compensation Act 1972 did not prevent the victim of a personal injury from suing for exemplary damages.

In *Taylor v Beere* (19 March 1982 CA38/80) the Court explained when an award of exemplary damages would be appropriate. Exemplary damages were defined as the difference between the sum the plaintiff ought to receive as compensation for the wrong suffered and what the defendant ought to pay as a result of his conduct. An instance of conduct likely to evoke an award was defined as "a contumelious disregard by the defendant of the plaintiff's rights". In this case, a contumelious disregard had occurred as the result of the appellant publisher including a photograph of the respondent grandmother in a sex instruction manual.

John McManamy

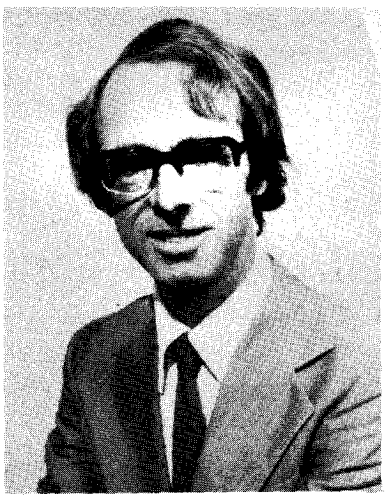
Wanted: Litigious Applicants

Wellington's *Evening Post* recently printed a situations vacant notice seeking the services of an investigating solicitor for the Commercial Affairs Division of the Justice Department. Readers were advised:

Applicants should sue form PS17A.

Invalid planning approval and negligence liability

K A Palmer



In this article Dr Palmer, a Senior Lecturer in Law at the University of Auckland, examines the implications of a recent High Court decision in which damages were awarded to a company that suffered loss through acting on a planning approval improperly granted. He goes on to consider, in the light of this and other recent New Zealand decisions, the nature of a planning consent, on his way referring to relevant Canadian and Australian cases.

Introduction

IN the recent decision *Port Underwood Forests Ltd v Marlborough County Council* (Blenheim Registry, High Court, Judgment 21 January 1982), Jeffries J was required to decide whether a Council could be liable for damages arising on an alleged "negligent misstatement" that planning approval had been granted to carry out an exotic afforestation project. In coming to the conclusion that the Council was liable, his Honour stated:

> It is sufficient to remark that over the last two decades the development of the common law negligence claim has been relatively swift and far reaching. Whether a private person could bring such a claim against a publicly constituted statutory body might have been arguable until 1977, but the decision in *Anns and Others v London Borough of Merton* [1977] 2 All ER 492 has clarified many issues.

As to the power and duty of administering the district planning scheme, and authorising changes of use or developments, his Honour stated:

> In the instant case the defendant gave a so-called permission which was plainly defective because the statutory procedure had not been followed. On the authority of *Anns'* case (supra) I would hold there is a duty of care in such circumstances. The duty owed was to give valid, authorised permissions under the statute to persons entitled to make applications for consents or permissions.

The Council was accordingly held liable for $232 damages for legal costs arising out of an injunction served on the company in 1976 by persons who had been advised that the original consent given in 1975 was invalid, and $787 damages were awarded as the agreed cost of clearing and replanting part of the land with decorative trees. A further claim for $3,080 legal costs for obtaining a valid planning consent (after an appeal) in 1977 failed, as the evidence did not prove causation.

The decision of Jeffries J is of considerable interest because it represents the 51st step in the development of negligence liability in this country, the previous steps having been ably stated by R P Smellie Esq, QC, in the article "Fifty Steps and More" [1981] NZLJ 511. In that article, the learned author traces the inexorable development of negligence liability from *Donoghue v Stevenson* [1932] AC 562 to include liability for negligent misstatement established in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465, where there is an assumption of responsibility arising out of a special skill or position, up to the liability of local authorities having statutory powers for "operational negligence" established in the *Anns* case. The liability of councils for the negligent issue of building permits is of course confirmed by the Court of Appeal in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, albeit that the builder concerned may also share the liability if still solvent.

One virtue of negligence liability is that it rests in the common law and has not been overtaken by the orchestrated codification which has almost consumed the law of contract (with apologies to Dr G P Barton, "Whither Contract" [1981] NZLJ 369). The basis of the tort, namely that justice requires a remedy for acts or omissions which can be foreseen as likely to cause unjustifiable injury, should, as a matter of principle, apply to the notification of planning approval if considered but a step in the construction or development process, especially where the consequence of approval is the carrying out of work in the utilisation of land which does not in itself involve a building permit. However, 14 years ago, the conventional view was that the failure to require a planning consent or the notification of an invalid approval did not confer any right of action sounding in damages, either upon the applicant or upon the person detrimentally affected but could support the issue of an injunction. In *Attorney-General v Birkenhead Borough* [1968] NZLR 383, in similar circumstances a building was erected without a change of use consent, and the alleged permission given by the Council was ruled to be invalid. The neighbour's claim for damages based only upon breach of statutory duty failed, following English decisions which held that the Town and Country Planning legislation did not confer new rights upon individual members of the public. Richmond J stated (p 389):

the 51st step in the development of negligence liability

> From the point of view of policy

> and convenience, it would be an astonishing result if all persons "claiming to be affected by the use" could bring actions for damages against anyone who commenced a use which detracted from amenities of the neighbourhood, particularly when one bears in mind the breadth of the concept of "amenities" as defined in the statutes. In all the circumstances, I cannot think that the intention of the legislature must have been to confer upon private individuals such a right to sue for damages as is contended for in the present case.

The same conclusion was reached by the South Australian Supreme Court in *Neville Nitschke Caravans (Main North Rd) Pty Ltd v McEntee* (1976) 15 SASR 330; 40 LGRA 276.

Planning consent as a quasi-judicial function

In the planning area, the approach of Canadian Courts has been generally to categorise the planning function of a local authority as involving the exercise of a quasi-judicial power, and liability does not arise for a negligent mistake of fact or law where the Council acts in good faith: *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg* (1972) 22 DLR (3d) 470. Likewise, the issue of a consent to land subdivision, where the land is found to be unsuitable for building and liable to flooding, is not an administrative action which gives rise to liability for a negligent decision: *Bowen v City of Edmonton (No 2)* (1977) 80 DLR (3d) 501; 6 WWR 344. The *Welbridge* and *Bowen* cases were considered in *Takaro Properties*. It would seem that in New Zealand the granting of land subdivision approval to a scheme plan and the sealing of a survey plan (where no objection rights or hearing apply) would be considered an administrative or operational function for which liability could arise. Hence the need for clear powers to refuse subdivision approval for land which is unstable or liable to flooding (Local Government Act 1974, s 274) and further powers, where no prior subdivision is under the immediate control of the Council, to refuse the issue of a building permit for structures upon lots which are likewise unsuitable (s 641(2)(a) and (b)).

Although the formal decision of a Council upon a notified planning application is categorised as a quasi-judicial function (*Denton v Auckland City* [1969] NZLR 256; *Atkins v Mays* [1974] 2 NZLR 459), statements made by Council officers or undertakings by responsible persons prior to a hearing may give rise to liability for negligent misstatement where considered to be part of the administrative or operational functions of the local authority. However, the promises or statements must be made in such circumstances that it is clear that an assumption of liability is being undertaken or ought to be imputed, and the officer had a special skill or responsibility as to accuracy: see *Meates v Attorney-General* [1979] 1 NZLR 415, 447. In the *Meates* case, a Minister of the Crown was not liable for casual promises given in circumstances where the promises ought to have been known to be not binding. Also, with reference to casual advice or inquiries (as contrasted with the formal granting of a planning consent or approval of a development), the Council officer would retain the right and ability to disclaim responsibility for the accuracy and to refer the inquirer to his own professional advisers for confirmation.

Planning and subdivision approval as an operational power

As indicated, the approval of a land subdivision plan in New Zealand without any formal hearing or rights conferred on other persons is likely to be construed as an administrative function in the operational area, which would give rise to liability for negligence. The approval of a scheme plan is in principle similar to the issue of a building permit in that the applicant is prima facie entitled to approval where the plan complies with the town planning scheme provisions, any code of subdivision, or bylaws, subject only to the exercise by the Council of the statutory discretions to refuse approval of the subdivision or building permit. As the *Anns* case emphasises and as implicit in the *Johnson* decision, the Council must exercise this power in the public interest where required, and a duty of care will be owed to persons whom the council ought to foresee as potential buyers or occupiers of the development it approved. The Council must act to protect the interests of these people under the "neighbour" principle.

But though Richmond J in the former case ruled against the plaintiff, he retained sufficient doubts about the justice of the end result to take the precaution of assessing damages in favour of the plaintiff whose property was detrimentally affected at $1,000 in case the matter was taken to appeal. The plaintiff in the *Port Underwood* case did not plead breach of statutory duty, but based its claim wholly upon the issue of a negligent misstatement as to a valid consent. At this stage, one may raise the issue as to whether, as a matter of principle, the plaintiff in the *Birkenhead* case should today also have a right of action against the Council for negligently allowing the building to proceed in breach of planning obligations, if the actual developer would have a cause of action arising out of the same facts. The Australian decision in *Freeman* (infra) indicates that the neighbour detrimentally affected does have the same right of action as the applicant.

Nature of planning approval

It is common knowledge that in New Zealand certain uses and developments may proceed as of right as predominant uses, or subject to discretionary regulation concerning landscaping, design and external appearance, where the scheme provides such controls. See s 36(4) and (5) of the Town and Country Planning Act 1977. As a halfway house, a proposal may qualify for approval following the granting of a dispensation or waiver from ordinances by consent of neighbours affected, pursuant to powers under subs (6). In other situations, a notified planning consent may be necessary for a conditional use defined in the zone, or for a change of use or work contrary to a proposed scheme change, variation, or review; or a specified departure consent may be required to carry out activities which are not authorised or are contrary to a land designation for a public work and contrary to the predominant use authorisation of the underlying zoning (the latter position being settled in *Manukau City Council v Pakuranga Community Drop-in Society Inc*, Court of Appeal, 18 September 1981, CA37/81). The Act does not define what amounts to "an application", and it may reasonably be assumed that, where a work may proceed as of right, there is no formal application for consent within the meaning of s 65 of the Act nor obviously any right of appeal to the Planning Tribunal under s 69 against the confirmation of predominant use status or other compliance with the scheme. Where the Council in effect rubberstamps the plans or development

as complying with the scheme, as a precondition to obtaining a building permit, the Council is clearly carrying out an operational power and acting administratively. The importance of this distinction is to determine whether negligence liability can arise, as it is a well-known principle that liability does not exist for the decision arising out of the exercise of a judicial or quasi-judicial function, even where given negligently: *Nakhala v McCarthy* [1978] 1 NZLR 291. Neither does liability arise where the power and decision may be exercised upon policy grounds provided the grounds are relevant to the power and exercised in good faith: *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314, 325, 334, 335, CA.

As already noted, a failure by the Council to exercise the powers does not confer any personal right of action in damages for breach of statutory duty (*Birkenhead Borough* case), and any exercise of the power which causes delay and loss to the applicant from a refusal does not confer rights to statutory compensation in ordinary circumstances, where the power is lawfully exercised in good faith: *Superior Lands Ltd v Wellington City Corporation* [1974] 2 NZLR 251, CA. Where the refusal relates to a public work which is later abandoned, the landowner may be entitled to claim actual costs and expenses: Public Works Act 1981, s 76.

In Australia, the granting of planning consent or indication of planning approval has generally been construed as an operational act which gives rise to liability for a negligent mistake of law or fact. The cases may be summarised.

(1) *Hull v Canterbury Municipal Council* [1974] 1 NSWLR 300. The plaintiff entered into an agreement to purchase a residential property conditional upon obtaining approval to erect motel units. The Council notified approval and the purchase was completed. Later the approval was found to be invalid as the Council had failed to consult with the State Planning Authority and fresh consent could not be obtained. A claim based upon negligence under the "neighbour" principle was upheld as the Council owed a duty of care to the applicant judged by "the proximity of the parties". Nagle J considered an alternative claim based upon negligent misrepresentation under the *Hedley Byrne* principle could possibly succeed as well, but left open the question of a "voluntary assumption of the risk" as the Council was obliged by law to carry out the approval function. Damages for the loss in land value were awarded against the Council. A third cause of action based on the principle in *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156, alleging an action on the case for an unlawful, intentional and positive act, did not succeed as there was no evidence that the Council deliberately intended to harm the plaintiff. This latter cause of action has now been clarified by the Privy Council in the *Dunlop* case (infra). In the *Port Underwood* decision, Jeffries J specifically referred to the *Hull* decision with approval.

Damages for the loss in land value were awarded against the Council

(2) *G J Knight Holdings Pty Ltd v Warringah Shire Council* [1975] 2 NSWLR 796; 34 LGRA 170. The plaintiff company obtained planning consent to add a sail loft building to an existing use structure but, following commencement of building, a stop work notice was issued as the State Authority had not been consulted and the consent was invalid. Yeldham J followed the *Hull* decision and found the Council liable in negligence and liable for deterioration in the building and extra costs pending final completion.

(3) *Shaddock (L) and Associates Pty Ltd v Parramatta City Council* (1981) 36 ALR 385, High Court. Although not a case involving the granting of a planning consent, this recent decision of the High Court concerning a factual situation which arose in 1973 is of a general importance concerning the responsibility of a local authority in giving information to an inquirer. The facts concerned the purchase of a commercial property by the appellant. Prior to the purchase, appellant's solicitor telephoned the respondent Council inquiring whether the property was affected by any road-widening proposals. From an unidentified officer a negative answer was received. The solicitor at the same time forwarded a request in writing for information as to the zoning and also specifically as to whether the property was affected by road-widening proposals. The certificate was returned with the zoning question answered, but the road-widening question left blank. On the assumption that there were no road proposals the purchase was completed. Subsequently it was found that existing road proposals involved the acquisition of almost a third of the property and the loss in value to the land was $133,000.

In the Lower Court, Waddell J considered that a duty of care could arise for a gratuitous negligent statement under the *Hedley Byrne* principle [1964] AC 465, but, in accordance with the majority ruling of the Privy Council in *MLC Assurance Co Ltd v Evatt* [1971] AC 793, the duty was limited to a person having a special skill and competence and assuming a responsibility, and, on the facts, the Council did not hold out that skill. The decision in favour of the Council was confirmed by a majority of the Court of Appeal. The High Court of Australia reversed the decision, holding the Council liable. Gibbs, CJ stated (p 392):

> From the standpoint of principle there is no difference between a person who carries on the business of supplying information and a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than to other persons, whether or not it has a statutory duty to do so. In either case, the person giving the information to another who he knows will rely upon it in circumstances in which it is reasonable for him to do so, is under a duty to exercise reasonable care that information given is correct. A public body, by following the practice of supplying information upon which the recipients are likely to rely for serious purposes, lets it be known that it is willing to exercise reasonable skill and diligence in ensuring that the information supplied is accurate. In the circumstances, diligence might be

Council held negligent where misleading reply given to query on roading proposals

more important than skill, although competence in searching for and transmitting the information must play a part. However, even if diligence only and not skill were required, a public body might be specially competent to supply material which it had in its possession for the purposes of its public functions.

On the evidence, the Judges considered that the telephone advice from an unknown person was not such as to give rise to a duty of care, as the person giving the advice would not have known that it was likely to be acted upon, but the giving of the certificate, which by implication indicated there were no road proposals, was negligent. As to a suggestion that the imposition of a duty of care would unduly hamper statutory and local authorities in the discharge of their public functions, Mason J considered this an unsupported assertion, and an authority could, if it so wished, obtain protection against liability by means of insurance (p 406).

The Council was held liable for the loss in land value, and for consequential losses relating to payment of rates during a two-year period in which the future of the land was assessed. The decision, accordingly, places liability squarely upon a local authority in giving information as to the state of zoning and public works where a written inquiry is made and an unqualified reply or answer is given.

Council liable for unauthorised consent to building variation which prejudiced neighbour

(4) *Freeman v Shoalhaven Shire Council* [1980] 2 NSWLR 826. This case involves an extension of the negligence principle to a claim by a neighbour affected by the granting of an invalid planning consent. The second defendants applied for a building permit which was granted and, to a certain extent, protected views enjoyed by the plaintiffs. After approval, the second defendants sought a variation of the consent, which was granted, and the dwelling was erected closer to the boundary than would have been permitted under the original approval. The Council failed to comply with the procedures relating to a variation and did not give the plaintiffs notice of the changes sought. The variation consent was therefore invalid, and the Council was liable to the plaintiffs for loss of land value. Kearney J adopted the distinction "between the exercise of quasi-judicial powers or policy decisions by the council and the negligent exercise of what has been described as a duty, not in the area of policy or discretion, but 'in the operational area' of the activities of the council." His Honour stated (p 841):

> I consider that the circumstances of the present case bring it within the latter category, so as to create a duty of care by the council to the plaintiffs. I consider that in order to render effective the statutory entitlement of the plaintiffs to notice and to object and have their objection considered, a duty towards the plaintiff was imposed on the council to take reasonable steps to ensure that its decision, made in the light of their objection, was duly carried into execution. This seems to me to be a necessary supplement to or incident of the plaintiffs' rights in relation to the council. Further, it seems to me that in acting as it did the council failed to take reasonable care, and, on the footing that the plaintiffs can establish any damage thereby caused to them, I would consider that the council incurred a liability in negligence to the plaintiffs.

Concerning the claim against the builder neighbours, the holding was that no duty of care was owed by the neighbour and, even if such a duty did exist, there was no negligence as the neighbours at all times acted in conformity with council consent, albeit an invalid consent. An alternative claim based upon the *Beaudesert* principle failed, as the claim did not show anything more than breach of a statutory obligation. Damages were awarded for loss of the value of the land ($2,000) and loss of amenities ($1,500).

(5) *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202; 1 NSWLR 76. This Privy Council decision is important as defining the bounds of the action on the case alleging an abuse of office, and also as to whether the taking of legal advice which turns out to be incorrect can or should amount to negligence. The plaintiff property owner claimed for loss of land value, costs and expenses, arising out of refusal of a building permit for a block of flats. In earlier proceedings, the refusal was found to be wrong as based upon a building line restriction which was legally unauthorised. The Council was found to have acted in good faith, and a claim alleging trespass on the case as the result of an unlawful, intentional and positive act and alternatively alleging negligence was dismissed by the trial Judge. On appeal, the Privy Council held that the action on the case claim based upon the *Beaudesert* principle required proof of an act that was knowingly unlawful or illegal, and not merely unauthorised or void by virtue of a legal mistake or subsequent Court declaration. The Council's resolutions were merely invalid and not unlawful within the criteria. Under the similar claim of abuse of public office, it was necessary to establish malice, and there was no evidence of a misfeasance of power to support the claim.

Council not liable in negligence where it acted on competent legal advice

Concerning the alternative negligence claim, the Privy Council stated (p 1209):

> What more could the council be reasonably expected to do than to obtain the advice of qualified solicitors whose competence they had no reason to doubt? It is true that Wootten J held that the legal advice which the council had received from their solicitors had been wrong; but it is only fair to the reputation of the solicitors who gave it to add that, until that judgment made the matter res judicata between the parties, the question of law . . . was an evenly balanced one and, in their Lordships' view, to answer it either way at any time before that judgment could not have amounted to negligence on the part of a solicitor whose advice was sought on the matter.

This statement, by Lord Diplock, must give reassurance to persons required to advise on fine legal points, and clearly indicates that a council is unlikely to be found liable in negligence where it has sought and

acted upon competent legal advice. (To the same end, individual councillors are not liable to surcharge for unlawful expenditure where acting in good faith upon solicitors' advice: Public Finance Act 1977, s 31(9)(d).)

Having regard to the above series of decisions, the *Port Underwood* judgment is entirely consistent with a finding of liability against the Council for the issue of an invalid planning consent. Furthermore, the *Freeman* case and the general principles indicate that, where a council fails to require a notified planning application where legally necessary, persons affected who would have had the right to object or appeal are owed a duty of care and have a claim for negligence for losses suffered. To this extent, the plaintiff in the *Birkenhead Borough* case (supra) would today have succeeded upon an allegation of negligence.

A claim based not on negligence but upon the action on the case or the similar abuse or misfeasance of public office ground will succeed only upon a proof of malice or an abuse of power directed at the applicant. The *Dunlop* decision confirms the approach taken in *MacKenzie v MacLachlan* [1979] 1 NZLR 670. (Cf Dench, "The Tort of Misfeasance in Public Office" (1981) 4 AULR 182.) Honest ignorance of legal obligations or a bona fide error on a matter of law or obligation would not be sufficient to establish the tort, but could be grounds for the issue of an injunction to ensure compliance with procedures: *Duigan v Thames Coromandel District Council* [1979] NZ Recent Law 147 (following the *Birkenhead* case).

Port Underwood facts

In finding the Marlborough County Council liable in negligence for the misstatement concerning planning approval, Jeffries J noted that, in 1974, a director and major shareholder of the plaintiff company, after purchase of the land, approached the Council concerning permission to plant an exotic forest. In 1975, the planning officer indicated that consent would be forthcoming upon receiving a letter. At the same time, the solicitors for the director wrote to the Council indicating that a change of use application was to be filed and information was requested as to service. The Council treated one or other letter as an application apparently, and issued a letter of approval.

Two explanations were given for the failure to follow the formal change of use procedure under s 38A of the Town and Country Planning Act 1953. First, the planning officer indicated that, following publication of the proposed scheme which zoned the land "Rural A" and limited commercial forestry to a conditional use consent, dissatisfaction from the landowners led to pressure upon the Council and a policy decision to facilitate approval as far as possible on the merits of each application. The alternative explanation adduced by the chairman was that the Council believed that, where no detraction from amenities arose, a public application was not necessary and the Council could approve the matter informally. Reference was made to *Oakley v I Clark and Son Ltd* [1967] NZLR 353. His Honour rejected the explanation of the chairman, as there was no evidence that the Council applied it across the board to all applications. The Judge concluded:

> The Court therefore is left with the conclusion that there was a deliberate decision to follow a procedure not authorised by the Act in an effort to ameliorate the effects of a planning decision on a group of developers.

In coming to this conclusion, his Honour no doubt had the advantage of seeing the witnesses, but one may at least comment that conceivably the Council could have honestly believed that planting of bare land, especially land subject to erosion, with exotic forests would not be a detraction and, accordingly, the consent under s 38A was not necessary. If the planting had been in native timbers, one would not expect any person to believe a detraction arose where the land was being restored to its original uncleared state. However, at the time, several decisions clearly indicated that any change in landscape should be considered per se a detraction: *NZ Institute of Agricultural Science v Paparua County* [1969] NZLR 653; *Mundy v Cunningham* [1973] 1 NZLR 555; *Attorney-General ex rel Mundy v Cunningham* [1974] 1 NZLR 737. His Honour found it "difficult to believe that in 1975 there could exist such a misunderstanding about the proper procedure for a change of use application as was suggested". To the extent that his Honour is applying a uniform standard of knowledge of planning law to this particular Council as otherwise expected to Councils throughout New Zealand, the finding of a duty of care and breach of the duty is no doubt correct. Had the year been 1958, confusion could have been justifiable: *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1, 4, 11.

Contributory negligence was pleaded without nominating particulars, and his Honour found there to be no contributory negligence on the facts. The request for advice as to a formal application and service was ignored, and this omission presumably did not place any notice or duty upon the plaintiff or its solicitors. However, in holding that the plaintiff had not established the major costs of the later valid planning application "as flowing from the negligent act alone", his Honour seems to have balanced out the Council default to a degree.

Conclusion

In brief conclusion, the following propositions may be advanced on the strength of the cases considered:

(1) A Council may be liable in negligence for giving a planning approval which is later found to be invalid.

(2) A duty of care is owed not only to a developer but also to a person otherwise affected to observe the proper statutory procedures and scheme obligations.

(3) A Council will not be liable for negligence in performing a quasi-judicial function such as granting a notified planning consent. Liability may, however, arise for ancillary advice, unless disclaimed.

(4) The negligent granting of land subdivision approval may give rise to liability, especially in respect of a claim by a purchaser, from the subdivider, to whom a duty of care is owed.

(5) The Council is not an absolute insurer, and negligence must be established. As to Council actions taken pursuant to legal advice, such action will not normally be considered negligent where the Council has sought and acted upon competent legal advice.

(6) Concerning disclaimer, the Council may not disclaim responsibility for the truth of, or representation contained in, a planning approval, being an exclusive statutory function assumed by the Council, but the Council may disclaim responsibility for the accuracy of advice given pursuant to casual inquiries (*Hope v Manukau City Corporation* [1976] Current Law, para 762, Chilwell J, unreported — see

[1976] NZLJ 541).

(7) The Council will be vicariously liable for the tortious acts of its employees within the scope of their employment. But not all statements or representations by an employee will give rise to liability for negligent misrepresentation; the particular employee must hold out or be expected to exercise a special skill and responsibility for liability to arise.

(8) Damages will be assessed at the date of the claim or hearing and may include legal costs incurred and the present value of carrying out work (*Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928).

(9) Refusal of planning permission or refusal of a land subdivision scheme in good faith, acting on grounds believed to be adequate and on legal advice as to powers where necessary, is not likely to give rise to any liability for loss or delay, even where the decision may be reversed upon appeal rights being exercised. For a claim to succeed, evidence of abuse or misfeasance of public office or malice would be necessary.

(10) Any mistake of fact or law made by the Planning Tribunal will not confer a right of action against the Tribunal while acting in good faith: Town and Country Planning Act 1977, s 140.

Accretion and the Privy Council

F M Brookfield

This article provides a coda to the author's earlier article on the Southern Centre of Theosophy case which appeared in our issue of August 1981. In his present article Dr Brookfield, who is an Associate Professor of Law at the University of Auckland, examines the decision on final appeal when this case (after some difficulty) reached the Privy Council.

THE decision of the Full Court of the Supreme Court of South Australia in *Southern Centre of Theosophy Inc v South Australia* (1979) 21 SASR 399, dealing with a claim of accretion to leasehold land held from the Crown and bordering an inland lake, has been reversed by the Judicial Committee of the Privy Council: [1982] 1 All ER 283 (Lord Wilberforce, Lord Russell of Killowen, Lord Bridge of Harwich, Sir David Cairns and Sir Robin Cooke). The Full Court's decision and the issues it raised were discussed by the writer in "Wind, Sand and Water: Accretion and Ownership of the Lake Bed" [1981] NZLJ 365, with which the present note should be read.

Jurisdictional problems

The case had some difficulty in getting to London at all. After the decision of the Full Court, allowing the appeal of the State of South Australia and rejecting the claim of the Southern Centre (the lessee) to accretion, the latter moved for leave to appeal to the Privy Council. Then, in the High Court of Australia, the State sued unsuccessfully for a declaration that, by reason of constitutional changes (beginning at Federation) between Australia and the United Kingdom, appeals could no longer be brought from the State Supreme Court to the Privy Council, whether under the Prerogative or the Judicial Committee Act 1844. Over the dissent of Murphy J the majority of the High Court, in *Southern Centre of Theosophy Inc v South Australia* (1979) 27 ALR 59, confirmed the orthodox view that in matters of general law appeals still so lie. Thus the way was clear for the appeal by the Southern Centre to proceed along the old imperial way.

It is interesting to note that, had the High Court decided otherwise and the majority agreed with Murphy J, strong support would have been given to the decision and reasoning of Wilson J in *Re Ashman and Best* (noted [1976] NZLJ 458) where unrepealed 19th century imperial legislation was held inoperative in New Zealand. However, the doctrine of the High Court of Australia is that the legal and constitutional structure of the (British) Commonwealth remains intact unless formally dismantled by valid legislation. In particular, except where repealed, the Judicial Committee Act 1844 and the machinery for appeal created by United Kingdom Orders in Council under it, remain operative in the Australian States; and, no doubt, as one has all along supposed, in New Zealand also.

Accretion

But the claim to accretion and its final determination are the main subject of this note. Here the decision of the Full Court had rested primarily on a conveyancing point, that the boundary described in the parcels of the lease held from the Crown by the Southern Centre was a fixed line and not a water boundary. The description of the land concluded thus:

> . . . as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide.

It was these words which had chiefly influenced the Full Court in deciding that the lake shore boundary of the land leased, ascertained by survey in 1888, was a fixed line so that the gradual recession of the waters of the lake brought no accretion to the land included in the lease.

In deciding otherwise, the Privy Council referred to the basis of the doctrine of accretion in justice and convenience, and to the need for the intention of the parties to be plainly shown that the doctrine is to be excluded. Their Lordships' judgment (delivered by Lord Wilberforce) stated the effect of the authorities (such as *Attorney-General v M'Carthy* [1911] 2 IR 260 and *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599) as follows (at pp 287-288):

> . . . where land is granted with a water boundary, the title of the grantee extends to that land as added to or detracted from by accretion, or diluvion, and that this is so whether or not a grant is accompanied by a map showing the boundary, or contains a parcels clause stating the area of the land, and whether or not the original boundary can be identified.

In the instant case, the boundary in question was shown on the public map as (in Lord Wilberforce's words at p 285) "a thick wavy line which manifestly corresponded with the margin of[Lake George]", though it was not identified on the map as a water boundary. The judgment refers to the surveyor's field notes and diagrams as establishing it to be in fact the high-water mark of the lake.

The comment on the Full Court decision at [1981] NZLJ 365 must now be read in the light of the above. The Privy Council judgment is obviously important in drawing attention authoritatively to the presumption, in appropriate circumstances, in favour of movable water boundaries rather than fixed line boundaries. But, where a non-navigable stream boundary of land transfer land in New Zealand is in question, one must note the complications caused by the decision of the Court of Appeal in *Attorney-General and Hutt River Board v Leighton* [1955] NZLR 750 (discussed by Hinde, McMorland and Sim, *Land Law* (1978) i, para 2.219 and by the present writer in *New Zealand Torrens System Centennial Essays* (1971) (ed Hinde) 162, 197-203).

Having held that the boundary in question was a water boundary, the Board had to decide questions upon which the opinions of members of the Full Court had been obiter only.

Thus: (1) Accretion was held to apply to inland lakes. Here the Board followed (as Zelling J in the Full Court had been inclined to do) American authority in preference to the dogmatic assertion to the contrary of Eve J in *Trafford v Thrower* (1919) 45 TLR 502, which had so far apparently provided the only English or Commonwealth authority on the matter. Lord Wilberforce refers in particular to the broad statement of the rule based on principles applying equally to land bounded by river, lake or sea, in the judgment of the Supreme Court of the United States delivered by Chase CJ in *Banks v Ogden* 69 US (2 Wall) 57, 67; 17 L Ed 818, 821 (1865).

(2) It was held that in the case of water boundaries, the doctrine of accretion was not limited to the action of the water alone but included the action of the wind, just as (on well-established authority) it may include changes caused by human action (other than deliberately by the claimant) which augment the action of water. The judgment points out the practical difficulty, in a case like the present, in differentiating between gradual augmentation from these several causes.

This welcome clarification of the law did not need to extend to consideration of the effect of wind on land as distinct from water boundaries. The Privy Council expressly left the former type of case open.

Hence the way was clear for the Privy Council to decide whether accretion had occurred in the instant case by the gradual and imperceptible means so long required by the common law rule and its Roman model.

Observing that the question was not merely one of the movement of parts of the sand dunes, but of "how long it takes for a consolidation to take place bringing about a stable advance of the land" (p 292), the Board took a different view of the evidence from that of Zelling J who (alone dealing explicitly with the matter in the Full Court) thought that much of the wind-blowing movement had in effect taken place in spurts. The Privy Council held rather that, though the evidence was finely balanced, it was such as could support the trial Judge's finding that the movement of the boundary was imperceptible within the meaning of the authorities.

Ownership of the lake bed

It will be seen that the judgment of the Privy Council valuably clarifies several aspects of the law relating to accretion and provides definite authority where there was none before. In one respect, however, the judgment is somewhat obscure. This concerns the title to the lake bed itself. It is true, of course, that once the doctrine of accretion was held to apply, it made no difference as between the Crown and its lessee whether the leasehold title ran to the middle line of the lake or to the lake margin at high-water mark. But it might make a difference as between the lessee and a possible third party not before the Court; for, if the lease ran to the middle line of the lake, then, but not otherwise, the accretion would presumably occasion an adjustment of the sublacustrine boundary with the opposite riparian owner. If, on the other hand, the lake bed is the allodial property of the Crown, separate from the shore holdings granted out in fee simple or leasehold, the issue could only be between the parties to the case, that is the State of South Australia and the Southern Centre. One must infer that the Privy Council accepted the latter position, largely from Lord Wilberforce's reference at (p 287 in a context not otherwise helpful) to

> the fact that both land to which the accretion is claimed and that covered by the waters of Lake George are allodial property of the Crown.

This is in reference to the words of Wells J in the Full Court (21 SASR at 414), that "both the land covered by the lake and the land from which the lease was taken have, at all material times, been held by the Crown as allodial property". These expressions seem to be consistent with the view developed by Zelling J at much greater length that, in general, the beds of inland lakes do remain the allodial property of the Crown. There is good ground for accepting that view, in New Zealand especially ([1981] NZLJ at 366-368). But the Privy Council's brief reference to the point is somewhat cryptic. Difficulties, such as Lord Macnaghten's dictum in *Johnston v O'Neill* [1911] AC 552, 577 (that the Crown was not "of common right" entitled to the soil or waters of an inland non-tidal lake), remain for future judicial solution.

The duty of disclosure

Johanna Vroegop, LLM

In this short article the author, a Lecturer in Commercial Law in the Accountancy Department of the University of Auckland, queries some common assumptions concerning the vendor's legal duty to disclose title defects on a sale of land.

SEVERAL texts on the law relating to contracts for the sale of land either contain parts which are devoted to the vendor's duty of disclosure, or discuss the rights of the parties, where there is a defect in title, as though there were merely an obligation on the vendor to tell the purchaser of the existence of the defect before contract.[1] Some judgments, in discussing the remedies available for a title defect, also state the rights of vendor and purchaser in a manner which indicates that such a duty rests on the vendor.[2] It is suggested that stating the rights of the parties in this way shows a misconception of the true position. Where there is a title defect the purchaser has a remedy, not for a failure by the vendor to disclose its existence, but for the vendor's breach of contract in being unable to give him a good title. Every contract for the sale of land contains an implied term that the vendor will give a good title, and the existence of a defect is a breach of that implied term. The function of a pre-contract disclosure by the vendor is to fix the purchaser with knowledge of the existence of the defect when he entered into the contract and, if he also knew that the defect was one whose removal the vendor was not in a position to enforce, to deprive him of remedy in respect of that defect.[3] It should be stressed that it is the fact of the purchaser's knowledge which precludes him from objecting, and it makes no difference how he obtained that knowledge. The effect is the same whether he is told of the defect by the vendor,[4] or it is disclosed in the contract,[5] or he obtains the information from another source.[6]

Support for the argument that the vendor's duty is to give the purchaser a title free of defects, not merely to disclose their existence, can be found in the cases cited where the duty of disclosure is mentioned. An examination of the decisions shows that their basis was the vendor's breach of his obligation to give a good title, and not his failure to disclose a defect. In addition, the majority of cases concerning title defects discuss the rights of the parties without reference to a duty of disclosure.[7] The only exception is the decision of the Supreme Court of Victoria in *Zsadony v Pizer*.[8] The purchaser's action, which related to the existence of a title defect, was framed as though the failure by the vendor to disclose the defect were a cause of action distinct from his failure to give a good title, and it was dealt with by the Court in that way. It is suggested that, in view of the authority to the contrary, that decision cannot be regarded as good law. Most of the texts referred to contain an explanation of the correct position,[9] but Blanchard and Stonham are notable exceptions.

It is suggested that stating the rights of vendor and purchaser as though the vendor's duty were merely to disclose a defect in title creates unnecessary confusion and that it should be avoided. Another reason for omitting any reference to a duty of disclosure is that explaining the matter as though the vendor's only duty were to disclose a defect suggests that he is under no obligation in respect of defects of which he is himself unaware. In fact, the vendor's lack of knowledge of a defect in no way affects his obligation as to title.[10] Stonham's statement to the contrary[11] is based on the decision in *Zsadony v Pizer* (supra) and must, it is submitted, be regarded as incorrect.

1 Battersby, *Williams' Contract for Sale of Land and Title to Land* (4th ed 1975), 94-113; Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (2nd ed 1981), 55-60; Farrand, *Contract and Conveyance* (2nd ed 1973), 62-77; Farrand and Gilchrist Smith, *Emmet's Notes on Perusing Title and on Practical Conveyancing* (16th ed 1974), 97-100; Stonham, *The Law of Vendor and Purchaser* (1964) para 357.

2 *Mostyn v West Mostyn Coal and Iron Co Ltd* (1879) 1 CPD 145 at 151, per Brett J; *Re Harris and Rawling's Contract* (1894) 38 Sol Jo 235 at 235, per Chitty J; *Molyneux v Hawtrey* [1903] 2 KB 487 at 493, per Collins MR; *Carlish v Salt* [1906] 1 Ch 335 at 341, per Joyce J; *Cook v Griffiths* (1913) 32 NZLR 1109 at 1111, per Stout CJ; *Moss v Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1923] NZLR 264 at 268, per Hosking J; *Stankievich v Armacost* [1926] 2 DLR 401 at 401, per Harvey CJA; *Re City of London Real Property Co Ltd* [1949] Ch 581 at 585, per Vaisey J; *James v Chiaravalle* [1970] 1 OR 233 at 236, per Parker J; *Dormer v Solo Investments Ltd* [1974] 1 NSWLR 428 at 433, per Holland J.

3 *Paterson v Long* (1843) 6 Beav 589; 49 ER 954; *Smith v Capron* (1849) 7 Hare 185; 68 ER 75; *Nicoll v Chambers* (1852) 11 CB 996; 138 ER 770; *Morley v Clavering* (1860) 29 Beav 84; 54 ER 558; *Henderson v Hudson* (1867) 25 WR 860; *Castle v Wilkinson* (1870) LR 5 Ch App 534; *English v Murray* (1883) 49 LT 35; *Re Gloag and Miller's Contract* (1883) 23 Ch D 320 at 327, per Fry J (obiter); *Larnach v Irving* (1893) 12 NZLR 212; *Hopcraft v Hopcraft* (1897) 76 LT 341; *Meehan v New Zealand Agricultural Co Ltd* (1907) 26 NZLR 766; *Wisely v McGruer* (1909) 28 NZLR 481 (a decision which, it is suggested, is incorrect because of the effect of the Property Law Act 1908, s 81(2), but which remains a valid authority on this point); *Radium Hill Co No Liability v Moreland Metal Co* (1916) 16 SR (NSW) 631 at 635, per Harvey J; *McGrory v Alderdale Estate Co Ltd* [1918] AC 503 at 508, per Lord Finlay; *Redapple v Hely* (1931) 45 CLR 452 at 471, per Dixon CJ; *Re Roe and Eddy's Contract* [1933] VLR 427 at 431, per McFarlan J (obiter); *Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110.

4 *English v Murray* (1883) 49 LT 35; *Re Gloag and Miller's Contract* (1883) 23 Ch D 320 at 327, per Fry J (obiter); *Meehan v New Zealand Agricultural Co*

Ltd (1907) 26 NZLR 766.

5 *Nicoll v Chambers* (1852) 11 CB 996; 138 ER 770; *Castle v Wilkinson* (1870) LR 5 Ch App 534.

6 *Paterson v Long* (1843) 6 Beav 589; 49 ER 954; *Smith v Capron* (1849) 7 Hare 185; 68 ER 75; *Morley v Clavering* (1860) 29 Beav 84; 54 ER 558.

7 A recent example in New Zealand is the decision of Chilwell J in *Harris v Weaver* [1980] 2 NZLR 437 at 439.

8 [1955] VLR 496.

9 Battersby, *Williams' Contract for Sale of Land and Title to Land* (4th ed 1975) 94; Farrand, *Contract and Conveyance* (2nd ed 1973) 62; Farrand and Gilchrist Smith, *Emmet's Notes on Perusing Title and on Practical Conveyancing* (16th ed 1974) 97.

10 *Murrell v Goodyear* (1860) 1 De GF & J 432 at 450; 45 ER 426 at 433-434, per Turner LJ; *Ashburner v Sewell* [1891] 3 Ch 405; *Re Brewer and Hankin's Contract* (1899) 80 LT 127; *Re Puckett and Smith's Contract* [1902] 2 Ch 528; *Shepherd v Croft* [1911] 1 Ch 521 at 530-531, per Parker J; *McDonald v Wake* [1919] GLR 106; *Moss v Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1923] NZLR 264; *Torr v Harpur* (1940) 40 SR (NSW) 585; *Persson v Raper* (1952) 69 WN (NSW) 10.

11 *The Law of Vendor and Purchaser* (1964) para 357.

Making the offender squirm — forfeiture and confiscation

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The author, who is on sabbatical leave in Wales, takes a critical look at one of the controversial recommendations in the Penal Policy Review Committee's Report.

MOST of the proposals made by the Penal Policy Review committee involve modifications to existing programmes and practices.[1] Overall only two completely new measures are proposed with any real degree of enthusiasm. One of these — the proposal for a new short-term sentence combining custody with non-custodial supervision — is so poorly argued and described that it is rather difficult to see it as a serious practical reform proposition. The other, which is the main subject of this note, is more substantial but it too is weakly argued and rather inadequately described. Furthermore the details, if not the basic concept, were obviously the cause for considerable dispute within the Committee.

1 Forfeiture

The bare bones of the proposal itself are relatively easy to describe. The justifications for it and the details of its operation are less clear. In essence the Committee recommends that major drug dealers and so-called "professional" property offenders should, on conviction, automatically forfeit all their property — including any after-acquired property — subject only to a power in the Court to exempt specific assets from the order and a right in the offender to reclaim any assets that he can prove were legitimately acquired. The seized assets would then be held at the direction of the Minister of Justice and would be used largely for rehabilitative work and research. The object of such a seizure is seen as being to deprive the offender of the proceeds of crime and to provide an additional punishment for serious acquisitive offenders. As such it plainly raises a number of important questions — both of principle and as to how it is likely to operate in practice — which go well beyond its immediate significance for the relatively small area of offending it purports to be concerned with. In that it involves the Crown seizing and retaining property without any need to produce evidence that it has been obtained illegally or used for some illegal purpose or, indeed, that it might belong to anyone other than the offender, solely on the basis of a conviction for a serious offence, the proposal plainly makes a significant departure from basic principle in a number of respects and creates a potentially dangerous precedent for the future. The major question it raises is whether there is any evidence to suggest that such a departure is justified.

(a) The problems of principle

The Committee's thinking on this matter seems to have had its origin in a submission by the Secretary for Justice advocating the Introduction of an additional penalty for serious drug dealing and property offences, which would involve the mandatory forfeiture of all the offender's assets. The justification is not at all clear from the summary of the initial proposal contained in the Committee's report. The Secretary is simply — and somewhat mysteriously — described as "being convinced that the public interest required a more positive approach to major offending by drug traders and 'white-collar' criminals and major property offenders". Nevertheless it seems that the proposal

1 Extensive comment on these proposals can be found in the April issue at [1982] *NZLJ* 121-135.

was essentially deterrent in intention, being seen as an additional and particularly appropriate form of punishment for acquisitive offenders. Plainly, however one views this claim, and leaving aside the somewhat mediaeval flavour of the proposal, it does have the merit of consistency both internally and in relation to basic principle. Forfeiture on this view is simply a form of punishment like any other, aimed at deterring specific categories of offenders who, we have decided, are for one reason or another likely to be particularly susceptible to the particular penalty suggested. The only difference between it and most other penalties is that it is to be mandatory.

No person may be deprived of his . . . property save by due process of law

The Committee adopts a rather different and more problematic approach. It seeks to combine the deterrent basis of the original proposal with a restitutive emphasis culled from its basic principle that "there must be a range of measures available to ensure that offenders do not gain financially or in other ways from their offending" (para 99). Hence the new proposal that the offender can regain assets that he can prove were legitimately acquired. The problem is that in combining these two justifications in this way the Committee has produced a measure which accords with neither of them and which violates basic principle in a way which a measure directed exclusively at one or other of them would not.

What is at stake here is the principle that no person may be deprived of his life, liberty or property save by due process of law. This principle is satisfied where, as in the original proposal, the forfeiture of property is a prescribed penalty for a particular offence. It is also satisfied where the offender forfeits property obtained by or used in the commission of an offence that has been duly proved against him — as, for example, occurs under the Customs Act 1966 and the Fisheries Act 1908. It is even satisfied, although much more tenuously, where property not involved in the immediate offence is ordered to be returned to its owner under s 404(1) of the Crimes Act 1961. It is not satisfied, though, where the property is unconnected with the offence proved against the offender and is seized and retained by the Crown purely on the basis of the type of offence committed and the fact that the only claimant to it, the offender, cannot prove that it was acquired legitimately. If the Crown wishes to seize a citizen's property it should show that the seizure is justified either because the property is derived from or has been used in the commission of a crime, or because it is a legally authorised punishment for an offence committed by the citizen. This proposal, by bridging these categories, avoids the limitations of both and gives the Crown a largely unfettered power to seize and retain property.

What is rather odd about the Committee's treatment of this proposal is its handling of the relationship between the proposal and the existing provisions of s 39 of the Misuse of Drugs Amendment Act 1978. That section enables a Court to increase the amount of any fine in a drug dealing case where it is satisfied beyond reasonable doubt that other drug dealing offences have been committed and that the offender probably still has in his possession money or assets acquired as a result of such offending. Of this section the Committee comments:

> This section has never been invoked since it came into effect and we agree with Working Party 1 that it is wrong in principle and unworkable in practice. If there is sufficient evidence to satisfy a court beyond reasonable doubt of previous drug dealing, he should and could be prosecuted for that offence (para 414).

With respect, this comment is clearly correct. But the logic of its argument surely applies equally to the Committee's own proposal for mandatory confiscation of all assets in such cases? Indeed one would have expected the principle to apply with even greater force to such a proposal since it involves the complete transfer of the burden of proof to the offender. For the Committee to suggest, as it does in para 414, that the proposal here is to be supported because it would, if implemented, accomplish what s 39 set out to do is to miss the basic point of its own criticism of that section. The problem with s 39 is not that it is unworkable — indeed many would argue that that was all that made it acceptable in the first place — but that it is contrary to principle in that it imposes punishment without proper proof of offending. The current proposal harbours exactly the same vice.

The complex provisions regarding burdens of proof in s 39 were inserted very much at the last minute as a result of the successful intervention of the then Secretary for Justice. In general this provision was presented as a minor departure from traditional practice, directed at a specific serious crime problem, under full judicial control and with all the usual rights of appeal. In reality the change was more significant than this and marked a fundamental breach of basic principle which, in effect, paved the way for the present much more far-reaching proposal. The two developments illustrate a style of law reform that is becoming increasingly evident in this country.

The analogy with s 39 of the Misuse of Drugs Amendment Act 1978

The initial change is minor and specific. Once accepted it is rapidly perceived as inadequate and perhaps unworkable in its restricted form. The next stage is to ensure that the existing provisions are rendered effective, and logical developments extending the provisions and reducing the restrictions on them are suggested. At this stage it becomes very difficult to resist the changes because within the premises of the existing law they are logical and necessary. The real problem is with the existing law, which already goes too far but, by dint of having been on the statute book for a number of years, is now unchallengeable. This sort of process is best illustrated by the thirty year history of what is now s 202B of the Crimes Act 1961. In the mid 1950s nobody would have dreamt of giving the police a virtually unrestricted power to search motor vehicles for offensive weapons, yet by 1979 that power was conferred on the police with scarcely a word of protest from anyone. The danger is that the current proposals may turn out to be simply an intermediate stage in a similar sort of process. Their effect if enacted as recommended here would be to remove the limited

protections conferred by s 39 as to burden of proof of prior offending, extend the principle to major property offending, and remove the right of appeal inherent in the fact that s 39 is a matter of calculating the quantum of a fine rather than a matter of mandatory forfeiture. Once such a development is accepted it is difficult to see why the principle of mandatory forfeiture should not be extended to all offenders or even to assets "reasonably" seized by the police but never made the subject of a formal charge.

(b) Will it be effective?

In addition to the matter of basic principle raised by this proposal there are a number of other aspects that give rise to concern. In the first place there is absolutely nothing in the Committee's report, the literature on the subject or our accumulated experience of existing penalties that would suggest that the introduction of this sanction might have a deterrent effect on the offenders and potential offenders singled out for attention in the Report. By their very nature people contemplating the sort of offences that concern the Committee are unlikely to anticipate that they will get caught or convicted, and even if they do it is difficult to see why the threat of prison plus forfeiture should be any more powerful than that of a lengthy period of imprisonment alone. Furthermore, even if it is assumed that the rational acquisitive offender envisaged by the Committee exists, and even if the threat of forfeiture is likely to add an extra deterrent "edge" to existing penalties, surely the fact that the forfeiture will not be total — that it will be possible to meet the offender's debts out of the property and for him to reclaim some if not all of it — will be likely to seriously reduce the extra impact the Committee hopes for.

More importantly it is regrettable that the description of the target population in the Report is so unclear. The Secretary for Justice was concerned to hit major drug dealers, "white-collar" offenders and major property offenders. The Committee goes for "drug dealers sentenced to over 5 years gaol", and "major property receivers" and "perpetrators of major frauds and thefts" who "could be classed as professional criminals from the persistence or the nature of their offending" (para 334). Can we, knowing what we do about judicial inconsistency in sentencing and about the effects developments such as parole, and, in England, suspended sentences have had on sentencing practice, view with equanimity the prospect of mandatory forfeiture depending on the length of sentence imposed? At no stage does the Committee even consider whether its proposal might affect current sentencing practice and if so whether such effects are desirable.

The label "professional criminal" is much used in facile polemical debates about the "crime problem"

Similarly, are the criteria suggested for "professional crime" really to be seen as a serious attempt to isolate a relatively homogenous group of offenders who deserve and are likely to be deterred by such a mandatory penalty? "Persistence" and "the nature of their offending" seem unlikely to be interpreted with any degree of consistency by either Courts or prosecutors and can indeed cover anyone from the sophisticated, high-living white-collar criminal to the petty, inadequate but utterly incorrigible milk-bottle thief. The label "professional criminal" is much used in facile polemical debates about the "crime problem". In practice it is impossible, as all the overseas literature on the subject shows, to reach any sensible consensus on its meaning. Hence it seems likely that, should this proposal become law, we would simply end up repeating all the inhumanities and inconsistencies that have accompanied our previous efforts to identify and deal specifically with stereotyped menaces to society — habitual criminals, sexual psychopaths and young offenders in need of special corrective regimes.

There are also difficulties with the mandatory nature of the penalty. In general the Committee is, very sensibly, opposed to mandatory penalties. It is thus significant and somewhat alarming that neither the Secretary for Justice nor the Committee produce any argument at all as to why forfeiture should automatically follow conviction. It may be that, as para 333 implies, this assumption is based on an analogy with current forfeiture provisions in customs, fisheries and summary offences legislation. If so the analogy is a false one. There is all the difference in the world between the mandatory forfeiture of material proved to have been used in or subject to an offence, and the mandatory forfeiture of property obtained either innocently or even by offences which are suspected but have never been proved against the owner. If forfeiture is to be seen as a deterrent penalty then it should, both in logic and in pursuit of the principle of parsimony in sentencing adopted by the Committee (see para 103), be able to be administered flexibly against offenders who might be deterred, along with others, from similar offences in the future. On the other hand, it may be that the penalty is to be seen as denunciatory, with its mandatory nature emphasising the serious view that is being taken of the offence. If so, why is it forfeiture that is mandatory rather than imprisonment or a period of imprisonment? That, after all, is generally recognised as the most important penalty we have and hence the most stigmatic. If denunciation is the real aim the proposal seems a little misdirected. Finally, the cynic might suggest that the mandatory element of the proposal is motivated more by a desire to override the judicial squeamishness that has been evident as regards s 39 of the Misuse of Drugs Amendment Act 1978 than by any desire to achieve such penal objectives. If this is so it would surely have been better for the Committee to try and remove the cause of such squeamishness, or perhaps even to understand it and accept its validity.

Freeze the offender's assets?

The overall impression that this proposal amounts to little more than a rather ineffective and unprincipled attempt to harass offenders who are perceived as serious and persistent menaces to New Zealand society is boosted by the suggestion — initially made by the Secretary for Justice and adopted by the Committee — that the "offender's" assets should be frozen as from the laying of the charge by the police. This is presumably to prevent the accused disposing of his assets prior to conviction, although neither the Secretary nor the Committee address any argument to the point or suggest

why analogous civil procedures for dealing with fraudulent bankrupts and the like could not be adapted to cover this situation. As it stands this aspect of the proposal places an unwarranted in terrorem power in the hands of the police and the prosecution. Assets can be frozen on minor, and perhaps ill-founded, charges and the livelihood of the accused, as yet untried and unconvicted, can be destroyed with very little chance of compensation if the charges prove to be unfounded. Furthermore, such a freezing of assets cannot but hamper the accused in the conduct and preparation of his defence and in his efforts to obtain legal representation. The suggestion that a Court order should be necessary to freeze the accused's assets in this way would be unlikely to afford much protection, since the inquiry would presumably be only as to the existence of proper grounds for arrest and charge and would not extend to consideration of whether a prima facie case had been made out.

(c) Conclusions

Hence the Committee's proposal on forfeiture raises many more questions than it answers. On any view it marks a significant departure from principle which is dangerous both in itself and as a precedent for the future. It is a departure which is unlikely to result in any of the benefits claimed for it. There is no reason to suppose, and the Committee itself suggests none, that it will prove to be a more effective deterrent to serious acquisitive crime than the present range of penalties, and the blanket nature of the proposal will destroy its justification as a fair device for ensuring that offenders don't profit from their crimes. In practice it places undue power in the hands of the police and prosecution, is likely to be fairly harsh and arbitrary in its application to particular groups of offenders, and dispenses with judicial control in a highly sensitive area of crime and punishment.

2 Confiscation of motor vehicles

In addition to its proposals on the forfeiture of assets the Committee proposes the extension of the current law relating to the confiscation of motor vehicles to all alcohol-related traffic offences. Under this proposal confiscation of the vehicle would be at the discretion of the sentencing Court and the proceeds of the sale of the vehicle would, with suitable deductions, be returned to the owner. This recommendation is made by the Committee in spite of the fact that, as the Report recognises, the current power under s 44B of the Criminal Justice Act 1954 is seldom used, is difficult and expensive to administer, operates or is seen as operating in an arbitrary way, and is generally accepted as being no more effective in preventing offenders from continuing to drive or offend than simple disqualification.

To extend any form of punishment in the face of comments like this would require considerable justification. The Report however merely states that in relation to the present law the majority of the Committee "felt that the Courts might have used the provision more robustly to deprive the mobile violent offender of his means of transport and escape." No effort at all is made to discover why the Courts have been so weak-wristed over such a manifestly useful penalty. Instead its extension is justified on the basis that it is "likely to operate as a powerful deterrent at the time when a driver is most likely to turn his mind to it and make a rational decision — namely when he takes the car out if he is going to drink, or decides whether or not he will drink when he has the car". This is, of course precisely the sort of pull-another-penalty-out-of-the-air approach that one did not expect to find in a Report of this nature. The fact is that we have no reason to suppose that such an additional penalty will add anything of any significance to our efforts to deal with drunken driving. While the literature on drunken driving is still not very extensive it does at least make it tolerably clear that enhanced penalties or even mandatory penalties are unlikely to be the answer. In other words punishment and the risk of punishment have little to do with the overall control of drunken driving. It is attitudes to drink, motor vehicles, the law and one's fellow citizens that really matter. The confiscation of a few family cars is unlikely to alter such attitudes, and the mere existence of confiscation as a possible penalty is unlikely of itself to persuade people to view the offence more seriously.

enhanced or even mandatory penalties are unlikely to be the answer.

3 Conclusion

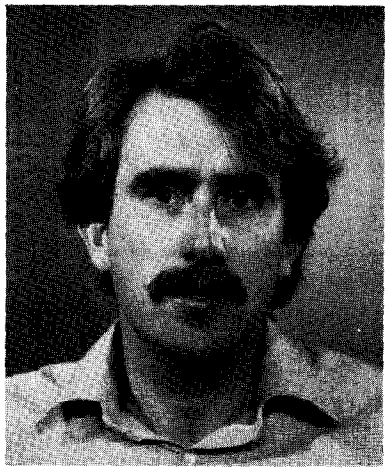
In conclusion it is suggested that in both these proposals the Committee is making a largely symbolic gesture whose capacity for harm — on both an individual and a general level — may be considerable but whose capacity for positive good is very limited indeed. The danger, as always, lies in our ability to assume that because we are doing something "positive" about crime — new penalties, new names for old penalties, new discretions, revamped guidelines, new monitoring agencies, more information and personnel etc we must also be further on our way to "solving" it. Nothing could be further from the truth. In most cases our efforts to reform the system have either had no effect at all or have exacerbated the problem. The secret of penal reform, as this report shows real signs of recognising both in its enunciation of guiding principles and in its treatment of areas like parole, lies in finding ways of doing less to fewer people. These proposals do not assist in that task.

Churchill Trust Fellowship

Applications are being sought by the Winston Churchill Memorial Trust for 1983 Fellowships. Fellowships granted are for research or other activity in New Zealand or overseas which will contribute to the advancement of any occupation, trade, business, or profession, or will in some way be of benefit to New Zealand.

The Fellowship provides an opportunity for enterprising members of the profession. One may recall Auckland practitioner Angela Muir who was awarded the Fellowship for a project to investigate the rights of the disabled. Fellowships have also been awarded for investigation into industrial relations, criminology, and law enforcement. Applications close on 31 August. Further enquiries should be made to the Secretary, Winston Churchill Memorial Trust Board, PO Box 12347, Wellington.

Liberalising the derivative action



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"When Sir James Wigram V-C decided Foss v Harbottle it may be doubted whether he foresaw the vigorous and active life which his decision would lead, or the many controversial obscurities that would arise about actual or possible exceptions from the rule that he was laying down." (Sir Robert Megarry V-C in Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 All ER 437, 443).

THE Rule in *Foss v Harbottle* (1843) 2 Hare 461 is one of those areas of company law which have received special attention, both judicial and academic, of late. As will be seen, there has been a trend in recent times, at least among the Judges of the Chancery Division, to push back the boundaries of one of the exceptions to the Rule, the so-called "derivative action".

As aficionados of company law know, the Rule is fairly easy to state, although that apparent simplicity disguises some horrendous difficulties which are even now unresolved. Its essence is that, if some wrong is done to a company, then it is the company, and the company alone, which should decide whether or not to take any action to redress that wrong. That decision must be made by the appropriate body, either the directors or the company in general meeting, acting by majority if necessary. Even if the minority is convinced that a decision not to sue is wrong, it remains a minority and not the majority. Therefore, a minority shareholder who seeks to sue in the name of the company, in a situation where the company has already resolved not to sue, is liable to have his action struck out.

The Rule, then, is really an inevitable consequence of the fact that a company has a separate and distinct legal personality, but it also involves a recognition of the fact that when a person takes shares in a company he thereby acknowledges that he must submit to majority rule.

Exception to the Rule

However, the Rule would be unduly rigid, and would involve an imbalance between this principle of majority rule, and the rights of minority shareholders, were it to exist in its bare form and to apply without exception. Therefore, the law has provided for certain exceptions to the Rule. Three of these so-called exceptions are really only situations in which the Rule has no room for application ab initio, viz where the act complained of is ultra vires the company, or can only be authorised by a special or extraordinary resolution, or where the act in question results in an injury being suffered by the minority shareholder personally. These can be united under the principle that the irregularity or illegality concerned is incapable of a cure by the passing of an ordinary resolution.

The exception with which we are mainly concerned here is the fourth exception, the "fraud on a minority" category. Although Professor Gower (4th Ed, p 645) is of the view that this exception comes under the same rationale as the first three, it is submitted that recent cases have shown that this may not be appropriate. Gower takes the view, using the analogy of cases on the validity of purported alterations to the articles, that a "fraud on a minority" is never capable of ratification by a simple majority of the company in general meeting. However, in *Daniels v Daniels* [1978] Ch 406, Templeman J refused to strike out a derivative action in circumstances where the directors of a company were being accused of mere negligence, albeit negligence which had brought them a profit. There was no allegation of bad faith at all. Yet Gower himself acknowledges, on the authority of *Pavlides v Jensen* [1956] Ch 565, that the members in general meeting may resolve not to sue in respect of a director's breach of his duty of care (Gower, p 619).

Derivative actions

In other words, it may be that a derivative action (as explained below) will lie in circumstances where there may have been a valid ratification by the general meeting. Therefore, the fourth exception to the Rule may not lie so easily with the first three. Nevertheless, this is not of crucial importance, since it can just as easily stand on its own on the ground that it exists to prevent what might otherwise be an injustice. The "fraud on a minority" exception was described by Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064, 1067:

> It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the Court because the wrongdoers themselves, being in control, would not allow the company to sue.

Thus, the exception is designed to prevent, say, a director of a company from escaping liability for a "fraud" by manipulating the company in general meeting. The law allows the minority shareholder to sue the wrongdoer on the company's behalf. Although the shareholder is the nominal plaintiff, the company will take the benefit of any judgment given in his favour, and it is to enable it to do so that the company is joined as a co-defendant to the action.

The minority shareholder may even obtain an indemnity from the company in respect of the costs of the action: *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 CA. Since the minority shareholder sues in respect of rights derived from the company, this type of action has come to be known as a "derivative" action, adopting American terminology.

To be able to bring a derivative action, the minority shareholder must be able to show both "fraud" and "control". To take the "control" requirement first, it is clear that it must be pleaded and proved (*Birch v Sullivan* [1958] 1 All ER 56) that the wrongdoers control the general meeting so as to prevent action being taken against them. At one time it was thought that the "control" required had to be actual voting control: see Lord Davey in *Burland v Earle* [1902] AC 83, 93. Now, however, it appears that it may be accepted as sufficient that there is de facto control of the general meeting. In *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1980] 3 WLR 543, to which further reference will be made, Vinelott J accepted counsel's submission that a voting majority was not necessary. Instead, all that had to be shown was that "the persons against whom the action is sought to be brought on behalf of the company. . . are able by any means of manipulation of their position in the company to ensure that the action is not brought by the company" (at p 584). It is submitted that this is plainly good sense, since it would be absurd to require voting control in times when de facto control over a general meeting can often be achieved with a much smaller shareholding.

The fraud requirement

As for the "fraud" requirement, it should be made plain that this term is in no way limited by conceptions of fraud that existed at common law. It is much more akin to equitable fraud, as in the equitable concept of a fraud on a power. Therefore, while cases of wilful misappropriation of company property will of course be "fraud" for this purpose, the derivative action will still lie where no fraud in the legal sense is alleged, as *Daniels v Daniels* (supra) shows, at least as long as the wrongdoers make some profit from their actions. That decision was thought to mark a departure from the hitherto commonly-held view that mere negligence could not found a derivative action (see Shapira [1978] NZLJ 156).

This liberal interpretation of the "fraud" requirement was maintained by Vinelott J in the *Prudential* case (supra). The facts were, briefly, as follows: B and L were both directors of TPG and N. B and TPG held shares (although not a majority) in N. TPG was in financial difficulties, and B and L arranged to sell its assets to N, but at a gross over-valuation. The Stock Exchange Regulations required that the consent of N's shareholders be obtained to the transaction, but this was done by way of a "tricky and misleading" circular. The plaintiff, a minority shareholder in N, brought (inter alia) a derivative action, claiming damages or compensation from B and L in respect of their conspiracy. As already noted, Vinelott J found that B and L had the requisite control over the general meeting of N. He then had to deal with the "fraud" point. It was clear on the facts that the required "fraud", in the broad sense, was found in the conspiracy between B and L to use the "tricky and misleading" circulars.

The derivative action will still lie where no fraud in the legal sense is alleged

However, the learned Judge did not stop there, but embarked upon a wholesale examination of "fraud" in the context of the derivative action, in order to formulate a generally-applicable principle. In the end, after a detailed examination of the authorities, he came to the conclusion that "fraud" for these purposes was established whenever directors (albeit bona fide) "are guilty of a breach of duty to the company (including their duty to exercise proper care) and as a result of that breach obtain some benefit" [1980] 2 All ER at 869. The Court of Appeal has subsequently reversed his judgment in part ([1982] 1 All ER 354), but without any comment on his analysis of "fraud" and "control".

However, the views of the learned Judge have revealed some difficulties, which are highlighted by Professor Wedderburn in a recent note on the case in (1981) 44 MLR 202. It is not desired to enter into these criticisms here, but suffice it to say that Wedderburn sees an obvious danger in the learned Judge's comments, in that they "would include each and every breach of a fiduciary duty, including those open to ratification by shareholders general meeting. Is there no limit?" (1981) 44 MLR, at 207.

The Estmanco case

The most recent treatment of the derivative action has been in the decision of Megarry V-C in *Estmanco (Kilner-House) Ltd v Greater London Council* [1982] 1 All ER 437. In this case the Court was concerned with the application of *Foss v Harbottle* to a non profit-making body controlled by a local authority. The GLC owned a block of flats which it decided to sell on long leases. The Council formed Estmanco Ltd to manage the flats when sold, in accordance with an agreement between the Council and the company. The agreement provided that the Council was to use its best endeavours to sell the flats on long leases. As each purchaser bought a flat, then one share in the company was to be transferred from the Council to the purchaser. The shares had voting rights in the company, but until all of the flats were sold, those rights were to be vested in the Council. After only one-fifth of the flats had been sold, a local body election resulted in a change in the constitution of the Council. With the change in political control came a change in housing policy. The new Council did not want to let the flats on long leases, but instead resolved to let the flats to persons on their housing list and to families in need of accommodation. The company issued a writ seeking, inter alia, an injunction to prevent the Council from proceeding with what was an intentional breach of its covenant with the company. The Council responded by requisitioning an extraordinary general meeting of the company. Being the sole holders of voting rights, the Council had no trouble in having a resolution passed instructing the directors to discontinue the action. The applicant, who had purchased one of the flats, sought an order that she be substituted as nominal plaintiff in the action, so that the action should continue as a derivative action.

Before examining the actual decision in the case, one or two features of it should be mentioned. First, this was not a case involving the breach of a fiduciary duty by a director, as are many of the *Foss v Harbottle* cases. Here, the wrongdoer was merely a shareholder in the company. It is submitted that this circumstance should in no way render the "fraud on a

minority" exception inapplicable. The wrongdoers have perpetrated an act which clearly comes within the extended definition of "fraud", and they have the power to prevent action from being taken against them, by virtue of their power to manipulate the company in general meeting. Although the exceptions to *Foss v Harbottle* are in most people's minds associated with attempts by shareholders to control management, the law should be flexible enough to apply itself to control by majority shareholders of other shareholders, who have undoubted power over the company's affairs.

Secondly, the case is unusual in that the minority shareholder had no voting rights at the relevant times. However, it is again submitted that this should not be significant. What was crucial in this case was that a decision by the directors of the company to commence an action was being stifled by the dominant shareholder, acting purely in its own self-interest.

The case is unusual in that the minority shareholder had no voting rights

The Council argued that the shareholders of a company, unlike the directors, may consult their own interests, and may use their voting power to protect themselves from being sued by the company. In support of this, the Council relied on the *North-West Transportation Co v Beatty* (1877) 12 App Cas 589 line of authorities. Megarry V-C would have none of this, however, stating that:

> Plainly there must be some limit to the power of the majority to pass resolutions which they believe to be in the best interests of the company and yet remain immune from interference by the Courts. It may be in the best interests of the company to deprive the minority of some of their rights or some of their property, yet I do not think that this gives the majority an unrestricted right to do this, however, unjust it may be, and however much it may harm shareholders whose rights as a class differ from those of the majority. If a case falls within one of the exceptions from *Foss v Harbottle*, I cannot see why the right of the minority to sue under that exception should be taken away from them merely because the majority of the company reasonably believe it to be in the best interests of the company that this should be done. This is particularly so if the exception from the rule falls under the rubric of "fraud on a minority" (at p 444).

Pausing there, it is submitted that this analysis is in accordance with authorities dealing with the validity of proposed alterations to a company's articles, in which an objective test has been imposed for determining whether the alteration amounts to a fraud on minority shareholders. In *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291, Lord Evershed MR stated that:

> . . . a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give the former an advantage of which the latter were deprived.

In holding that there was a "fraud on a minority" here, Megarry V-C adverted to three relevant factors: first, it could not reasonably be said to have been established that it was, or could reasonably be thought to be, for the benefit of the company that the action be discontinued, since to discontinue would be to stultify the purpose for which the company was formed. Secondly, it was not clear that the Council ever adequately considered and decided what was for the company's benefit before voting at the meeting. Thirdly, the Council had not considered the effect of its vote on the rights of purchasers qua shareholders.

Critique

The judgment of Megarry V-C is epitomised in a concluding paragraph:

> No right of a shareholder to vote in his own selfish interests or to ignore the interests of the company entitles him with impunity to injure his voteless fellow shareholders by depriving the company of a cause of action and stultifying the purpose for which the company was formed. (at p 448)

It would be difficult to argue with the justice of the result in the *Estmanco* case. The Council was seeking to avoid its admitted contractual obligation out of what were clearly political motives. No doubt those who share the political ideals of the Council will find cause to bemoan yet again the "politics of the judiciary". Quite apart from these considerations, however, the writer begs leave to make what some might regard as academic points.

The Council was seeking to avoid its contractual obligation out of what were clearly political motives

Although it is submitted that the facts did indeed bring the case within the "fraud on a minority" exception, yet the judgment of Megarry V-C seems to have proceeded upon a somewhat unusual approach, in that he concentrated more on the Council's use of its control of the meeting than on the original wrongful act, the proposed breach of covenant. It is as though he sees the "fraud" here as being the former, rather than the latter, whereas orthodoxy states that it is the original act which must be "fraudulent". If the original act of wrongdoing is not "fraudulent", within the extended definition of that term, then the question of control becomes irrelevant. The derivative action will not lie.

One cannot escape the conclusion that, while dressing the case up as a "fraud on a minority" case, Megarry V-C was in substance applying a wider concept of justice. Earlier authorities had speculated whether an additional exception to *Foss v Harbottle* existed, viz — that the Rule could be departed from whenever the justice of the case required it: *Heyting v Dupont* [1964] 2 All ER 273. The Court of Appeal in the *Prudential* case (supra) firmly scotched any such ideas ([1982] 1 All ER at 366), and Megarry V-C agreed with them that it was "not a practical test". Whether it is a practical test or not is another matter entirely.

Experience has shown that cases decided on principles of "justice" do little, if anything, to aid in the process of putting a particular area of law on a sound basis of principle, from which accurate observations of the state of the law can be made. It may be thought that the judgment in this case, while being laudable in one sense, has not been as helpful as it might have been to lawyers who have to tell their clients what exactly the derivative action is, and

when it will lie. It reinforces the previously expressed view of this writer ([1981] NZLJ 71) that a far simpler approach is to resolve intra-corporate disputes by way of petition under s 209 of the Companies Act. Since the 1980 amendments to that section, an aggrieved minority can now obtain an order that they should continue proceedings on behalf of the company, once they have established either "oppression . . . unfair prejudice, or undue discrimination". Admittedly, the past attitude of the Courts to s 209 has been very conservative, with few petitions succeeding. It is hoped that the widening of the ambit of the section will bring about a change in attitude in this respect. Certainly, there is as much chance of a change through s 209 as there is through *Foss v Harbottle*. Although Vinelott J and Megarry V-C found cause to interpret the exception to it liberally, it is highly uncertain whether higher Courts would take the same view. In the *Prudential Assurance* case, the Court of Appeal were at pains to point out that "the rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary" and that "the rule in *Foss v Harbottle* is founded on principle but it also operates fairly by preserving the rights of the majority" (at p 367).

Where the Courts eschew judicial law-making in deference to the supremacy of Parliament, it is to be hoped that when Parliament responds by reforming the law they will act in like vein.

Compensation for criminals

A P Blair LLM

The author has been on the Bench since 1958 and, as most readers will be aware, has been the Appeal Authority under the Accident Compensation Act since 1974. He has also been Judge of the Compensation Court since 1966. In this article he considers the question of claims for personal injury by accident where the injury was suffered in the course of criminal activity on the part of the claimant. In particular he examines the extent to which such claims may be barred by the "public policy" doctrine.

Preliminary

THERE has been some public and political discussion on whether compensation under the Accident Compensation Act should be payable as of right to a criminal injured while committing a crime. In this article, it is proposed to consider whether any such claims may be barred on the grounds of public policy. In other words, does the maxim ex turpi causa oritur non actio apply to the Act? By way of background, two hypothetical claims at opposite ends of the scale may be mentioned.

(a) A bank robber loses his leg by "accident" and receives some brain damage while blowing open a safe. Assuming that this is an "accident" and that the criminal element in his accident is irrelevant, the robber would receive, as well as medical and surgical care, and the provision of an artificial limb (s 111), a lump sum under s 119 of $5250 for the physical loss, a lump sum under s 120 of up to $10,000 for pain, loss of amenities, etc, rehabilitation aid (s 49) and (if an "earner") earnings related compensation under s 113 related to his loss of earning capacity which may continue to age 65 (see s 128). (However, earnings related compensation is not likely to be paid while he is in prison or hospital — s 129). Should he die as a result of the accident, his widow and children would be entitled to lump sums and earnings related compensation pursuant to ss 123 and 124 and his funeral expenses would be paid. The accident victim or his dependants, might have other claims, eg for "losses" under s 121, and if the accident victim needed "constant personal attention" he would be eligible to receive substantial assistance for the costs of looking after him (s 121(3)). The total compensation payable could easily be in excess of $100,000.

(b) A man, while trespassing on another person's land to gather mushrooms, falls and fractures his back, causing a permanent injury. His injury is serious, but arose while committing a trivial offence.

The Act and criminal conduct

The Act of course is a new code of law with the remedial purpose of giving aid to all persons suffering personal injury by accident who are covered in terms of the Act. The general purpose of the Act can be extracted from the preamble, from ss 4 and 5, and from the statutory definition of "personal injury by accident" in s 2. In broad terms, the design of the Act is to provide different forms of compensation or other aid, for various types of loss which flow from injury by accident, and to cushion the accident victim and his dependants from the consequences of injury. The novel and radical feature of the Act is that it extinguishes all former kinds of claims for damages or statutory compensation for personal injury loss. In general, it is irrelevant whether the injury was the result of the fault of another or was the applicant's own fault. The old common law and

statutory rights for personal injury by accident are entirely replaced by the rights of compensation available under the new Act.

In some instances, the injury by accident will be associated in some way with criminal acts and the statute has some express provisions on this:

Sexual offences

Section 105B ensures that the cover of the Act is extended to certain injuries resulting from sexual offences of the kind mentioned in the section. As s 105B relates to providing protection for the victims of criminal acts, and has no application to claims by criminals themselves, the section need not now be further discussed. It is mentioned only to make the point that injuries relating to criminal acts have received the attention of the legislature in the statute.

Self-inflicted injuries

Section 107 bars the payment of compensation to a person who directly or indirectly wilfully inflicts personal injury upon himself. The same section prohibits compensation being paid in respect of the death of a person who commits suicide unless the suicide was the result of a "state of mind" that itself was the result of personal injury by accident. The rigidity of the foregoing provision is alleviated by the proviso. However, the point now being made is that the section provides an exception to the general scheme of the Act that fault is irrelevant.

Murder and manslaughter

Section 138 makes provisions for a bizarre possibility, namely that a person who killed someone else might claim compensation as a dependant of the person killed. (At least one such claim has already been made under the Act — see *Public Trustees Appeal re L* (1980) 2 NZAR 180, where a young man who killed his parents, but was found not guilty of murder or manslaughter on the grounds of insanity, acquired the status of a dependant by reason of the deaths and was awarded some compensation rights.) Section 138(1) provides that if the spouse, child, or other dependant of a deceased person has been convicted of the murder or manslaughter of the deceased, then no compensation shall be payable to the killer under the provisions of those sections in the Act which deal with dependants' rights. However, pursuant to a proviso of the subsection, the Corporation may pay compensation to any such person convicted of the *manslaughter* of the deceased if it is *proved to the satisfaction of the Corporation* that the convicted person *had no intention* of killing or causing grievous bodily harm to the deceased or anyone else at the time of the killing. It seems plain that the purpose of the proviso is to allow the Corporation to pay compensation to a dependant convicted of the manslaughter of the deceased if the nature of the wrongful act amounts to no more than what is sometimes called "involuntary manslaughter". Lord Salmon pointed out in *Director of Public Prosecutions v Newbury* [1976]2 All ER 365 that:

> Cases of manslaughter vary . . . infinitely in their gravity. They may amount to little more than pure inadvertence and sometimes to little less than murder.

It is the first kind of manslaughter mentioned by his Lordship that the proviso is aimed at.

In administering and applying the proviso the Corporation will be obliged to make a decision for itself on the applicant's intention at the critical time. His state of mind will have to be "proved to the satisfaction of the Corporation." The Corporation will not be restricted to the evidence given at the trial, nor bound by the laws of evidence or the standard of proof which apply in criminal trials. The standard of proof will be the civil one imposed by the words "proved to the satisfaction of." (*Blyth v Blyth* [1966] 1 All ER 524 at 533). In *Rejfek v McIlroy* [1965] 112 CLR 517 (where there was an allegation of a criminal act in a civil claim) the Court said:

> No matter how grave the fact which has to be found in a civil case, the mind has only to be reasonably satisfied and has not . . . to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

As regards the evidence required to decide the issue of intention the Corporation will be free to receive any evidence which it considers relevant whether or not the same would be admissable in a civil Court (see s 154(7)).

The interesting feature of s 138 is, first, that it provides an exception to the general rule in the Act that compensation rights will be available to the victims of accidents and their dependants regardless of fault. Secondly, the section obliges the Corporation to make its own finding on what is normally a criminal law matter — namely the intention of a person at the time he committed a criminal act.

It is an integral part of the statute's policy to ignore criminal involvement or fault

The rule of "public policy"

The significance of s 138 is that it can be said that, in the limited circumstances set out, the Act is applying the rule of public policy that a criminal shall not benefit from the consequences of his criminal act. The question must now be faced whether a verdict of "not guilty" by a criminal Court in a murder or manslaughter trial is final and binding on the Corporation. If so, the Corporation will be obliged to pay compensation to the dependant of the deceased, even though the Corporation has good reason to believe that such dependant acquired that status because he killed the deceased with an intention to do so or to do grievous bodily harm.

In every claim made under the Act the Corporation, using the standards of proof required by that statute, has to decide whether to grant cover. The rules of evidence and the standards of proof applicable to the criminal law do not apply. The Corporation has to be "satisfied" using the test enunciated, for example, in *Rejfek v McIlroy* (supra), that the claimant is entitled to compensation, and it can call in aid additional evidence that would not be admissible in a Court of law.

On the point whether a civil tribunal can go behind a jury's verdict in murder or manslaughter trials, two recent cases may be referred to. In *Gray v Barr* [1971] 2 QB 554, Barr was acquitted of the murder or manslaughter of Gray, but was later sued by the widow in a civil claim for damages for causing the death. Barr admitted that he had caused the death, but pleaded that it was an accident and claimed indemnity from an insurance company which was joined as a third party. The insurers argued, inter alia, that what happened was no accident, but manslaughter, and that it was contrary to public policy to enforce the contract of indemnity. The Court of

Appeal re-examined the evidence for itself and found that Barr had been guilty of manslaughter. In making that finding, Denning M R said:

> I know that at the criminal trial he was acquitted altogether, but . . . in this civil action we must, when called upon, give the true decision according to law.

The Court held that Barr could not recover on the policy as the death was not an "accident" and that also it would be against public policy to allow him to recover.

Is a verdict of not guilty binding on the Corporation?

Gray's case was referred to recently in *R v National Insurance Commissioner ex parte Connor* [1981] 1 All ER 769. A woman convicted of the manslaughter of her husband was put on probation and then applied for a widow's pension under the Social Security Act, but this was refused by the Commissioner though Mrs Connor fulfilled the requirements of the Act for entitlement. When the matter came before the Queen's Bench Division, the Court examined the evidence and concluded that the woman's act which led to death was intentional and deliberate. It rejected the argument that as the Social Security Act was "a self contained modern Act . . . rules of public policy do not apply". On this aspect, Lord Lane LCJ said that in drawing the Act the draftsman would do so against the background of the existing principles of law. The decision of the Commissioner was upheld.

The principles to be extracted from the foregoing cases are as follows:

(1) Claims arising from the death of a person will be declined on public policy grounds, if the death was caused by the applicant for compensation who, at the time of death, at least had a deliberate intention to do grievous bodily harm.

(2) Notwithstanding the verdict of a jury at the criminal trial, a civil Court can decide for itself the matter of intention.

Application to the Accident Compensation Act

The Corporation is not a civil Court. Nevertheless, it is required to make quasi-judicial decisions, and its duty to make a finding on the claimant's "intention" when the proviso to s 138(1) has to be applied is an example of its quasi-judicial function. In making such a finding the Corporation will apply civil standards of proof and determine whether it is "proved to its satisfaction" that the claimant had no intention of killing or doing grievous bodily harm to the deceased person whose death has given the status of "dependant" to the claimant.

Although the proviso to the subsection refers only to those claimants who have been convicted of murder or manslaughter, it would seem to be implicit in for example the *Gray v Barr* judgment that if a civil tribunal finds it necessary to decide on the intention of a claimant it may do so using the civil standards of proof. It follows that the jury's verdict in the criminal trial has little, if any, probative value — this was a submission in *Gray v Barr* which was apparently accepted. If then the Corporation is faced with a compensation claim by a dependant, together with material which tends to prove that the death on which the claim depends was brought about by the intentional act of the claimant, it is suggested that the Corporation must have regard to this evidence. The Corporation's primary duty is to decide whether a claimant has cover under the Act, and the statute declares that a person guilty of murder or manslaughter in the circumstances set out is barred from cover. If then on the evidence available (which may include material not admissible in a criminal Court), the Corporation decides that a claimant is guilty of murder, or of manslaughter more serious than "involuntary manslaughter", it is suggested that it may then go on to hold on the grounds of public policy that the claimant is not eligible for compensation. In so holding, the Corporation's position would be comparable to that of the Commissioner in *Connor's* case. Like the Commissioner, the Corporation is administering a "self-contained modern Act" and, in *Connor's* case, the Court held that the Commissioner was right to apply the public policy rule even though the widow fulfilled the requirements of the Social Security Act as to entitlement.

Cases of manslaughter vary infinitely in their gravity

Extent of the "public policy" doctrine

There is a temptation to suggest on the authority, say, of *Connor's* case that the Accident Compensation Act could be cleansed of claims which (at least to an ancient lawyer brought up on the ex turpi rule) are tainted by crime. If the public policy doctrine does not apply, then it would seem that the drunken, reckless driver who kills others and injures himself, and the dangerous bank robber, hurt while safe-breaking, are eligible not merely for proper medical care but also for significant monetary compensation. However, in relation to a particular statute, public policy can apply only to the extent that the statute permits. Public policy has been described as being "always an unsafe and treacherous ground for judicial decision". The doctrine cannot overrule enacted law. In *Ewart v Ewart* [1958] 3 All ER 561 Lord Merriman P said, at p 564:

> The Court in face of the plain words of the statute is not concerned with questions of public policy. . . .

In *Commonwealth of Australia v Bank of New South Wales* [1950] AC 235 at 307, Lord Porter quoted the following words:

> In a Court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by necessary implication.

In the light of these principles it is plain that any influence that "public policy" can have in the administration of the Accident Compensation Act is governed by the terms, philosophy and intention of the Act itself as expressed or implied in the language used. It must be reiterated that the general purpose of the Act is to replace all former claims based on personal injury by a new scheme with the dominant purpose of giving comprehensive cover to all persons injured by accident without regard to fault or negligence. That such a scheme might create anomalies and "hard" cases has always been recognised — see, for example, the report of the Royal Commission para 289. This has to be accepted as one of the prices to be paid for a unique scheme whereby all persons in New

Zealand (and also visitors here) are cushioned against some of the financial losses which flow from personal injury by accident. In deliberately giving wide coverage in a way which could be regarded as an extension of the social security philosophy, it must be recognised that it is an integral part of the statute's policy to ignore criminal involvement or fault. It is of the essence of the Act that the occurrence of personal injury by accident ipso facto gives entitlement and that the morality of a victim is irrelevant (except in the special cases mentioned). It is therefore submitted that the ex turpi causa rule may not be invoked under the Act except in certain claims under s 138 where the statute has given express or implied authority for the application of the doctrine.

A civil tribunal in deciding on the intention of a claimant may rely on the civil standards of proof

A "grey area"?

In this article, it has so far been assumed that any injury suffered by a criminal while committing a crime is personal injury by *accident*. "Accident" has not got a precise meaning. "Mankind has taken the liberty of using it as it uses so many other words, not in any exact sense, but in a confused way or rather in a variety of ways." *(Trim Joint District School v Kelly* [1914] AC 667). In *Mills v Smith* [1963] 2 All ER 1079, it was said that the word was undefinable, and in *Chief Constable and West Midland Police v Billingham* [1979] 2 All ER 182 its meaning was said to be elastic according to the context in which the word was used. The classic description of "accident" in relation to personal injury is contained in Lord Macnaghten's words in *Fenton v Thorley* [1903] AC 443 when he said that the expression "is used in the popular and ordinary sense of the word as including an unlooked-for mishap or untoward event which is not expected or designed."

It could be argued that the armed bank robber or hijacker who decides to fight his way out of trouble with his weapons is "asking for injury" and, if injury occurs, this could not be described as unexpected. Look also at the common case of the aggressive man in the pub who puts up his fists and says "hit me you bastard", and duly gets hit and injured. He has invited a blow and the invitation carries with it the acceptance of the likelihood of some trauma. The drunken driver with sufficient intention to start his car but insufficient ability to control it may also be said to be inviting injury. Under insurance policy law some of the above kinds of injury may not qualify as injury by accident. *MacGillivray on Insurance Law* 5th Ed Vol 2 p790 says that if the injury was the foreseeable result of an intentional act of the injured person it is not an accidental injury under an insurance policy.

However it is the meaning of "accident" as defined in the Accident Compensation Act which must govern these kinds of case. With the background of an Act with a liberal and remedial purpose, the statute has exempted from cover in s 137(1)(a) only those sorts of injury "that a person wilfully inflicts on himself or, with intent to injure himself, causes to be inflicted upon himself". It is suggested that this express provision settles the limits of exception in those situations where the claimant might be said to have "asked for injury". Unless he actually intended to get himself injured the exemption will not apply. From the language used in the subsection it cannot be implied that the bank robber, the drunken driver and similar miscreants intended to cause themselves injury. It follows that the Corporation cannot refuse cover to an applicant because his injury was foreseeable or likely, but only if his intention was such that he is barred by the express terms of s 137.

Summary

It is suggested that:

(a) Criminals suffering personal injury by accident as a result of crime are generally entitled to normal rights of compensation under the Act, though they will be unlikely to receive earnings related compensation while in hospital or prison.

(b) When s 138 applies to a claim it is clear that the Corporation has a right to decide, using civil standards of proof, whether a person convicted of manslaughter is entitled as a "dependant" to compensation.

(c) Even if a "dependant" is acquitted of murder or manslaughter, the Corporation may decline his claim if "satisfied" in terms of the Act that the death and consequent dependency were created by the intentional act of the claimant.

(d) The scheme of the Act precludes the application of the ex turpi causa doctrine to other claims even though the accident victim incurred his injuries while acting unlawfully.

(e) A person knowingly putting himself at risk of injury while committing a crime is covered against personal injury resulting therefrom unless he *wilfully* inflicts the injury upon himself or causes it to be inflicted upon him. The word "wilfully" means "deliberately" — see *Hall v Jordan* [1947] 1 All ER 826.

CORRESPONDENCE

Correspondence should be addressed to: The Editor, New Zealand Law Journal, CPO Box 472, Wellington.

DEAR Sir

The letter published in your March 1982 issue by John Burns of Sydney, formerly of New Zealand, contains serious inaccuracies which invalidate most of what he says. He has long been an opponent of the accident compensation scheme. His understanding of the problem has not been improved by his sojourn in Australia.

I am quite familiar with the situation in New South Wales, having been principal assistant to the Woodhouse Inquiry in Australia. Mr Burns points to differences in the method of assessing damages in Australia which have been changed recently by decisions of the High Court of Australia. The position has recently been usefully analysed in the *Victorian Law Institute Journal* by Professor Harold Luntz of the Melbourne University Law School (1982) 56 Law Institute Journal 35. He reached conclusions very different from Mr Burns. The recent setting up of an inquiry into the injury industry by the New South Wales Government indicates the grave problems which exist in the present system. The inquiry is being conducted by the New South Wales Law Reform Commission.

The second point Mr Burns makes is also invalid. It is true that the public hospital costs in New Zealand are met from the Health vote. This was done to compensate for the savings the introduction of the scheme afforded to the Social Welfare vote by way of decreased pay-out in social security benefits. It is wrong to say, therefore, that the true cost to the community in New Zealand is much higher.

Next Mr Burns says employers in New Zealand pay the loss of wages to accident victims for the first two weeks. They do not. The Act has never so provided. It provides for employers to pay 100 percent of ordinary earnings for one week for work related accidents only. The General Manager of the Corporation has written in 1982, "The cost to employers of the first week of compensation provisions still averages about 10 cents per $100 of leviable payroll."

To conclude on the basis of inaccurate and misleading information that the costs of the New Zealand scheme are less than those of a common law scheme is not only unwarranted. It is wrong.

Yours faithfully

Geoffrey Palmer
Christchurch

Editorial (concluded)

Conclusion

It is not intended to suggest that the Court has decided wrongly or badly, or that our legislature is at fault. It is rather to suggest that overall the election petition decisions lack any underlying philosophy.

In directing the Courts to be guided by the substantial merits and justice of the case Parliament may well have thought it had imparted sufficient authority to enable the Courts to develop an electoral common law. Yet is the grant of such a wide discretionary power really sufficient? The charge has been laid before that when Parliament does not know what to do it gives the Courts a discretion. However with an Act that is one of the keystones to our constitution, and which details minutely how elections are to be conducted, one can fully understand the judicial arm of the state being reluctant to exercise a discretion in too cavalier a manner lest it be accused of trespassing on legislative preserves.

Detailed voting procedures are necessary; for electoral officers must be able to decide on the face of the vote whether to allow or disallow it. Sometimes votes will be disallowed that later evidence may show should have been allowed, and some allowed that should not have been. But these are likely to be a small fraction of one percent of all votes cast, and in the great majority of electorates this minute margin of error will not affect the result.

However, when the result is sufficiently close for these doubtful votes to make a difference, should not the basis for deciding their validity rest, not on the procedures laid down for officials, but on the great principles underlying our electoral system — one of which is that an enfranchised person who has clearly indicated the candidate of his choice is entitled to have his vote counted?

Tony Black

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Ford, M F	Wellington	19 February 1982
Forrester, G R	Wellington	19 February 1982
Frecklington, W S	Wellington	19 February 1982
Fyfe, N D	Wellington	19 February 1982
Gray, J P	Wellington	26 February 1982
Greene, P K	Wellington	19 February 1982
Gunn, P J	Wellington	19 February 1982
Hancox, C D	Christchurch	29 January 1982
Harrison, E C A	Wellington	19 February 1982
Holland, R K H	Wellington	19 February 1982
Howells, K L	Christchurch	29 January 1982
James, A G	Christchurch	29 January 1982
Johnston, S A	Christchurch	29 January 1982
Kearns, J A G	Wellington	19 February 1982
Kennedy, H	Christchurch	29 January 1982
King, B J	Wellington	19 February 1982
Kos, J S	Wellington	19 February 1982
Kyle, J A	Christchurch	29 January 1982
Langton, R J	Christchurch	29 January 1982
Levin, C H	Christchurch	29 January 1982
Lewington, M C	Christchurch	11 December 1981
Lucie-Smith, N P	Wellington	19 February 1982
MacCuish, A J	Wellington	19 February 1982
Macky, P A	Wellington	19 February 1982
McMaster, G R	Wellington	19 February 1982
McSweeney, S M	Christchurch	29 January 1982
Malcolm, J J	Christchurch	29 January 1982
Malthus, A M	Wellington	19 February 1982
Mansell, J L	Wellington	19 February 1982
Marriott, D E	Christchurch	30 March 1982
Maskill, J R	Wellington	19 February 1982
Matson, M E	Wellington	19 February 1982
Mercier, M J	Wellington	5 March 1982
Milner, L D	Wellington	19 February 1982
Moi Yin, L	Christchurch	29 January 1982
Morgan, R A O	Wellington	19 February 1982
Northover, C N	Wellington	19 February 1982
Ogilvie-Lee, M C	Wellington	19 February 1982
Palmer, D C	Wellington	19 February 1982
Paterson, B I	Christchurch	29 January 1982
Perry, A J	Wellington	19 February 1982
Phillips, P A	Christchurch	29 January 1982
Plunkett, D J	Wellington	19 February 1982
Poczwa, A M	Wellington	19 February 1982
Prakash, J	Christchurch	29 January 1982
Prescott, A W	Christchurch	29 January 1982
Redshaw, S M	Wellington	19 February 1982
Russell, C E	Wellington	19 February 1982
Ryde, J L	Christchurch	9 March 1982
San Nyein, M	Wellington	19 February 1982
Saunders, J R	Wellington	19 February 1982
Scott, I D	Christchurch	29 January 1982
Sewell, P D	Christchurch	17 December 1981
Sharp, G J H	Wellington	19 February 1982
Smith, M C	Wellington	5 March 1982
Smith, M J	Wellington	19 February 1982
Somers, J A	Christchurch	29 January 1982
Steele, P W	Wellington	19 February 1982
Stevens, J B	Christchurch	29 January 1982
Stodart, S M	Christchurch	29 January 1982
Stribling, H F	Wellington	19 February 1982
Stringer, D J H	Christchurch	29 January 1982
Stringfellow, K A	Wellington	19 February 1982
Sutton, J D	Wellington	19 February 1982
Swan, J M	Wanganui	5 March 1982
Taylor, L J	Wellington	19 February 1983
Thrush, P C	Wellington	19 February 1982
Tong, J	Wellington	19 February 1982
Treacy, T S	Wellington	19 February 1982
Tricker, G S	Wellington	19 February 1982
Venning, G J	Christchurch	29 January 1982
Verbiest, M J	Wellington	19 February 1982
Walsh, P J	Wellington	19 February 1982
Weston, T C	Christchurch	29 January 1982
White, G E	Christchurch	29 January 1982
Wright, D R	Wellington	19 February 1982
Yeoman, B S	Wellington	19 February 1982