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Following the logic of reasonable foreseeability

FIFTY years ago, in *Donoghue v Stevenson* [1932] All ER Rep p 1, Lord Atkin propounded in simple and direct language the principle on which *at law* liability for negligence has since been founded. The words *at law* are emphasised for the test of reasonable contemplation, or reasonable foreseeability as it has become, was intended to limit a wider moral obligation — and indeed Lord Atkin specifically referred to it as limiting "the range of complaints and the extent of their remedy."

Reasonable foreseeability is a marvellously flexible test that has enabled the progressive development of negligence on a case by case basis from very cautious beginnings. However there has been a counter-current that, in its mildest form, introduces limitations additional to those proposed by Lord Atkin on the ability to claim or recover and in its more extreme form seeks to close off categories of negligence. In *Anns v London Borough of Merton* [1977] 2 All ER 492, 498 Lord Wilberforce considered the time had come where a two-stage test should be applied;

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises.

This is very similar to Lord Atkin's test except that no more than a prima facie duty of case arises.

> Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . . .

In its milder form these other considerations are applied on a case by case basis — in the more extreme form they are dignified with the name of policy and are expressed to apply in a general way to limit liability for negligence. A good example is found in the case of *Lambert v Lewis* [1980] 1 All ER 978 (CA). Here a defective trailer coupling caused an accident. The plaintiffs claimed against the driver, who joined the retailer, who joined the manufacturer. The claim of the retailer, in the fourth party proceedings against the manufacturer, was for economic loss. Relief was refused. Stephenson LJ, who delivered the judgment of the Court of Appeal on this point, said:

> There comes a point where the logical extension of the boundaries of duty and damage is halted by the barrier of commercial sense and practical convenience. In our judgment, the facts of this case do not enable the suppliers to push that barrier back as far as to include themselves and their damage within the range of the manufacturers and the towing hitch which they put into the market, or to surmount the barrier where we think common sense would place it.

(Those who have read "After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/80"; (1981) *44 MLR* 617; (1982) *45 MLR* 34 by W T Murphy and R W Rawlings will be very conscious that Stephenson LJ has simply asserted the proposition on which the division is based — justification for it cannot be found in the judgment.)

Lord McMillan may well have said "the categories of negligence are never closed." Instead we find them bounded — and that boundary is not implicit in Lord Atkin's principle. On the contrary it denies the relief that application of the principle would grant. A plaintiff may well have been within reasonable contemplation, and likewise the nature of his loss, and the extent of his loss — yet, for reasons of commercial sense, for reasons of practical convenience, for reasons of policy, and almost certainly for reasons insufficiently justified or explained, relief will be denied. Of these cases, those dealing with economic loss are perhaps the most notorious.

Now, and fittingly in this, the fiftieth year since *Donoghue v Stevenson*, there is comment from the House of Lords on this issue. The case is *McLoughlin v O'Brian* (*The Times*, 7 May 1982). This case could well be overlooked in New Zealand for it deals with a claim for nervous shock — a subject not commonly followed in view of the Accident Compensation Act 1972. Unfortunately a full report is not yet available but the *Times* report gives a general indication of how their Lordships, in their five different ways, approached the topic.

The plaintiff was the mother of children who were injured in a car crash. She was told about it at home and shortly afterwards saw her husband and children at hospital in varying states of distress and injury and there discovered one of her children had been killed in the accident. She claimed damages for nervous shock. In the lower Court she was unsuccessful — either because the possibility of her suffering shock was not reasonably foreseeable or because the duty of care was limited to persons at or near the scene of the accident.

This judgment was upheld in the Court of Appeal ([1981] 1 All ER 809). Stephenson LJ considered injury by

nervous shock to be reasonably foreseeable but held that considerations of policy prevented her from recovering. Griffiths LJ also held the injury to be foreseeable but that the defendants owed no duty of care, the duty being limited to those on the road nearby. Cumming-Bruce LJ agreed with both.

The plaintiff succeeded in the House of Lords.

Lord Wilberforce took the view that the plaintiff's case fell within the boundary of existing law. The relationship was sufficiently close, there was sufficient proximity in terms of time and space, and the shock had been caused by sight and hearing of the aftermath of the accident.

The wider interest in the decision however lies in the other four judgments, in that they discuss the question of whether responsibility for negligence should be bounded by policy considerations. Those coming fresh to the case may find it helpful to read the judgments in reverse order starting with Lord Bridge. However, they will be described in the order in which they appear.

Lord Edmund Davies concurred in the result. He was not persuaded by floodgates arguments. He did not accept the proposition that foreseeability having been established the Court of Appeal had no course but to allow the appeal. He did not agree with Lord Scarman that public policy had no relevance to liability or that public policy issues were not justiciable. In his opinion the Court of Appeal was quite right to consider public policy — they had just got it wrong.

Lord Russell took the view that if the result of the negligence was reasonably foreseeable there was no justification for not finding liability in damages. He was not impressed by the floodgates argument either, but would not shrink from regarding policy as something which might feature in a judicial decision.

Lord Scarman deals directly with a point of the greatest importance both to the law of negligence and to the respective roles of the Courts and the legislature in developing the common law. The Court of Appeal agreed that *an extension of the scope of liability* in negligence ought only to be made by the legislature, a proposition carrying the implication that the common law may be inflexibly frozen. Lord Scarman took a different view. He regarded it as being not for the Courts but for the legislature to *set limits*. The Courts' function is to adjudicate according to principle leaving policy curtailment to Parliament. The Judges were required to follow the logic of the "reasonably foreseeable" test. The Courts would not draw a line because the policy issue as to where to draw the line was not justiciable. It may be hoped that the full report will amplify and clarify this observation.

Lord Bridge was even more forthright in dealing with this point. He felt that to attempt to draw a line and leave it for the legislature to extend the limit would be an unwarranted abdication of the Court's function of developing and adapting principles of the common law to changing conditions. He would resist the temptation to freeze the law in a rigid posture which would deny justice to some who on the application of the classic principles of negligence derived from *Donoghue v Stevenson* ought to succeed. To quote from the *Times* report:

> The defendant's duty must depend on reasonable foreseeability and must be adjudicated only on a case by case basis. If asked where the thing was to stop, His Lordship would answer; ". . . *where in the particular* case the good sense of the Judges, enlightened by progressive awareness of mental illness, decided".

In other words, he would follow principle as far as the evidence takes him.

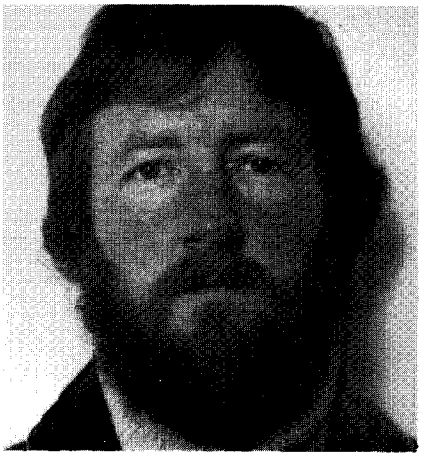
This case will obviously warrant close analysis when the full report is available. Meanwhile the decision gives a slight feeling of living dangerously, for with Lord Scarman and Lord Bridge prepared to follow the logic of the reasonably foreseeable test, with Lord Russell and Lord Edmund Davies not so quick to set aside policy considerations, and with Lord Wilberforce avoiding the issue, it will be a matter of nice judgment as to whether the time is ripe to carry to the House of Lords or Privy Council an attack on other policy limitations such as those that bear on claims for economic loss — or liability of counsel.

Tony Black

International law in the Falkland Islands

Rupert Granville Glover

The author, a Lecturer in law at the University of Canterbury,
sketches the historical background to the dispute, discusses the legal basis of the Argentinian claims, and considers the present rights of the combatant nations in terms of general international law and under the United Nations Charter.



Background

(a) The Falkland Islands

THE Falkland Islands were probably first sighted by Europeans when the English captain John Davis recorded their existence in 1592. The first known landing was by Captain John Strong in 1690. He named the group after the Treasurer of the Navy, Viscount Falkland. In 1764 a small French colony was established in East Falkland and three years later it was formally sold to Spain. Meanwhile a British navigator John Byron made a comprehensive survey of West Falkland in 1765, and the following year saw the establishment of a British settlement there. In 1770 a Spanish force compelled the British to leave and the two countries came close to war, but in 1771 Spain returned the settlement to Britain. It was re-established, but was finally withdrawn in 1774 for economic reasons. However the British maintained their claim to sovereignty and left a leaden plaque declaring the Falkland Islands to be "sole right and property" of King George III. The Spanish settlement on East Falkland was withdrawn in 1811.

In the meantime the Spaniards were in difficulties in the Vice-royalty of Rio de la Plata. In 1806 a British force commanded by Commodore Sir Home Popham attacked Buenos Aires and took the city in three days. This unauthorised action by Popham signalled the birth of the Republic of Argentina. The creole community neither accepted conquest nor sought help from Spain. Instead they struck out for themselves in a movement of independence and took Popham's forces prisoner within six weeks. Although both Britain and Spain attempted to recover their positions, henceforth the central actors were Argentinian, and in 1816 a formal declaration of independence was made, denying the sovereignty of Ferdinand VII. In 1820 the Buenos Aires Government sent a ship to the Falklands to proclaim its sovereignty, and in 1826 an Argentinian Governor was appointed despite British protests. In 1831, however, a United States warship destroyed the Argentinian fort and declared the Falklands free of all government. In January 1833 a British expeditionary force expelled the Argentinian garrison. British occupation of the islands was resumed, and has continued unbroken until the recent Argentinian invasion.

(b) South Georgia

Although there had been a number of earlier sightings of South Georgia, it was not until 1775 that any attempt to claim sovereignty over it was made. On 17 January the log of the ship *Resolution*, under the command of Captain James Cook, recorded: "I landed at three different places, displayed our colours, and took possession of the country in His Majesty's name, under a discharge of small arms." The diary of George Foster, a naturalist aboard the *Resolution*, also describes the ceremony:

> We climbed upon a little hummock. . . . Here Captain Cook displayed the British flag, and performed the ceremony of taking possession of these barren rocks, "in the name of his Britannic Majesty, and his heirs for ever." A volley of two or three muskets was fired into the air, to give greater weight to this annexation; and the barren rocks re-echoed with the sound, to the utter amazement of the seals and penguins, the inhabitants of these newly discovered dominions.

Claims to sovereignty

(a) The concept of territory

In the *Island of Palmas* case (Permanent Court of Arbitration, 1928) territorial sovereignty is defined as the right to exercise the functions of state in a portion of the globe to the exclusion of any other state. Territorial sovereignty can be acquired in five ways: (i) by the occupation of *terra nullius*. British sovereignty in South Georgia is an example; (ii) by prescription. Territory formerly under another state is possessed and controlled by a new sovereign with the acquiescence of the previous sovereign; (iii) by subjugation, but this is now illegal under the UN Charter; (iv) by cession. An example is France's transfer of its Falklands settlement to Spain; (v) by accretion.

The effective control test was once quite strict

In order to occupy effectively, two essential elements must be present: the power asserting sovereignty must actually take control and possession, and it must have the intention to occupy as sovereign. The effective control test was once quite strict. A state could satisfy it only by taking exclusive

control and possession. Nowadays, however, all that is generally required is the exercise of some governmental functions, which may be largely nominal in the case of remote territories, over the claimed territory: *Clipperton Island Arbitration* (1931); *Legal Status of Eastern Greenland* case (PCIJ 1933).

(b) The Falkland Islands

On the above criteria it would seem that sovereignty over the Falkland Islands may have changed hands several times during the years prior to 1833. But for the purposes of the present dispute only the claims of Argentina and Britain need be examined. Although Argentina claims to have inherited Spain's title, this must be seen as dubious since Argentina rebelled against Spanish authority, and since Spain itself returned Britain's settlement in 1771. From that date until 1774 the British clearly satisfied the effective occupation test. So the real question in this early period is whether Britain abandoned the Falklands in 1774 in such a way as to allow Argentina to establish a title by prescription in 1820, or whether British sovereignty continued after the removal of its physical presence there. It is established in international law that physical abandonment does not involve dereliction as long as the asserting sovereign has the will and the ability to reoccupy the territory. Britain demonstrated its will by protesting against Argentina's claims in the 1820s, and did in fact repossess the islands in 1833. Even if Britain's claim is seen as derelict, its act of subjugation in 1833, when the acquisition of territory by force was not illegal, coupled with its continuous, peaceful and effective occupation of the islands ever since, would be sufficient to establish its sovereignty over the Falklands. Nevertheless, Argentina has never acquiesced in British sovereignty, and the status of the Falklands has been debated regularly in the Fourth Committee of the United Nations and in its special committee on colonialism. The elected representatives of the Falklands have made it clear that the population wishes to remain associated with Britain and does not seek independence or association with another country. Britain has pointed out that in the circumstances Argentina's claim is contrary to the principle of self-determination (*General Assembly Resolution 1514 (XV)*). Diplomatic discussions made considerable progress during the 1970s and terms of reference were established for negotiations covering political relations, including sovereignty, and economic co-operation in the Falklands and Dependencies. Meetings were held in Rome, New York and Lima during 1977-8.

(c) South Georgia

Although Britain's claim to sovereignty over South Georgia on the basis of annexation of *terra nullius* seems unassailable in international law, Argentina has put forward claims to this island and to the South Sandwich Islands based on proximity to Argentina and on inheritance from Spain. Argentina, Britain and Chile also have overlapping claims in Antarctica, which led to exchanges of naval gunfire between British and Argentinian warships in 1948. In 1947 and subsequently Britain offered to submit the dispute over the Falkland Dependencies to the International Court of Justice, but Argentina refused. In 1955 the British Government applied unilaterally to the Court for redress against Argentinian and Chilean encroachment in the Dependencies but both respondent states refused to submit to the jurisdiction of the Court.

The Argentinian invasion and the British response

Regardless of the soundness or otherwise of Argentina's claims to legal sovereignty over the Falkland Islands, there can be no doubt that their armed occupation was illegal under Art 2(4) of the UN Charter, which states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The illegality of the invasion was recognised by the Security Council in Resolution 502, which

> Demands an immediate cessation of hostilities, demands an immediate withdrawal of all Argentine forces from the Falkland Islands, and calls on the Governments of Argentina and the United Kingdom to seek a diplomatic solution to their differences and respect fully the purposes and principles of the Charter of the United Nations.

The Resolution was adopted under Chap VII of the Charter, although it is not completely clear under which Article, so is mandatory. Non-compliance therefore entitles Britain to seek a whole range of sanctions against Argentina, from cutting off communications to a full economic, diplomatic and military embargo. But until the Security Council takes positive action, Britain also has the right to self-defence bestowed by Art 51 of the Charter, and by customary international law. Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority or responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

At customary international law the *Caroline* case (1842) sets out three criteria for self-defence: (i) a delict against the state exercising the right; (ii) an overwhelming and instant need to act; (iii) the action to be reasonable and not disproportionate.

Britain's actions in sending a naval task force to the area and in blockading the islands to prevent further reinforcement of the Argentinian position, while at the same time showing itself willing to conduct negotiations through diplomatic channels, seem to satisfy the requirements of both Art 51 and Resolution 502, and the criteria of the *Caroline* case. The presence of Argentinian troops and the refusal to withdraw them, violate both Art 2(4) and Resolution 502.

The legal position has been complicated by the Soviet assertion that Britain's exclusion zone on the high seas surrounding the Falkland Islands is illegal in terms of the 1958 Geneva Convention on the High Seas, Art 2 of which reads:

> The high seas being open to all nations, no state may validly purport to subject any part of them

to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal states:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas.

But the Geneva Conventions on the Law of the Sea contain practically no references to security measures. Explaining this omission the International Law Commission, which drafted the articles, suggested that the concept of security was too vague and might lead to abuse. In the last resort, a state's inherent right of self-defence would provide an adequate safeguard for its legitimate interests. Bowett has commented that it is "generally recognised that a state may exercise its authority on the high seas in exceptional circumstances where this is necessary to forestall a real threat to its territorial integrity and general security" (*Self-defence in International Law*, p 66). So a state which is the target of an invasion fleet, or a ship that is about to be attacked, need not wait until the fleet enters territorial waters or the attack takes place before acting. Further, the concept of the pacific blockade is widely recognised as allowing action against ships of the blockaded power on the high seas, although this may not extend to interference with the freeedom of the high seas in relation to other states. It seems therefore that the British blockade of the Falklands as regards Argentinian vessels is legal as a matter of legitimate self-defence, but that any attempt to interfere with the freedom of vessels of a third state might not be. By these criteria the sinking of the Argentinian warship *General Belgrano* by a British submarine was probably a legal act of self-defence, but the missile attack on the British destroyer *Sheffield* was not, since Argentina is involved in the conflict in the role of aggressor, and even if it was sought to justify the attack as a reprisal for the *General Belgrano* it would still be illegal under Art 2 of the Charter, Argentina being unable to invoke Art 51.

Prospects for settlement

Clearly the most desirable conclusion to the Falklands crisis would be a negotiated settlement. At the time of writing, American and Peruvian efforts at diplomacy appear to have failed and no clear details are available concerning the mediation attempts of UN Secretary-General Javier Perez de Cuellar. Should these fail and hostilities break out again, Art 99 of the Charter empowers the Secretary-General to bring the matter before the Security Council. In view of the past record of this body it seems unlikely that any proposal for a Chap VII peace-keeping force could survive the veto of one or more of the permanent members. Such a veto would leave the more remote option of action by the General Assembly under the Uniting for Peace Resolution (*GA R377(V)*), or mediation by another power or group of powers.

Conclusion

It seems apt to quote words written by H S Ferns in 1969 (*Argentina*, pp 256-260): ". . . there is no substance nor has there ever been any substance in the popular Argentine myths about British imperialism. It is useless, however, to assert this. It is so, but it must be seen to be so. . . . From the British point of view there is much to be said both politically and economically for settling the dispute by transferring the islands to Argentina. Unfortunately what is rationally desirable is frequently emotionally unacceptable. The Argentines have behaved throughout with exceptional foolishness. Always determined to argue their case on legal grounds, they have rigidly refused to recognise the British presence in the Falklands. . . . The combination of ignorance, patriotism, and devotion to the dogma of self-determination on the part of the British is perhaps more dangerous than Argentine legal pedantry and nationalist zealotry. . . . As events are shaping up . . . it is possible to foresee a situation in which Argentina will force the solution . . . and thus do something the Argentine government has no wish to do . . . humiliate Britain. If this happens the British will have no one to blame but themselves."

It has happened, and it now remains for the international community to produce a measured response which may assist the two protagonists in reaching a settlement. International law will have a role to play, but it will be a role *ex aequo et bono*, an appeal to the spirit of the law rather than the letter. National pride buttressed by legalisms is no good reason for warfare in the late twentieth century: the interdependence of the family of nations is simply too great.

Section 62 of the Companies Act

Mark Russell, Lecturer in Law, University of Canterbury

In this article the author subjects s 62, which prohibits a company from providing financial assistance to purchase its own shares, to critical scrutiny. After discussing the differing attitudes Courts have taken to cases under the section (and under corresponding provisions in other jurisdictions) he recommends specific reform.

Genesis of the section

IT has been said before that it has often been the misfortune of companies to have been legislated for in an underlying climate of emotion. Nowhere in company law is this more evident than in the case of s 62 of the Companies Act 1955. It began life originally as s 45 of the Companies Act 1945 (UK). It was introduced as a result of recommendations contained in a report made by a Company Law Reform Committee chaired by Lord Greene. Although the equivalent English provision has been considerably altered by the Companies Act 1981 (UK), the New Zealand counterpart remains substantially in the original form.

Basically, s 62 makes it unlawful for a company to provide financial assistance for the purchase of its own shares, or those of its holding company. There are exceptions to the prohibition in the cases of companies that provide finance as a normal part of their trading activity, and of schemes whereby directors of private companies, and trustees for employees, acquire company shares.

The Greene Committee gave an example in their report of the sort of transaction against which their recommendation was aimed: A "syndicate" acquired control of a company by buying shares out of borrowed money, which they proceeded, when they had appointed themselves to the company's board, to repay from money lent to them by the company. The Committee thought that such an arrangement offended against the spirit, if not the letter, of the law, which prohibited a company from trafficking in its own shares,[1] and added that the practice was "open to the gravest abuse".[2]

However, the thrust of s 62 is not really against transactions such as those whereby a company buys its shares. There may be a fundamental difference between that sort of arrangement and that which may be prohibited by s 62.[3] If a company does purport to purchase its own shares, then in doing so it parts outright with the consideration for the purchase and thereby reduces its capital, to the prejudice of the interests of both its own minority shareholders and its creditors. By contrast, where a company provides financial assistance to a person, for example, by way of a loan, then it simply changes the form of its assets (as long as the loan is in all respects enforceable and on commercial terms) and if the borrower is able to repay the loan the company's capital remains intact.

It is clear that the section aims to prevent abuses which are likely to arise when practices such as the above are followed. As the Jenkins Committee pointed out in their 1962 Report (Cmnd 1749, para 173):

> If people who cannot provide the funds necessary to acquire control of a company from their own resources, or by borrowing on their own credit, gain control of a company with large assets on the understanding that they will use the funds of the company to pay for their shares it seems to us all too likely that in many cases the company will be made to part with its funds either on inadequate security or for an illusory consideration. If the speculation succeeds, the company and therefore its creditors and minority shareholders may suffer no loss, although their interests will have been subjected to an illegitimate risk; if it fails, it may be little consolation for creditors and minority shareholders to know that the directors are liable for misfeasance.

Therefore, instead of only striking at transactions which clearly cause the company some loss, the section goes one stage further by prohibiting transactions which it is thought give rise to a risk of loss occurring, through either the subsequent impecuniosity or the outright fraud of those assisted.

The section in practice

It is the basic thesis of this article that s 62, as presently framed, is awkwardly drafted and operates harshly in some instances. It is arguable that if it were directed only at transactions which clearly prejudice minority shareholders and creditors, then there would be less difficulty in interpreting it. At present it may prohibit perfectly innocent transactions. For instance, take the case of a private company with three members only. One member wishes to sell out his shareholding and retire. The profits of the company have in the past been retained, so that the level of reserves is high. The company has no major liabilities.

The other shareholders cannot afford to buy his shares out of their own resources, and so a scheme is devised whereby the company lends those members sufficient funds to make the purchase. Although neither shareholders nor creditors would be prejudiced, the transaction would nevertheless be invalid under s 62.[4] Similarly, to take the loan example again, it could be argued that such a transaction need not be prohibited in every case. This would, of course, be subject to the loan being on "realistic" terms and adequate security. To repeat the point, s 62 was enacted so as to prevent the possibility of anything occurring which would be detrimental to the company, and therefore its shareholders and creditors.

As will be seen, the Courts have on occasions interpreted s 62 in such a way as to save arrangements which seemingly came within the literal words of the section. The most notable

example is the treatment of dividend payments. The common thread which runs through these cases is the reluctance of the Courts to invoke the prohibition in circumstances where it is clear that the transaction in question has caused no prejudice to the protected interest groups. Yet, if it is accepted that it is the risk of prejudice which it is aimed to prevent, then in theory this approach, while commendably pragmatic, could be somewhat anomalous.

It is because of the difficulty which is involved in justifying these attempts by the Courts to soften the jagged edges of s 62 that consideration needs to be given to possible reforms. Does the section at present constitute an unwarranted fetter on companies? If there is an element of "overkill", then how should it be eliminated?

Before examining the issue of reform of s 62, it is necessary to review some of the more recent cases on the provision; since, if this suggests that in fact the Courts are already interpreting it so as to leave unaffected most "innocent" transactions, it may be argued that reform is not necessary.

The cases — two approaches

The key to the interpretation of this section by the Courts is the expression "financial assistance". It is expressly stipulated that what is prohibited is the giving of such assistance "by means of a loan, guarantee, the provision of security or otherwise . . . for the purpose of or in connection with a purchase or subscription . . .".

The first approach would give the widest possible meaning to the words.

What then, is meant by "financial assistance"? Bearing in mind the mischief which the section was designed to attack, there are, broadly speaking, two possible approaches. The first approach would give the widest possible meaning to the words, so that any transfer of finance from the company to a prospective purchaser, in whatever context, would be within the phrase, so long as it bore some causal relationship to the actual purchase of the shares. To put it more simply, the question would then be — has this transaction in any way made a purchase possible? Under this approach, financial assistance would be regarded as having been given even though the company received a quid pro quo for its provision of finance, for example, the obligation of a borrower of money to provide security and to pay interest on the principal sum.

The Courts have been constrained to adopt this approach by the wording of the section, which assumes that a "loan, guarantee, or the giving of security" will always amount to financial assistance. They have, therefore, been forced to follow what amounts to the "avoidance of risk" rationale, as expounded in the Greene report.

The strict approach

The first approach can be illustrated by the recent Canadian case of *Central and Eastern Trust Co v Irving Oil Ltd.*[5] The company in question purported to mortgage its real and personal property to secure a loan. The proceeds of the loan were paid to the owners of all of the company's shares, who then transferred them to purchasers. The plaintiff, when seeking to foreclose under the mortgage, was met with the defence that it was unenforceable as being in contravention of s 96(5) of the Nova Scotia Companies Act 1967, which is in pari materia with s 62.

The Supreme Court of Canada said that it was "beyond question" that the mortgage contravened the section. Clearly, it was enough for the Court that this was "the provision of security . . . for the purpose of or in connection with a subscription or purchase . . .". In reaching this conclusion, no consideration was given to whether or not the company had received anything in return. It was enough that the security had been given. It is particularly interesting to note that at first instance in the Supreme Court of Novia Scotia (1978) 28 NSR (2d) 151, 165-166, Hart J had the following to say about the transaction:

> Even though the funds advanced . . . may have been used indirectly to assist in the purchase of the shares of the company, the mortgage . . . does not offend the provisions of s 96(5) . . . the mortgage was granted for an actual consideration of a monetary advance of $225,000 to the company, and the fact that this consideration was channelled in a certain direction does not render the mortgage void.

The money was paid straight to the vendors of the shares.

In fact, it is submitted that on any approach the company gave financial assistance, since it did not in fact receive the said consideration, contrary to the opinion of Hart J. The money was paid straight to the vendors of the shares. Nevertheless, the case shows that the Supreme Court of Canada felt that it did not even have to consider the point. The words of Hart J quoted above certainly indicate that an alternative approach to interpreting "financial assistance" is possible, although it must again be stated that the clear words of the section severely limit its application in certain cases.

That s 62 may be invoked in situations where the company has received full value can also be shown from the decision of the Court of Appeal in *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393. W Ltd owned the controlling interest in City Ltd, which in turn owned Belmont. J was Chairman of all three companies. G was the controlling shareholder in Maximum Ltd. G desired to buy Belmont so as to gain access to its assets, while J wanted the benefit of G's expertise in property development for his companies. G agreed to sell Maximum to Belmont for £500,000, and then to buy the capital of Belmont for £489,000. When Belmont later went into receivership, the receiver discovered through an independent valuer that Maximum was really only worth about £50,000. The Court of Appeal found that a breach of the section[6] had occurred. G had been financially assisted through the inflated price put on Maximum Ltd. Clearly, the sole purpose of the transaction was to enable G to gain control of Belmont. There was no question of its having been entered into for the benefit of Belmont. Therefore, as the asset had been purchased at an inflated price, there was "financial assistance" on any interpretation. The realised effect of the transaction was a loss to Belmont. Despite the clear decision on these facts, the Court went further, and formulated

a series of propositions: first, Buckley LJ stated (p 402) that:

> If A Ltd buys from B a chattel or commodity . . . which A Ltd genuinely wants to acquire for its own purposes, and does so having no other purpose in view, the fact that B thereafter employs the proceeds of sale in buying shares in A Ltd should not . . . be held to offend against the section, but the position may be different if A Ltd makes the purchase in order to put B in funds to buy shares in A Ltd. If A Ltd buys something from B without regard to its own commercial interests, the sole purpose of the transaction being to put B in funds to acquire A Ltd, this would, in my opinion, clearly contravene the section, even if the price paid is a fair price for what is bought . . . .

Waller LJ took a slightly stricter stand (p 414):

> To avoid a contravention of s 54 it is not sufficient, in my view, to show that the company is purchasing an asset which is worth the price being paid. The company must also show that the decision to purchase is made in the commercial interests of the company. If this were so, then the fact that the proceeds are used by the seller for the purchase of shares in the company would not necessarily infringe s 54. That would only happen if the decision was made partly with the intention on the part of the Board that the proceeds should be used for the purchase of shares in the company.

it will not be enough to show that the company has acquired an asset at the market place.

The result of these propositions is that it will not be enough to show that the company has acquired an asset at the market price. It must also be shown that the asset was bought by the company for use by it in its normal trading activities. It matters not that the company would immediately resell the asset, even at a profit. Thus, s 62 may now conceivably apply to situations where there is neither actual loss nor a risk of loss to the company. It might well be thought that it is wholly inappropriate to make the application of the section dependent upon the intentions of the Board of Directors. It is the loss of company assets which it is sought to prevent. The matter of managerial motives, it is submitted, is one best left to the existing rules regarding directors' fiduciary duties.

The liberal approach

It is in interpreting the catch-all words "or otherwise" that the Courts have been given the chance to employ the second approach to s 62. The express specification of "loan, guarantee, the provision of security" leaves them little or no room for manoeuvre. However, in the case of the words "or otherwise" the position is different. The Courts are not in the position of being told that certain forms of transaction will always amount to financial assistance. They are free to decide the matter for themselves. It is submitted that as a result the words have been interpreted in such a way that a particular transaction will only be held to be "financial assistance" if the perceived effect of it is in some way to reduce the assets of the company, to the detriment of minority shareholders and/or creditors.

The example which most readily presents itself is dividend payments. In *Re Wellington Publishing Co Ltd* [1973] 1 NZLR 133, W Ltd made a takeover offer for the shares in Blundell Brothers. Payment was to take the form of shares in W Ltd, and a sum in cash. The cash was to be derived from a dividend to be declared by Blundell Brothers. As shareholders W Ltd would receive the dividend, and pay the offerees. Quilliam J held that no breach of s 62 had occurred. He stated (p 136):

> The expression "financial assistance" is an indefinite one and it is beyond normal experience to regard that expression as applying to the payment of a dividend . . . . To be more precise, a dividend must be regarded as first and foremost a return on an investment.

The learned Judge also thought that his interpretation of "financial assistance" should accord with the mischief which s 62 was designed to attack. That is (p 136):

> The purpose of the section would seem to be the protection of minority shareholders, and creditors. If, therefore, a transaction in question is likely to detract from that protection, then the words of the section may the more readily be regarded as extending to embrace the transaction.

The payment of a company's debts provides another instance.

It is important to note that every shareholder in Blundell Brothers accepted the offer of W Ltd for their shares, and payment of the dividend would still have left sufficient assets to repay the creditors.

That case was followed by the Queensland Supreme Court in *Rossfield Group Operations Pty Ltd v Austral Group Ltd* [1981] Qd R 279 where Connolly J stated:

> It is of the nature of a share or stock unit that dividends are paid on it from time to time. Giving financial assistance, in my judgment, means making a provision, in money or money's worth to which the shareholder is not already entitled in his capacity as shareholder.

The payment of a company's debts provides another instance. In the Australian case of *Burton v Palmer* there was an agreement for the sale of the plaintiff's shares in S Ltd to the defendant. As a condition of the sale the company covenanted by deed to repay to the plaintiff amounts said to be owing by it to him. The defendant, in an action by the plaintiff, contended that the agreement was unenforceable, as being in breach of [s 62]. The New South Wales Court of Appeal, however, held that the transaction was not within the section.

Mahoney JA stated (p 885):

> I do not think that the mere agreement of the company to pay its present indebtedness is "financial assistance" even if the agreement be made to satisfy a condition imposed by the vendor of its shares.

Again, it was thought necessary to examine the original mischief, as an aid to construction. To refer again to the judgment of Mahoney JA (p 887):

> I do not think that it was the purpose of [s 62] to require a company, merely because the demand was

made in the context of a proposal for the sale of its shares, to do otherwise than it would ordinarily have been proper for it to do.

The Court reached its conclusion even though it seems that there was agreement neither as to the precise quantum of the debt nor as to the terms on which it was to be paid:

> It is perfectly proper for a company which is admittedly indebted, to act reasonably and to attempt bona fide to come to an agreement as to the amount of indebtedness where that amount is not immediately apparent.[7]

On this analysis, there would presumably be a contravention of s 62 where the company went ahead and paid what the creditor was claiming from it, even where the circumstances were such that it was unreasonable that payment should be made without demur, for example, where there was a real doubt as to the quantum. Such would not be a "bona fide" settlement.

Section 62 may be breached where the company pays the debt of another.

Similarly, there would be a contravention where the seller of a controlling block of shares is given an undertaking by the purchasers that they will have the company release him gratuitously from a debt he owes it once they are in control.[8]

On a slightly different note, it is now clear that s 62 may be breached where a company pays the debt of another, even where the company paying is the subsidiary of the debtor. In *Armour Hick Northern Ltd v Armour Trust Ltd* [1980] 3 All ER 833 Judge Mervyn Davies QC (as he then was), sitting as a Judge of the Chancery Division, held on a preliminary issue that a payment by a subsidiary on behalf of its holding company was capable of constituting "financial assistance".

This review of recent cases under s 62 and its various Commonwealth counterparts does not purport to be exhaustive. All that it was intended to show was that the cases can be divided into two groups: on the one hand, those where there is not necessarily any immediate loss to the company, and, on the other, those where such a loss is taken as being a necessary prerequisite to the applicability of s 62.

What, then, are the possibilities for improving s 62? Of course, it is always a question of balancing commercial freedom with protection of shareholders and creditors. Does the section strike this balance fairly at present?

Reform

It is submitted that, as presently framed, s 62 contains a basic contradiction. Depending on the form of transaction which is adopted, there are different factors which the Courts will consider. On the one hand, where what is involved is "loan, guarantee, the provision of security . . .", the section assumes that these will always be "financial assistance". On the other hand, with any other type of arrangement, the Courts can make their own decisions on the matter.

As has already been noted, the original concern was with the elimination of risks. This concern is valid: but in some cases the assumption that a risk exists is not warranted by the circumstances — where, that is, the interests of minority shareholders and creditors may clearly be safeguarded. Therefore, it is submitted that it may be right, at the outset, to propose a limited reform to s 62, which would have the effect of not prohibiting transactions where such interests are obviously protected. It is further submitted that this sort of reform would best be limited to the case of the small private company. To refer back to the hypothetical case given earlier in the article, what possible objection could there be to such a transaction, where all shareholders have agreed to it, and there will be sufficient funds, even after the financial assistance is given, to pay creditors in full?

The Companies Act 1981 (UK) introduces such a private company exemption (ss 43 and 44). The effect of this is that a private company may give financial assistance for the acquisition of its own shares if:

(a) it has net assets which are not reduced by the giving of the assistance or, to the extent that they are reduced, the assistance is provided out of distributable profits; and
(b) the assistance is approved by a special resolution; and
(c) the directors make a statutory declaration of solvency.

The key is to retain sufficient safeguards while legitimating transactions involving negligible risk of future loss.

It is submitted that, even if no other reform of s 62 is deemed justified, then at least this limited measure is. It is not easy to extend such an exception to public companies, but should there be a wider reform so as to afford these companies more freedom? Clearly, to adopt an approach whereby transactions are only deemed to amount to "financial assistance" where their effect is to cause a loss to the company will open the protected groups to risk of loss. If a transaction is allowed to go ahead, and the company subsequently suffers a loss, then it may be little consolation for the shareholders and creditors to know that they have recourse against the instigators of the scheme. Those persons will often not be able to fully compensate for damage caused.

The key, then, is to retain sufficient safeguards, while at the same time legitimating those transactions whereby a risk of future loss is minimal or non-existent. But what are the advantages of making it easier for a company to provide financial assistance? First, it might in many cases facilitate takeovers. In *Coleman v Myers* [1977] 2 NZLR 225, 287, Mahon J in the Supreme Court said:

> It seems to be an accepted commercial view that from the point of view of the national interest the activities of an inefficiently managed company are better merged with those of an efficient competing organisation, and it is also accepted that there are shareholders in many companies where financial interests are better served by accepting offers for their shares on a takeover or merger basis when the result of such offers is to provide for them a better income or capital position.

Secondly, it would facilitate the transfer of shares to "friendly" interests. A company would have greater control

over the future composition of its members. This is most relevant, of course, in the "family" company situation, where shareholder personality is a very important matter.[9]

Thirdly, it would assist in the marketing of a company's shares. Obviously, the field of prospective purchasers would be widened if it were known that financial assistance was available. It would help to support the market for the company's shares, if it was depressed.

It will still be feasible to stipulate in the section which forms of financial assistance are prohibited, if it is desired to draw particular attention to these. This list of specified types of transactions might usefully conclude with a provision to the effect that there is also prohibited any other financial assistance given whereby the company's net assets are reduced to a material extent.

The reason why the writer favours the retention of the specified transactions is that this could be accompanied by an all-embracing subsection which would state that the prohibition would not apply to these unless the company's funds were thereby diminished or reasonably likely to be diminished, or the company were thereby rendered insolvent or there were reasonable grounds to believe that that would occur.[10] The inclusion of such a subsection would of course mean that in the end a Court would have to make its own assessment as to what was or was not likely to occur in the future, and this may prove difficult. Typical of the sort of consideration which would become relevant as evidence would be whether or not a loan by the company was adequately secured, ie would the company be able to resort to the security if need be, and thereby recover its outlay?

The writer submits that this type of amendment would bring s 62 more closely into line with the ultimate purpose, that is, the prevention of the dissipation of company funds on unauthorised ventures. The previous paramount object, the curtailing of risks, was only an intermediate point, and had the effect of imposing a prohibition, in many cases, before it could be said whether in the circumstances there would or would not be a loss. By so doing, it is submitted, the section often constituted an unwarranted obstacle to the course of business, particularly in the areas of takeovers and financing generally.

Lastly, and perhaps from an excess of caution, it might be thought wise to stipulate certain particular transactions as being wholly outside the ambit of s 62. These could be as follows: (a) paying off a due debt; (b) payment by a company of certain expenses in connection with an offer to the public of its shares, or in connection with an offer to acquire its shares; (c) dividends lawfully paid; (d) the allotment of bonus shares; (e) anything done in pursuance of an order of the Court made under s 205 (compromisesand arrangements with creditors and members). The existing exemptions, which are contained in s 62(1)(a)-(d) might also be retained.

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1 See *Trevor v Whitworth* (1886-90) All ER Rep 46. By virtue of the Companies Act 1981 (UK) English companies now have a limited right to buy their own shares.

2 Lord Greene MR repeated this statement in the case of *Re GM Holdings* [1942] 1 All ER 224, 225.

3 In the Canadian case of *Hughes v Northern Electric and Manufacturing Co* (1915) 21 DLR 358, 364, Duff J thought that there was no analogy at all between a company providing financial assistance, and purchasing its own shares outright.

4 This example was given by the MacArthur Committee in its 1973 Report, para 142.

5 (1980) 110 DLR (3d) 257. Supreme Court of Canada, noted by Braithwaite at (1981) 51 Can Bar Rev 371.

6 Companies Act 1948 (UK), s 54.

7 Ibid. See observations to a similar effect in the South African case of *Gradwell (Pty) Ltd v Rostra Printers Ltd* [1959] 4 SA 419, 426, per Schreiner JA.

8 *Curtis' Furnishing Stores Ltd v Freedman* [1966] 2 All ER 955.

9 Of course, the issuing of shares to "friendly" interests, particularly as a defence to a takeover bid, is sometimes restricted by the doctrine relating to directors of a company using their powers for improper purposes. See *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126.

10 Cf Canadian Business Corporations Act 1974-75, s 42.

The "accident" of a heart attack

A P Blair

In this latest article on controversial aspects of the Accident Compensation Act Judge Blair examines the history and present consequences of the provisions governing compensation for heart attacks. He ends by proposing brief amending legislation designed to resolve some of the anomalies that beset claims in this area.

Preliminary

THE general purpose of the Accident Compensation Act is to provide compensation cover for those injured by *accident*. As a matter of policy and economics, incapacity or death from disease or illness is generally excluded from the protection of the Act, these misfortunes being left to be dealt with by social security legislation. The legislators' task of drawing a line between injury from accident and injury from disease or illness has not been easy. Parliament was faced not only with difficult questions of law and medicine but also with political and historical problems. For example, it would be impolitic to exclude from cover in the new Act those industrial diseases which for many years had been treated as compensable under the Worker's Compensation Act 1956. The new Act has had to compromise. Some of the ways in which this has been done can be seen in the definition of "personal injury by accident" in s 2 of the Act.

The original definition in the 1972 Act was a limited one, and in 1974 the present enlarged definition was enacted by amendment. Paragraph (a) sets out the kind of damage which is included in the definition, and para (b) lists damage which is excluded. However, para (b) is made subject to the words "except as provided in the last preceding paragraph". It follows that injury or damage which is excluded by para (b) might still qualify for cover if it can be regarded as coming within the scope of para (a). For example, a disease condition will be covered if it can be found to be "a physical consequence" of an accident injury, (para (a)(i)).

The "heart attack" and the Worker's Compensation Act

Subject to qualifications and exceptions which will be mentioned later the definition declares that the damage caused by a cardiovascular episode (for convenience this will hereafter be called a "heart attack") is excluded from cover. It may be assumed that para (b) has been enacted in order to avoid some of the confusion which had arisen in heart claims under the old Worker's Compensation Acts. Under those Acts the law relating to cover for heart attacks was Judge-made. The Worker's Compensation Act 1956 and its predecessors did not define personal injury by accident, nor were there any express provisions relating to heart attacks. It was left to several generations of Judges of high and low degree to expound the law, as over 40 volumes of Butterworths Worker's Compensation Cases testify. The older judgments are undoubtedly influenced by a reluctance to interfere with lower Court findings and also by the social conditions of the times, and the fact that the Judges were dealing with what was sometimes called the "Worker's Protection Act".

A benevolent approach can be discerned, for example in *Clover Clayton & Co v Hughes* [1910] AC 242, a heart case which has had considerable influence in the evolution of judicial thinking — perhaps more than it deserves. The basic facts are that a worker died from a ruptured aorta while performing his normal work. It was common ground that his heart disease had developed to the stage that he was liable to die at any time, and his death could have happened in bed or while walking to work. The County Court Judge found that the work was a factor in the death and held that the death was the result of accident arising out of the employment. The House of Lords by a majority confirmed this decision, but the Lords' decision cannot be regarded as a strong one. Two of the five Judges recorded dissenting opinions, and two of the majority Judges indicated that they might have come to a different decision had they been the arbitrator, (Lord Loreburn LC at 247 and Lord MacNaghten at 249) but both felt that, as there was evidence to support the finding of the trial Judge, it should be upheld.

The *Clover Clayton* case will be discussed later. It is mentioned at this stage to illustrate earlier judicial attitudes in heart cases. Because of the language used in the Accident Compensation Act the cases under the older Acts are now of limited assistance. The new Act has created express provisions which must now govern heart claims and, as Perry J has pointed out, there are dangers in considering authorities under the old Acts in relation to the words "personal injury by accident" in the Accident Compensation Act (*Re Petty* (1979) 2 NZAR 1, 5).

When a heart attack is compensable

Except in para (b)(i) of the definition there is no express provision in the Act for heart claims. And that subparagraph gives only limited cover — namely to employees suffering a work-induced heart attack. However para (b) is preceded by the words "except as provided in the preceding paragraph". It follows that if a cardiac episode can be regarded as "the consequence" of an ordinary accident then it may be compensable pursuant to para (a)(i). The two paragraphs will now be considered separately.

Paragraph (a)(i) covers any injury which is the consequence of personal injury by accident. If then a heart attack follows an electric shock or some other traumatic incident it may be readily inferred that "accident" caused the heart attack. Similarly a cardiac episode following accidental poisoning presents a prima facie case for cover. Of course the particular facts will govern the claim — the nature of the "accident", the degree of mental or physical injury, and the pre-accident condition of the

claimant. A heart attck is not itself an "accident". There must be proof of some external factor which has the character of an accident and can be held to have caused the episode (see Lord Diplock's observations in *R v National Insurance Commissioner ex parte Hudson* [1972] AC 944, 1009). And Lord Wrenbury in *Grant v Kynoch* [1919] AC 765 said "I have to find some occurrence which is accidental and is extraneous to the disease itself from which the disease resulted. . . ." There must be some nexus between two elements — the impact of the physical world and a physiological change (see Lord Wilberforce in *Minister of Social Security v Amalgamated Engineering Union* [1967] AC 725, 759).

A heart attack resulting from medical or dental misadventure is compensable

A heart attack resulting from say medical or dental misadventure (see para (a)(ii)) is compensable. But such claims must be rare and difficult to prove. A person submitting to medical tratment accepts the risks which go with that treatment. Even though a cardiac episode may have been caused say by a surgical operation this is not injury by accident as "it is in the nature of medical and surgical treatment that unexpected and abnormal results may follow . . ." and "certainty of success in medical matters cannot be underwritten" (per Speight J in *ACC v Auckland Hospital Board and M*, 1980 M630/78 unreported).

The effect of para (b) read apart from para (a) is that a heart attack will be regarded as personal injury by accident only if it is:

> . . . the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it *and* . . . the effort, strain, or stress arises out of and in the course of the employment of that person as an employee.

The first thing to notice about this provision is that it applies only to the "employee", as defined in s 2. It may seem odd that if an employer and his employee are working together on a stressful job and both suffer heart attacks induced by the effort, only the employee is eligible to claim pursuant to the paragraph. The distinction is explainable on historical grounds. For many years employees have enjoyed compensation rights for what might be called work-contributed heart attacks. It would be impolitic for these rights not to be preserved. Parliament had the dilemma of reconciling its general purpose of creating an *accident* compensation Act (as distinct from a *disease* compensation Act) with the practical need to keep alive for employees the kind of rights which they had had previously. As regards heart claims at work, para (b)(i) is the result. The new law continued to give rights to employees comparable to (but not quite the same as) those they had had before, but Parliament has drawn back from extending these sorts of right to everyone, presumably because such an extension might bring the Act's coverage still further into the disease areas. Parliament's decision is justifiable, but the distinction it has made will cause anomalies. Apart from the one already mentioned, the "one-man company" situation may be referred to. A person who forms his business into a company and thereby gives himself the status of employee would be eligible under the paragraph, while his friend across the road who continues to trade in his own name would be ineligible, as a self-employed person.

The second thing to observe about the terms of para (b)(i) is that the rights it bestows on employees are not precisely the same as those which existed under the Worker's Compensation Acts. The Judge-made law which evolved under those Acts might be said to have interpreted the word "accident" in relation to heart attacks in a paternalistic way. Two well-known House of Lords cases which have influenced the shaping of the law may be mentioned. The first is *Clover Clayton and Company v Hughes* (supra) where it is clear that the death occurred after a normal working effort by the deceased, whose heart condition was such "that he might have died in his sleep and the mere tightening the nut, with no more strain than ordinary in such work, caused the accident". (Per Lord Loreburn at p 246). (Incidentally, the House of Lords decision in that case has been described as "medically absurd" by Dr J B Lowe, the cardiologist, in an article which will be referred to later). The second case is *James v Partridge Jones and John Patton Ltd* 32 BWCC 277. In that case, there was a finding of fact that the worker had pre-existing coronary disease, and that at the time of his heart attack he was doing his ordinary work which did not cause him any additional damage. Nevertheless the House of Lords held that he died "because he was engaged in doing his ordinary work . . . and the failure (of the blood supply) arose and that the work and disease contributed to his death".

The logic of the foregoing cases need not be discussed. They are cited to make the point that these decisions are obsolete as regards the interpretation and application of the definition of "personal injury by accident" in the Accident Compensation Act. Perry J's observation in *Petty's* case (supra) relating to the dangers in utilising these old authorities has already been mentioned. In particular, the new definition now requires that the effort, strain and stress relied on must be "abnormal, excessive or unusual for the person suffering it." This requirement was considered by Davison CJ in *Re Archer* (1979) 2 NZAR 25 at 28 et seq. The Chief Justice accepted that the words imposed a subjective test, but said that the test to be applied was to compare the effort, strain and stress which the worker was undergoing at the time of the cardiac episode with the effort etc usual for that worker in his employment. The Chief Justice went on to say "if the test were otherwise, then it could be contended that every worker suffering from a cardiac condition who uses a little more effort than his diseased body can stand and suffers a cardiac episode has suffered a personal injury by accident in terms of the Act. Such cannot be the case."

The stress must be "abnormal, excessive or unusual" for the person suffering it

In *Archer's* case, the appellant had underlying coronary disease and suffered a heart attack while doing his ordinary work. After considering the evidence, the learned Chief Justice concluded that it was not established that appellant's cardiac episode was caused by effort etc that was abnormal, excessive or unusual for him and accordingly that it was not injury by accident.

The judgment in *Archer's* case is a useful exposition of the law in heart cases relating to employees' claims. It also establishes that the circumstance that the heart episode occurred at work is, by itself, neutral in evidentiary value. Whereas under the old judgments there was a disposition to conclude that if such an episode occurred at work then the work being done was a contributing factor, this no longer applies, unless there is an element of effort, strain or stress that is abnormal, excessive or unusual for the person suffering it. It may be said with some confidence that the workmen in the two House of Lords cases above mentioned would not succeed in a claim under the Accident Compensation Act.

Claims by persons other than employees

Employers, self-employed persons, employees on holiday, housewives, pensioners, etc who suffer a heart attack can turn only to para (a)(i) to make a claim for personal injury by accident. To succeed, such persons must show that the episode was a physical or mental consequence of an accident or of the injury caused by an accident. Persons other than working employees are not covered by the provisions of para (b)(i). It has been held by the Appeal Authority in the cases of *Greenaway* (1977) 1 NZAR 263 and *Petty* (1977) 1 NZAR 268 that the clear intention of para (b)(i) is to give exclusive cover to employees, and that as a matter of statutory interpretation it must follow that a person who is not an employee cannot recover under para (a)(i) by establishing that a heart episode arose in circumstances that would make him eligible if he could proceed under para (b)(i). It would make nonsense of the special provision made for employees under that paragraph if the privilege bestowed by para (b)(i) had general application. In other words, if it is the law that any person suffering a heart episode can recover compensation simply by showing that the episode resulted from abnormal effort, then para (b)(i) is superfluous. Such cannot be the case, as it would offend against a basic rule of statutory interpretation to hold that para (b)(i) has no effective meaning. The truth is, as earlier mentioned, that the paragraph is designed to give and preserve a special right to employees. This interpretation problem was referred to by the High Court in *Re Petty* (supra) where Perry J, agreed that to give any force to para (b)(i) the words in para (a)(i) must be read in a more limited way, and the learned Judge went on to indicate that the kinds of episode which would be covered by the latter paragraph are those following, say, electrocution or an episode following emotional distress or shock caused by an accident.

Medico-Legal considerations

Usually the central matter in heart claims is the cause of the episode, and the decision will be governed by medical opinion which will have had regard both to lay evidence and to medical findings. The quality of the medical evidence may depend upon the status of the medical witness. As a general rule the objective opinion of a cardiologist or pathologist may be preferred to that of a general practitioner.

The kind of heart claim which will most frequently present itself will be the "employee" claim in which there is doubt whether the heart attack was caused by physical or emotional stress. (For an example of an "emotional stress" claim, see *Inder* (1981) NZACR 59). In "employee" cases, attention will be focused on the effort, strain or stress which preceded the episode and whether this stress is abnormal. The expert evidence will be directed towards expressing an opinion on this. The essential issue will be whether the episode was a consequence of abnormal effort, stress or strain, or was a natural consequence of a diseased heart.

In practice the evidence will rarely be dogmatic. The specialists have to do a balancing exercise. The doctors' dilemma is clearly expressed in an article by Dr J B Lowe, the Auckland cardiologist, published in March 1977 ACC Reports. An adequate summary of this article cannot be given here, but the following generalisations may be quoted:

1 A cardiovascular episode may occur without recognised provocation in the course of the natural history of cardiovascular disease.
2 Both physical and mental stress have circulatory effects which may aggravate or accelerate a cardiovascular disease process and thus determine the occurrence of an episode at a particular time and sooner than this might have been expected in the course of the natural history of the underlying disease.
3 The assessment of the contribution from stress to a particular cardiovascular episode will depend on:
   (a) The balance between the natural prognosis of the underlying condition in the individual concerned and the probable circulatory effects of the stress involved and,
   (b) The time relationship between exposure to stress and the cardiovascular episode.

The article deals with both physical and emotional stress and proceeds then to discuss differences between doctors and lawyers on the determination of heart claims. Dr Lowe makes the point that in these claims lawyers are inclined to insist on an "all or nothing" approach and he says that this does not make medical sense. Lawyers (he says) argue that if the alleged stress could have had some circulatory effect contributing to the development of a heart episode, then the stress has to be accepted as wholly responsible, for the episode. Dr Lowe goes on to observe that, from the doctors' point of view, it is impossible to deny that some quite trivial stress might have contributed in a minor way; but on medical grounds it is quite unrealistic to attribute such an episode, occurring in the context of recognisably severe cardiac disease, solely to stress.

The quantum of compensation should be commensurate with the medical realities

The doctor suggests that consideration should be given to the desirability of establishing the principle of limited liability in cardiac claims. The thrust of his submission is that, as accident compensation is intended to compensate an accident victim for the damage suffered *from an accident*, then the quantum of such compensation should be commensurate with the medical realities. If then the "accident" of stress has played only a minor part in the cardiac episode, but the victim has moved to the inevitable point where quite ordinary stress is too much for him, the compensation payable should be relative only to the damage produced by the stress and not to that produced by the disease. Dr Lowe makes the point that if the "all or nothing" attitude of the lawyers were modified, medical

opinion, given adequate background information regarding the severity of the underlying disease and the degree of time relationships of physical or emotional stress to any particular incident, would not differ widely in the estimate of the relative aetiological importance of stress and disease.

It is suggested with respect that there is logic and common sense in Dr Lowe's ideas. If, in heart claims, a reasonably reliable method exists of assessing the degree of responsibility which an "accident" should bear for the cardiac episode, it should be used. If such a method were used, two results would follow:

(a) Claimants would receive compensation based on reality, and not on dogma and practices which have evolved under ancient and now superseded legislation.

(b) More claimants than before would receive *some* compensation for heart episodes, though some claimants might receive lesser amounts than before. In other words the "all or nothing" approach would be superseded by a more equitable and practical method.

Reform of the law?

The following amendment to the definition is suggested:

1 A new subpara (v) should be added to para (a), to read as follows:

(v) Damage to the body or mind caused by a cardiovascular or cerebro-vascular episode which is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it: provided that compensation payable for such damage, whether to the person suffering it or to his dependants, shall be relative to the extent to which the effort strain or stress contributed to the damage, having regard to evidence of the existence of disease before the episode, and before making any payment of compensation pursuant to this subparagraph the Corporation shall require evidence from at least two medical practitioners who shall give opinions on the extent to which the episode was contributed to by disease and/or by effort, strain, or stress that was abnormal excessive or unusual for the person suffering the episode:

2 Paragraph (b) should simply read:

(b) Does not include damage to the body or mind caused exclusively by disease, infection, or the ageing process:

It is suggested that the proposed amendment deals with the problems of heart and stroke "accidents" in a positive way, compared with the negative and restrictive approach taken by the present para (b)(i); and that it would bring more equity and clarity to the law. The following would result:

(a) The anomaly of giving a special privilege to "employees" would be removed. Any person whose heart or stroke episode was contributed to by a traumatic event as defined would be eligible for compensation.

(b) The quantum of compensation payable would be realistic. It would be commensurate with the damage contributed to by "accident" as distinct from damage which should be regarded as being contributed to by progression of disease. Accordingly the amount payable would accord with the purpose and philosophy of an Act designed to provide compensation for "accidents" but not for illnesses or diseases. If for example the weight of medical opinion was that the "accident" was 50% responsible, then the claimant would get one half of the lump sums or periodic payments which would accrue to a person whose accident was the sole cause of the episode.

Public work designations unscrambled

K A Palmer

In this article Dr Palmer first discusses a recent Court of Appeal decision relating to designations and reserves, and then examines in more detail the effect of the new s 118A inserted into the Town and Country Planning Act 1977 by the Public Works Act 1981. In Manukau City Council v Pakuranga Community Drop-In Society Inc (18 September 1981 (CA37/81), Davison CJ, Cooke, Mahon JJ), the Court of Appeal allowed an appeal from the judgment of Speight J, reported in full at 7 NZTPA 335. The Court of Appeal judgment (delivered by Davison CJ) clarifies some important interpretation questions under the Town and Country Planning Act 1977.

The Court of Appeal decision

THE case concerned a conditional use planning consent granted by the Council and upheld by the Planning Tribunal (as a specified departure consent) to allow for the erection of an art gallery and arts centre on part of land known as Ti Rakau Park, Pakuranga. Speight J had ruled that the specified departure consent was not available and the building could be authorised only by removing or altering the designation.

The first submission concerned the power of the Council or Tribunal to grant a specified departure under s 74. For the Court, Davison CJ noted that s 74(1) empowered the grant "of an exception to any provision of an operative district scheme", and concluded that a designation was part of a district scheme and the wording of s 74(1) "is so wide in its import as to cover departure from both the provisions of a designation and a code of ordinances". Accordingly, the power existed to grant a specified departure consent.

The next question was whether the proposed gallery did involve a departure from the scheme. The land at the time of the Council consent in December 1978 was designated "reserved for public recreation and other open space existing", and although the Council had, by resolution in July 1978, declared the land to be "a reserve for local purposes" in terms of the Reserves Act 1977, the resolution was not gazetted and effective until January 1979.

The Court noted that, under s 2 (of the Town and Country Planning Act), a public work included "any existing or proposed public reserve within the meaning of the Reserves Act 1977" and the Council resolution declaring that land a reserve was sufficient to make it a "proposed public reserve", and hence a public work pending the actual gazetting of the resolution. Reference was made to *Junction Motors Ltd v New Lynn Borough* [1975] 2 NZLR 131, where proposed public open space land was held not to be a reserve in the absence of any Council resolution to that effect.

The next question concerned the interpretation of s 121(4) of the Act which states:

> Any provision of a district scheme which indicates the purposes for which any land so designated may be used if it were not so designated, shall apply in respect of the construction of any building on the land or any use of the land which is not part of the designated public work.

Two interpretations were open. The interpretation accepted by Speight J was that the phrase, "which is not part of the designated public work" qualified "land", and the underlying zoning could apply only to land which was surplus to that required for the designated public work. The other view was that the underlying zoning applied to any building on the designated land or any use thereon which was not part of the designated public work or within its legal scope. The Court of Appeal accepted the latter interpretation as the correct one. It noted that, under s 121, subs (3) provided that the underlying zoning should have no effect on the carrying out of the designated public work, and subs (4) was the converse of subs (3). The Court stated:

> It provides that where the construction or use is not for a public work then the underlying zoning provision shall apply. In the result, because the application is for use of the land for an art gallery and arts centre, which use does not accord with the designation, the provisions of s 121(4) apply and the proposed art gallery and arts centre must also comply with the provisions of the underlying zoning Residential A.

Having regard to the ordinances for the Residential A zone, the Court concluded that the proposed gallery was neither a predominant use nor a conditional use in the zone. Although a conditional use category included halls, rooms and buildings used for arts and recreation, buildings on reserves were excluded. The finding of the Planning Tribunal that the use conformed with the underlying zoning was considered to be incorrect. Accordingly, it was necessary for the application to be approved (if at all) by way of a specified departure consent under s 74. It was not necessary to remove the designation or to alter it as suggested in the High Court. Neither was it necessary to invoke the aid of s 178(3), and apply the provisions of s 33A of the 1953 Act in order to permit the specified departure

to be consented to.

The remaining issue was whether, had the proposed use come within the conditional use category of the underlying zoning, that type of consent was available to authorise the use in accordance with s 121(4). The Court noted the reservations expressed in *Waimairi County Council v Hogan* [1978] 2 NZLR 587, 590. The present Court of Appeal declined to express any concluded view on the matter but indicated that "it would appear that the proper application in a case where the proposed use does not accord with the designation [or underlying zoning predominant use provisions] is one for a specified departure under s 74". (Passage within brackets added) the Court continued:

> We do not foresee that it is possible for a district scheme to specify conditional uses of land designated for public works.

The Court noted that, in the *Birkenhead Residents* case (unreported 26 June 1979) and *Baragwanath v Manukau City Council* [1980] 7 NZTPA 111, the Planning Tribunal had accepted that a specified departure consent was necessary for a building not complying with the designated purpose nor the underlying zoning predominant use categories. The decision of the Planning Tribunal granting consent was restored.

Comment

The decision is to be welcomed as clarifying the right and power to use a specified departure consent to overcome provisions in the district scheme or restrictions imposed by a designation. With reference to designated land, a departure consent cannot of course be implemented in any event unless the responsible body grants a further consent under s 124, and additional conditions may be imposed. A right of appeal to the Tribunal exists against a refusal under that section; cf *Minister of Works and Development v Bay of Islands County Council* (1979) 7 NZTPA 17, 22, as to consent to carry out work contrary to a requirement prior to an operative designation.

Secondly, the acceptance of land set aside by Council resolution for a reserve as having the status of a public work clarifies the designation power and the application of s 121. The decision of Casey J in *Maine v Christchurch City Council* (1980) 7 NZTPA 92, invoking the 1953 Act provisions, in respect of a consent to erect a pavilion on Elmwood Park, Christchurch, must be now in doubt, if Elmwood Park is land constituting a reserve under the Reserves Act.

the only purpose for which the land may be used under the underlying zoning is the predominant use category

Thirdly, although the Court of Appeal decision is not entirely clear and precise (with respect) as to the reason why a conditional use application is not available in relation to designated land, where the proposed use does not comply with the designation but falls squarely within a conditional use category found in the underlying zoning, the basis of the reasoning would appear to rest in the words of s 121(4). The part of the underlying zoning which applies is the provision of the district scheme "which indicates the purposes for which any land so designated may be used if it were not so designated". The Court decision is that the only purpose for which the land may be used under the underlying zoning is the predominant use category for which the use may proceed as of right. A conditional use category is subject to a notified planning consent and, accordingly, may not be used for that purpose within the meaning of subs (4). The status of a use permitted following a waiver or dispensation (or design approval under s 36(4)(c) or s 36(5) of the Act) would come within the predominant use category, and be available as part of the underlying zoning rights. The wording of s 36(4) of the Act supports these distinctions.

The end result of the decision can be illustrated as follows:

1 A club-house erected by a council as a public work could be built upon a reserve in accordance with a designation allowing buildings or uses for "community purposes" or "recreational purposes". The fact that the club-house might be let to a particular club would not take it outside the above designations, but could take it outside a designation "public uses" or "open space".

2 A club-house erected by a private body or association on a public reserve would not constitute part of the public work, and could not be authorised by a public works designation. Accordingly such a club-house could be erected as of right only if a predominant use under the underlying zoning, and in conformity with the reserve management plan (Reserves Act 1977, s 54).

3 If the proposed club-house does not comply with the scheme designation, and does not comply with the predominant use provisions of the underlying zoning, a specified departure consent is necessary to authorise the use; a conditional use consent cannot be invoked as outside the scope of s 121(4).

4 The designation system (supplemented by the underlying zoning) is not mandatory for land in public ownership, and as to reserves, a simpler system may be to avoid designations and adopt a suitable recreation or community use zone. The zone could be applied to land in private ownership which was intended to remain permanently available for public or club use, and not be sold for other purposes. However, such private land should normally be accorded an "ordinary zoning", and merely identified in the district plan by specific notation under s 73 of the Act. See *Dilworth Trust Board v Auckland City Council* (1980) 7 NZTPA 198.

"Proposed reserve" designation and s 118A

As an addendum to the comment on the *Pakuranga* decisions, it is desirable to point out the important amendment to the Town and Country Planning Act 1977 inserting s 118A, designed to give effect to the purposes of the Public Works Act 1981 coming into force on 1 February 1982. The section reads as follows:

> 118A (1) Where any requirement has been made under section 118 of this Act, or any land has been designated under this Act for a public work, and the requirement or designation is not —
>
> (a) In respect of an essential work; or
> (b) For an existing or proposed reserve under the Reserves Act 1977 or an existing or proposed national park under the National Parks Act 1980; or
> (c) In respect of land of which the Minister or Local Authority having responsibility for the work is the owner or lessee —

the requirement or designation shall be deemed to be removed on 1 February 1982, and the Council shall amend the district scheme accordingly.

The provision clearly covers both requirements of the Crown and local authorities which take the form of designations on the operative scheme, and work proposals by the territorial authority which also become designations on the plan. As to para (b), concerning the designation for a "proposed reserve under the Reserves Act 1977", some legal doubt has arisen as to whether this saving covers all "proposed reserves" designated on private land, or only reserves which are already acquired by the Council and merely await gazetting of the resolution that the reserve be formally constituted. This doubt follows from statements by Speight J in the *Pakuranga* case (see 7 NZTPA 337) and by Davison CJ for the Court of Appeal, who both hold that the definition of a public work in the Planning Act, as related to a proposed public reserve, takes effect after the Council has resolved to constitute the land a reserve (pursuant to s 14 of the Reserves Act 1977), and while the land is being held in the interim period pending gazetting upon which the resolution takes effect: s 14(5). If this latter interpretation, which was all that was necessary for the purposes of deciding the *Pakuranga* case, is applied to the interpretation of s 118A(b), then effectively the only proposed reserves which will remain on an operative district scheme will be those comprising land already owned by the Council and merely in the interim period outlined.

In the writer's opinion, this interpretation is incorrect and is contrary to the statutory intent, which is to maintain all present proposed reserve designations affecting private land, as a compromise in allowing for local authority planning objectives. The concession in respect of a proposed National Park designation is also similar, in that a National Park is not prima facie an essential work, yet there are many reasons why any present designations should remain.

In support of the broader interpretation, it is the writer's opinion that the reference to the Reserves Act 1977 as qualifying "an existing or proposed reserve" is for the sound purpose of distinguishing between the ordinary usage and meaning of "reserve" which may include any open space, land, or land bought for a particular purpose, and the more special legal meaning applicable to those types of reserves intended to come under the Reserves Act. As long as the intent is clear under the district planning scheme that a "proposed reserve" designation is intended to amount eventually to a reserve under the Reserves Act 1977, then the saving provision should apply. This interpretation is certainly supported by a closer consideration of s 14(2) of the Reserves Act 1977, which sets out that the resolution of a local authority declaring land to be a reserve must be preceded by a public notice, but that "such a notice of intention shall not be necessary where the land is zoned as a reserve or designated as a proposed reserve under an operative district scheme under the Town and Country Planning Act 1977".

The proviso contemplates that a designation under a district scheme may have the status of a "proposed reserve" before the later resolution of the Council to formally constitute the reserve, which takes effect upon gazetting under s 14(5). Accordingly, one must distinguish between the first (and perhaps general) resolution approving a new district scheme or variation or change to designate land as a "proposed reserve" which, it is submitted, constitutes a proposed reserve designation as contemplated under s 118A, and the subsequent different resolution for the purpose of constituting the reserve finally under s 14 of the Reserves Act, which can obviously be made only when the Council has acquired the land in its name or at least pursuant to a purchase agreement.

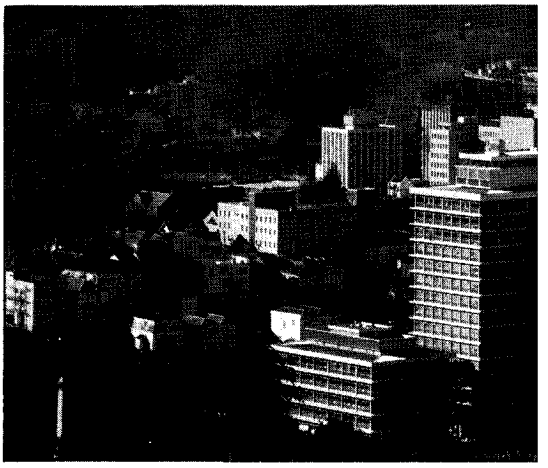
the Council retains the power to negotiate a voluntary purchase

Accepting that "proposed reserve" designations on private land are retained under the saving provision, the legal situation is that the Council has no power of compulsory acquisition under the Public Works Act unless the reserve can be declared an essential work, but the Council retains the power to negotiate a voluntary purchase under s 17 of the Public Works Act 1981. On the other hand, the retention of the "proposed reserve" designation serves a useful purpose in preventing private development of the land without consent of the Council, which could render eventual acquisition more costly or in fact impossible (s 124, TCPA), but allowing the owner the right to apply to the Planning Tribunal for a compulsory purchase order (under s 82, TCPA), where the property cannot be sold in the meantime as a result of the designation blight.

Concerning the saving provision as to a "proposed national park", the same legal position must apply, as under the National Parks Act 1980 there is no legal mechanism whereby the National Parks and Reserves Authority can give some interim legal status to a proposed reserve pending its formal constitution as a reserve. The mere resolution to make a requirement or to support the Minister of Lands in making a requirement must be sufficient indentification to define the proposed national park, where forming part of an operative district scheme before 1 February 1982.

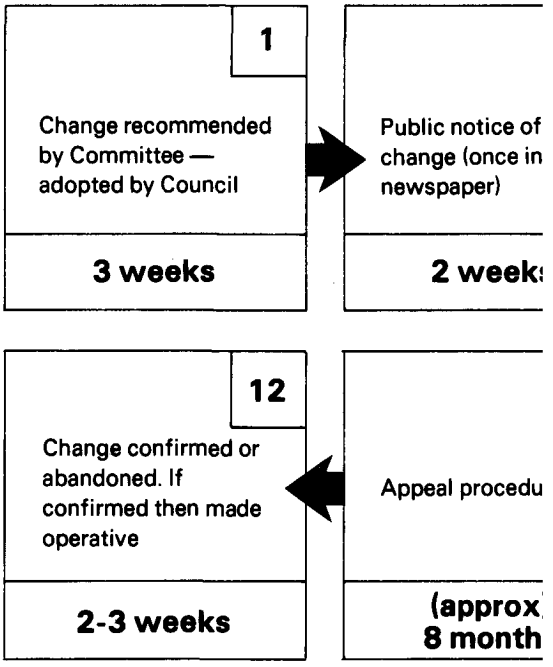
One doubt remains as to the interpretation of s 118A in preserving designations. The Planning Tribunal (No 4 Division) has recently ruled in *Beazley Homes Ltd v Mt Maunganui Borough Council* (Decision A43/82 — 22 March 1982) that s 118A does not save a proposed reserve designation which was subject to appeal at the material date, and therefore did not form part of the operative scheme. This ruling is undoubtedly correct, but in passing the Tribunal interpreted para (c) to apply to land held by the Minister or local authorities other than the territorial authority (council). On this interpretation, designations for which the territorial authority has responsibility, and which do not relate to essential works or existing or proposed reserves, are voided from 1 February 1982 even though applying to land owned at the time by the council. On the other hand, s 36(8)(b) of the Town and Country Planning Act (as amended at the same date) authorises the council to designate its own property for any public work for which it has financial responsibility. Accordingly, where councils wish to maintain these designations on their own property, presumably a scheme change will now be required to reimpose the designations which were legally removed under the deeming provision on 1 February. Perhaps a retrospective amendment to the provision may be desirable to remove this unexpected burden of administration.

Town and Country Planning — The basic steps

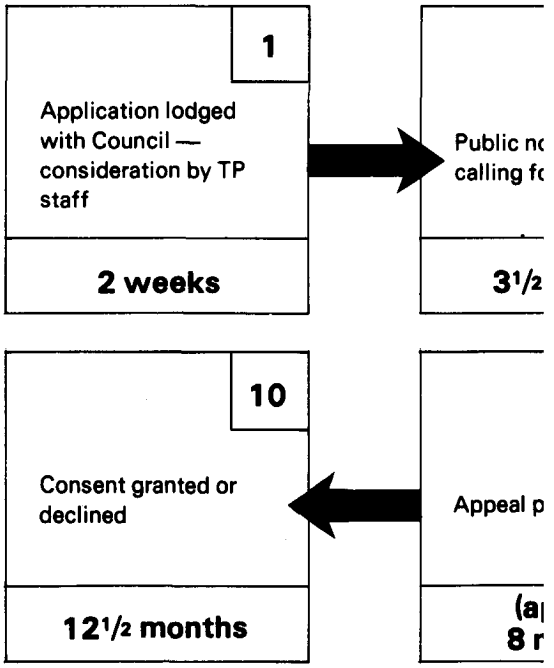


Three flow charts prepared by the Franklin County Council for the Commission for the Environment, adopted for general use by the NZLJ

Changes to district scheme



Specified departure applications



* Points of public participation

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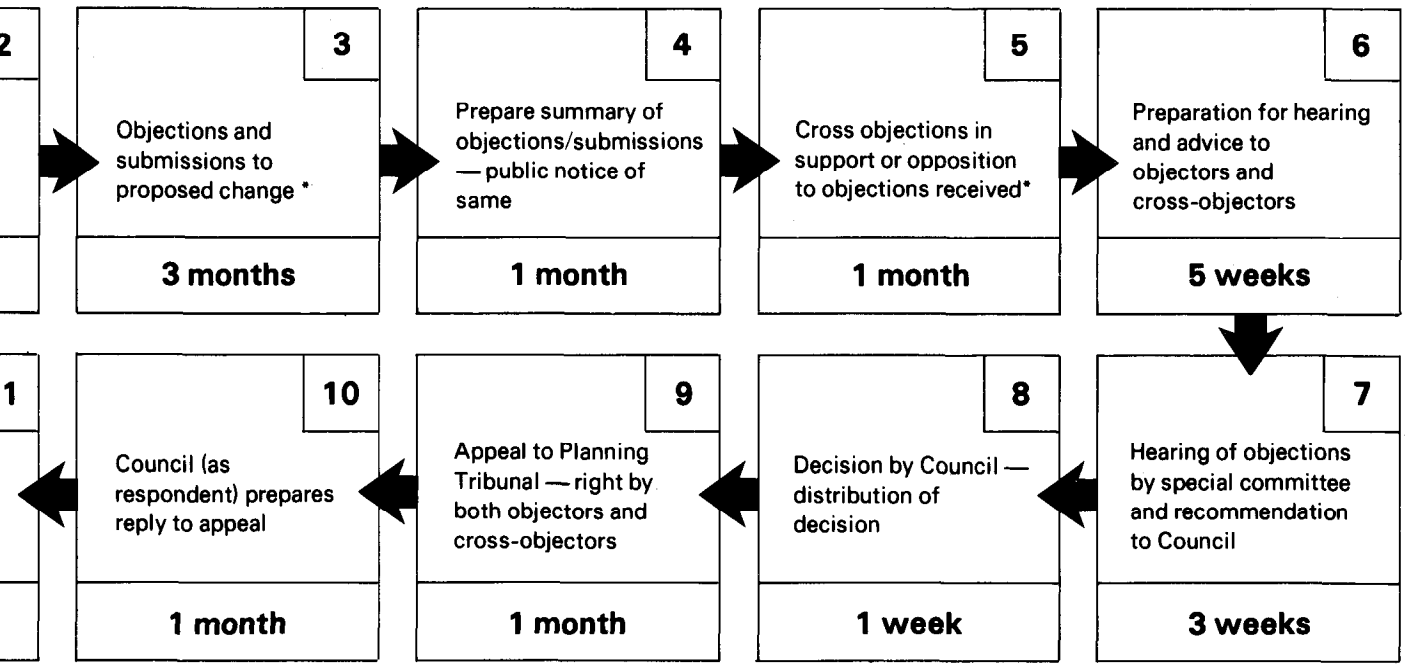
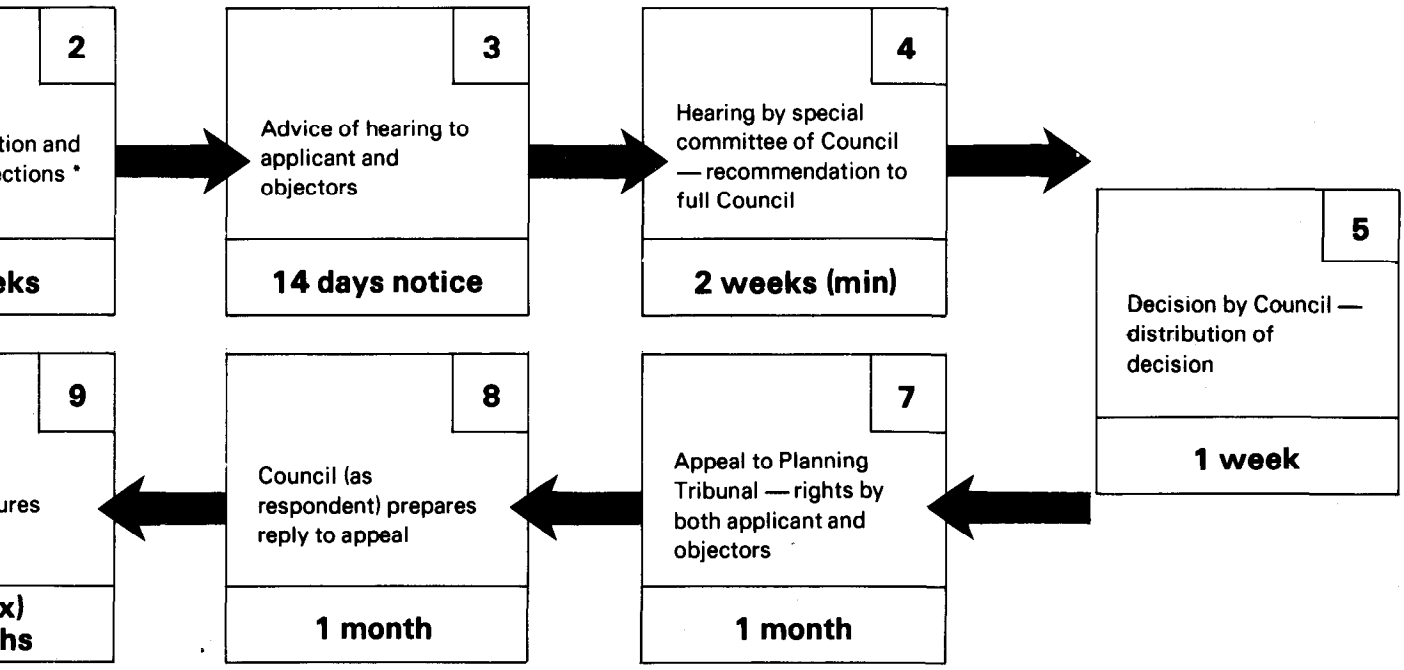




Requirement under s 118

Start

1 Requirement to designate land received from Minister

2 District Scheme Amendment prepared and advertised — **2 weeks**

3 Period for objections and submissions * — **(min 21 days) 4 weeks**

4 Prepare summary of objections/submissions — advice of hearing to objectors — **4 weeks**

5 Consideration of requirement and hearing of objections by special committee and recommendation to Council — **3 weeks**

6 Report of Council forwarded to Minister and objectors — **1 week**

7 Minister considers report of Council and advises decision — **3 months**

8 Copy of Minister's decision served on objectors — **2 weeks**

9 Appeal to Planning Tribunal — **1 month**

10 Planning procedures — **9 months**

11 Requirement confirmed, modified or rejected by Tribunal

11a/12 If confirmed, requirement incorporated in District Scheme

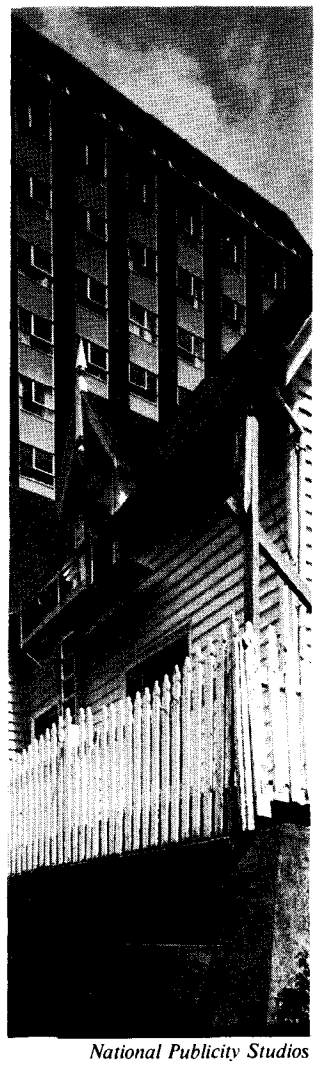
Finish

10a Minister advises Council of his decision

9a Tribunal reports to Minister and copy to objectors

8a Planning Procedures — **(as soon as possible)**

7a Request for inquiry under s 119 by Minister (before Planning Tribunal) — **3 months**



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* Points of public participation

Books

Drafting and Negotiating Commercial Leases

By Murray J Ross, Butterworths, 1980, xxxv + 316pp (including index), $40.50

Reviewed by **P J Merfield**

THIS English text is written for practitioners and will be of very limited interest to academics. Its aims are to assist, first those practitioners who are confronted with their first commercial lease instructions and, secondly general practitioners who may have been dealing with such leases for years but do not regard themselves as experienced in this area. However, the book could be used by any practitioner as it provides a fresh approach to problems encountered with commercial leases.

As the title suggests, the subject is dealt with so that the practitioner is not only able to draft a suitable lease, but is also provided with sufficient guidance to assist him to answer any queries as to whether or not the lease which he has produced is correct in the circumstances. A "correct" lease here means one that is fair, covers problems both from a legal and practical point of view, and is unambiguous. Further, the lease should be presented in a form and style that make it useful in the everyday administration of the leased premises. On the other hand, for the practitioner perusing the lease, the book provides suggested amendments to meet a number of common problems which might arise, and reasons why the lessor's solicitor should accept these amendments. Thus, the drafting and negotiating are looked at from both lessor's and lessee's points of view. Where particular problems are encountered, the author has included in the text a number of forms of Model Clauses which are in addition to the precedent set out in the appendix.

The word "Negotiating" in the title really refers to the drafting and completion of the lease and not to the preliminary activities whereby the prospective lessor and lessee come to an initial agreement to enter into a lease.

The layout of the book is of assistance to the practitioner in that there are ample cross-references from text to precedents and vice versa. One is pleased to find that the commentary is not bogged down with a discussion of legal technicalities or principles. These are not forgotten but are usually relegated to footnotes. The text does include, on occasions, the discussion of cases where these help illustrate practical considerations concerning a particular clause. The result is that when it comes to dealing with a particular problem it is not usually necessary to delve through too many pages or clauses before the relevant text or clause is found.

The author takes the reader chapter by chapter through the usual events which occur during the drafting and completion of a commercial lease. The first two chapters deal with the pre-drafting stages of getting together the relevant information on which a draft lease can be prepared. The second chapter on Non-Drafting steps should be of interest to many practitioners, as it underlines the need not merely to peruse the lease but also to gather information about the premises and the parties from searches and enquiries. The following two chapters discuss how the leased premises should be described in the lease and what they should include. In my experience this is an important area dealt with inadequately in many leases. An accurate description of the leased premises is fundamental to any lease and the suggestions offered by the author will assist in this regard.

The next eight chapters cover, clause by clause, the provisions usually found in a lease. Rent review provisions are dealt with in depth and extra precedents are provided for these in the appendices. In fact the book devotes nearly one-sixth of its text and precedents to rent review provisions. This no doubt reflects the large number of recent decisions in the English Courts concerning these clauses, the most important and well known being *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC904, [1977] 2 ALL ER 62. Obviously, because of inflation, the importance of these clauses has grown. Rents have increased more quickly. This has led to these clauses being challenged more frequently as lessees try to escape the burden of higher rentals. The result is to some extent a preoccupation with these clauses which are growing in length and increasing in detail in order to cover the ramifications of each new decision. The book reflects this preoccupation. This may be at the expense of other problem areas such as the conflict of the rights between the lessor, lessee and the lessor's mortgagees over the proceeds of insurance policies, or sub-leasing problems, which are covered in less than four pages.

A number of precedent leases are included at the end of the book. These cover a lease of a suite of offices, industrial premises and a shop. The structure of these precedents differs from that usually found in New Zealand. I suggest that these precedents be "handled with care". For instance, the usual provisos for abatement of rent and termination of the lease on damage or destruction by fire or other disaster are not included in the precedents. They are noted merely as alternative provisos. The clause covering the lessee's right to assign or sub-let the premises requires the sub-lessee to covenant to observe the terms of the head-lease even where only part of the premises is sub-let. Such a covenant would make the sub-lessee responsible for all the premises and rent and this would be unreasonable.

New Zealand readers need to bear in mind that the book is written for English practitioners, and they must accordingly think carefully before using some of its suggestions. In the main this does not greatly detract from the book's usefulness as much of the commentary concerns practical problems which are similar to those encountered by New Zealand practitioners. With a bit of thought the author's suggestions can be adapted to our situation. For example, arguments suggested for a lessee's solicitor to resist the liability for Development Land Tax being passed on to the lessee could be adapted for use by New Zealand practitioners where Land Tax assessments are passed on to the lessee.

(continued on p 213)

Case and Comment

Tax deductions as voidable preferences

THE judgment of Speight J in *Re Butler* (High Court, Auckland, judgment 10 December 1981, B 92/77) concerns a point arising in the interpretation of the Insolvency Act 1967 which could have practical consequences in many bankruptcies. The action, which was brought as a test case by the Official Assignee, sought to recover from the Commissioner of Inland Revenue tax deductions made by the bankrupt's employer during the four months between the date of service of the petition and the date of adjudication. The deductions had been made as the result of a notice served by the Commissioner on the bankrupt's employer pursuant to s 210 of the Land and Income Tax 1954, which gives the Commissioner power to require deductions where a taxpayer has defaulted. The Official Assignee claimed that these deductions were voidable preferences on the basis of s 56(2) of the Insolvency Act, the relevant part of which is as follows:

> Every conveyance or transfer of property, every charge made on any property, every obligation incurred, every execution under any judicial proceeding suffered, and every payment made (including any payment made in pursuance of a judgment or order of a Court), shall be voidable as against the Assignee, if —
>
> (a) It is made, paid, suffered, or incurred by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor; and
>
> (b) It is made, paid, suffered, or incurred within the period specified in subsection (3) of this section:

The period specified is either one month before adjudication or, if a creditor's petition has been served, from the date of service to the date of adjudication.

The decision is based solely on the interpretation of s 56(2), since there were no New Zealand authorities on the point and the equivalent legislation in England and Australia is in different terms. The Official Assignee's submission was that the deductions came within s 56(2) because they were a transfer of the bankrupt's property suffered by him. Since there was some ambiguity in the wording of the subsection, Speight J relied on s 5(j) of the Acts Interpretation Act 1924 to decide the question. He considered the object of s 56(2) to be to ensure that a creditor who is paid within a short time before adjudication should not obtain a preference over other creditors, regardless of any intention to prefer on the part of the bankrupt or of any connivance on the part of the creditor. The interpretation which carried out that purpose most effectively was the one contended for by the Official Assignee, and, on the basis of that reasoning, the decision was that the salary deductions were voidable preferences and therefore recoverable by the Official Assignee. It is suggested that this decision could also be applied to other wage or salary deductions, eg PAYE, and that it could thus affect the administration of a number of bankrupt estates.

Johanna Vroegop

Compensation for errors in gynaecological operations

Two recent decisions of the Accident Compensation Appeal Authority have concerned the result of mistakes in gynaecological operations. In one case, Decision No 764, an operation for sterilisation had been performed some years ago on a married woman who already had four children. Despite the operation she conceived the following year and bore a healthy child. Following an application to the Supreme Court it was held that she was covered by the Accident Compensation Act. She had been a victim of medical misadventure. She accordingly received compensation under ss 113, 120 and 121 of the Act totalling $5,500. Last year the child attained the age of five and the mother applied for a further sum of $2,435 which she calculated to be the cost she had incurred in maintaining and clothing the child up to that date. Her counsel indicated that if this claim succeeded further claims would follow from time to time on the same basis.

The Hearing Officer rejected her claim on the ground that it was too remote in terms of the stringent test laid down in *Accident Compensation Commission v Nelson* [1979] 2 NZLR 464, referring also to the options which had been open to the appellant of having the pregnancy terminated or the child adopted.

On appeal, Judge Blair held that, though the principle of the duty to mitigate damages is not applicable to cases of this nature, the existence of the options was a factor which could not be totally ignored when considering whether the expenses claimed were "necessarily" incurred. His Honour dismissed the appeal, basically on the grounds relied on by the Hearing Officer but applying also the principle that on grounds of public policy some limitation of liability must be set. On this aspect he called in aid (so far as they were relevant) dicta of Griffin LJ in *McLoughlin v O'Brian* [1981] 1 All ER 809, 827.

Judge Blair added that, though the matter had not been argued before him, he considered that the Corporation would have been justified in exer-

cising its discretion under s 121(3) of the Act to disallow the claim.

Few would dispute the justice of this decision. More debatable is the earlier decision which established that compensation was payable under the Accident Compensation Act. It is arguable that the appellant should have been left to her cause of action in contract against the negligent surgeon, thus avoiding the need to define an unintended pregnancy following a botched sterilisation as "injury by accident".

Compensation for the surgeon's mistake the appellant was clearly entitled to, though the cases in which this principle was established were until recently almost entirely from North America. However, in the English case of *Sciuriaga v Powell* (1979) 123 SJ 406, an unmarried woman was awarded (ultimately) £14,000 for breach of contract against a surgeon who performed an abortion negligently and thus failed to prevent her giving birth to a child. Of the damages awarded, however, none was in respect of the future costs of maintaining the child. A recent article by Geoffrey Douglas in the *Solicitors Journal* (1982) SJ 58, examines various implications of the case and contains an interesting passage on the attitude of North American Courts to claims of this nature, in particular referring to a Canadian case of *Cataford v Moreau* (1981) 114 DLR (3d) 585. In this case a married woman with ten children successfully sued the surgeon who had carried out an ineffectual sterilisation operation which led to her bearing an eleventh child. Part of her claim was for a capitalised sum representing the cost of maintaining the child till its eighteenth birthday. After argument balancing the acknowledged cost of maintenance against the welfare allowances which the child would generate — a calculation which threw up a small notional loss — the Court remarked, "The burden is more than compensated for by the moral and financial benefits which the plaintiffs may reasonably expect to derive from the child."

Geoffrey Douglas comments:

> Presumably an English Court would accept the same principle in rejecting such a claim, although in America this argument was initially successful; but the Courts now recognise that in many cases, for example where the plaintiffs have already raised a family or consider themselves too old to bring up children, the birth and upbringing does not bring so much joy as to completely offset the financial commitments involved.

A converse case recently came before the Accident Compensation Appeal Authority, this time in the person of Judge Willis. The appellant, a young married woman, entered hospital for a relatively minor gynaecological operation. Through gross error, surgical sterilisation was carried out. Partly because of the callous manner in which the news was imparted to the appellant, Judge Willis increased the total awards under ss 120 and 121 to $15,000. Counsel for the Corporation cited a 1980 decision (Decision No 346) under which compensation of $4500 was awarded to a 17-year-old man who was kicked in the scrotum by a horse — resulting in an injury which made him incapable of fathering a child but did not significantly affect his sexual capacity. Judge Willis expressed the view, in distinguishing the earlier case, that the man must be regarded as having been the victum of "a rub of the green", whereas the appellant before him had had no reason whatsoever to imagine such a disastrous outcome to her operation.

The facts disclosed in these cases suggest that an unwanted result from this kind of operation may soon come to be regarded equally as "a rub of the green".

Peter Haig

Contempt of Court

Two recent House of Lords decisions, by virtue of superficial similarity and different result, invite observers to form their own conclusions as to the manner in which their Lordships dispose of matters before them. Although the nominal issue in both cases concerned contempt of Court, the actions arose out of the alleged misbehaviour of prison authorities.

In *Home Office v Harman* [1982] 1 All ER 532, the appellant was a solicitor acting for a long-term prisoner. The prisoner was seeking statutory relief and damages arising out of what he alleged to be unlawful confinement in an experimental control unit of one of Her Majesty's prisons. In the course of proceedings the appellant obtained discovery of documents containing minutes of high level policy meetings. The documents were obtained on the understanding that they would not be used for any other purpose except the case in hand. At the trial material parts of the documents were read out in open Court. Later the appellant allowed a journalist to have access to the documents referred to in Court. The journalist later published an article highly critical of the Home Office. The Home Office then applied for a motion for contempt of Court.

Following her conviction in the Divisional Court Miss Harman was unfortunate enough to have her appeal heard before Lord Denning, a liberal on matters of rewriting contracts but a hardliner on issues of law and order. The Master of the Rolls, obviously unimpressed with the appellant's arguments, referred to her client as a "dedicated troublemaker" who had enlisted "the assistance of lawyers" in order to exploit "a grand opportunity to make further trouble for many innocent people." The finding of contempt was predictably sustained. On appeal to the House of Lords, the appellant argued that she was released from her undertaking in regard to the other parties' documents once they were read out in open Court. Their Lordships (with two Law Lords dissenting) disagreed with this contention, and held that it was the duty of a solicitor to refrain from using the advantage enjoyed by possession obtained by discovery for some collateral or ulterior purpose of her own and not necessary to the conduct of the trial. A solicitor's undertaking did not terminate when the document was read out in open Court. The solicitor was under an obligation not to make this material available, even though it was already part of the public Court record.

The next case posed more of a problem in that it was the prisoner himself who brought the action for contempt. In *Raymond v Honey* [1982] 1 All ER 756, a prison Governor relied on the rules of the institution to stop the sending of a letter and an application concerning committal proceedings which the applicant was facing at the time. The applicant then applied for an order of committal against the Governor for contempt of Court. The Governor stopped this application as well. The Divisional

Court held that the application to commit the Governor for contempt could not be treated as a letter which could be stopped under the prison rules, and that in stopping the application the Governor had obstructed the aplicant's right of unimpeded access to the Courts. The House of Lords upheld the Divisional Court's finding of contempt, noting that only the second stopping constituted an offence. This was because the prisoner failed to establish that the stopping of the first letter and application effectively impeded his right of access to the Courts. On one hand, then, the right of unimpeded access to the Courts has been upheld; on the other hand by drawing a distinction between when legal communications can and cannot be stopped, the House has created a Catch-22 situation. As noted in [1982] New Law Journal 230:

> [I]f the prisoner succeeds in clearing all obstacles and gains access to the Courts, the placing of the obstacles in his way is legal, but if he fails at the first obstacle and fails to get up or withdraws from the race, the placing of the obstacles in his way is illegal. So a situation might arise where a prisoner might wish to instruct a solicitor to institute proceedings, his letter is stopped by the Governor on the ground that its contents are objectionable or that it is of inordinate length, the prisoner thereby discouraged lets the matter drop, and the result of stopping the letter is effectively to deny the prisoner access to the Courts. The action of the Governor in stopping the letter may be a contempt. . . . The prisoner of course may go in ignorance of this.

Concurrent liability

The rule derived from the Court of Appeal's decision in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 has occasioned considerable misapprehension amongst the profession and has proved a vexing hurdle for would-be litigants. The recent decision of Bisson J in the High Court in *Port and Another v NZ Dairy Board and Another* (Hamilton, 10 March 1982 (A209/74)) sets out to clarify the rule and is accordingly one that will be greeted with relief by many in the profession.

In *McLaren Maycroft*, the Court of Appeal dealt with the narrow issue of whether the existence of a contractual relationship *arising out of a professional relationship* will exclude an action in tort. In that case, the Court was compelled to consider the somewhat arbitrary distinction between contractual and tortious relationships drawn by the Limitation Act 1950. Generally, a tortious relationship arises some time after a contractual one, and this becomes a crucial factor in meeting the six year limitation period prescribed for bringing an action. In *McLaren Maycroft*, the limitation had expired for bringing an action in contract but not in tort, and this factor alone brought the issue to the attention of the Court.

Subsequent decisions, however, have widened the rule to the point where no action in tort will lie where there is any contractual relationship, *regardless of the professional status of the parties*. Quilliam J, for example, in *Young v Tomlinson* [1979] 2 NZLR 441, 448 observed, "I do not see that there is any reason to draw a distinction between professional men and others for the purposes. . ." However commendable it may have been for His Honour to eschew legal hair-splitting, his decision exacerbated a previously minor distinction between contract and tort — a distinction that now involved endless argument over the supposed legal relationships between the parties.

In some cases, this amounted to a procedural nuisance. In others, the litigant was denied a cause of action.

In the *NZ Dairy Board* case, Bisson J declined to accept the wider approach New Zealand Judges have taken to *McLaren Maycroft*, and expressly restricted the rule to professional relationships. His Honour did not see any difficulty in having to decide if a professional relationship existed. Further, there was the implied suggestion that the meaning of professional be restricted to those who practised in the traditional professions. Although not expressly stated, the deduction to make is that skilled tradesmen, however professionally competent, should not be able to bring themselves within the rule. Certainly, His Honour did not regard the dealings between the plaintiff cattle-breeder and the defendant suppliers of animal semen as professional. If Bisson J's decision is part of a trend to limit the authority of *McLaren Maycroft*, one may look forward to the restoration of the ancient prerogative of the plaintiff in choosing his own writ and to a state of affairs that can save the Courts from the involved process of sorting out the duty or duties which are owed by the defendant.

Mitigation of Damages

This case might be known as the Sinking of the Liesbosch. In Perry v Sydney Phillips & Son [1982] 1 All ER 1005, the plaintiff sought damages for defects he discovered after he purchased his property. Some time elapsed before the plaintiff could afford to carry out the necessary repairs; and in the interval their cost increased. The defendant argued that a reduced sum should be awarded, because the plaintiff should have mitigated his damages by carrying out repairs as soon as the defects were discovered. The plaintiff argued that this was impossible for at the time he did not have money to carry out the repairs and that the defendant's conduct had led him to believe that no compensation would be available.

Bennett QC sitting as a Deputy Judge of the High Court was faced with the celebrated case of the Liesbosch, Dredger v Edison [1933] AC 449 which established that impecuniosity on the part of a plaintiff damaged by the tort of the defendant rendered his consequent loss irrecoverable. Here, however, His Honour decided the case on the principle of causation, and noted that it was reasonably foreseeable that the plaintiff would exhaust most of his available funds on the purchase of the house and would not have money left over to spend repairing defects he was unaware of at the time of the purchase. This combined with the defendant's conduct was sufficient for the Court to conclude that it was reasonable for the plaintiff to delay carrying out repairs until he was in a position to undertake the expenditure. There was accordingly no duty to mitigate the damage.

It will be noted that the Court of Appeal in *Taupo Borough Council v Birnie* [1978] 2 NZLR 409 used a similar approach. In particular Cooke J noted the development of cases concerning causation were decided after the *Liesbosch* and ruled that the plaintiff's financial condition was a foreseeable factor. The moral? Everyone may be equal in the eyes of the law; however, do not tortfease unto another who is less equal.

To be or not to be — the Privy Council

Three years ago, when the Court of Appeal gave its decision in Reid v Reid [1979] 1 NZLR 572 the usual arguments concerning the sanctity of the husband's property were resurrected with fresh vigour. An amendment was made to the Matrimonial Property Act 1976. In the meantime the husband petitioned the Privy Council. The merits of the case for present purposes are not important. What is relevant is that the husband felt that he had suffered an injustice and went to the trouble and expense of appealing to New Zealand's highest appellate authority (which happens to be 12,000 miles away) to put matters right. From a rule of law point of view, of course, the implications are self-evident. Consequently, it must have come as a disappointment to many when Her Majesty was advised that the case at hand was "a matter of discretion in which the Court appealed from is much more favourably placed than Their Lordships to consider the relevant local considerations. . . ."

Perhaps this should be accepted as acknowledgement that New Zealand is capable of managing its own affairs. That, however, does not change that Court's status. Imagine if our own Court of Appeal were to dismiss an appeal from the High Court on the basis that a local Court was in a better position to sort out a particular legal problem. Although it is standard practice not to upset findings of fact in the lower Courts, one cannot recall an instance where a higher Court has expressly shirked its duty to address itself to the matters before it. It is accepted that at times Courts may discharge their functions badly: they may manipulate the facts; they may manipulate the legal arguments. However a decision is always reached. This is something the Privy Council in Reid v Reid expressly chose not to do. One can only ask then, why a Privy Council?

Town and Country Planning

One may recall the case of *Attorney-General ex rel Benfield v Wellington City Council* [1979] 2 NZLR 385, which involved the notorious BNZ building still under construction in downtown Wellington The bank had advertised in a daily newspaper that it had applied for conditional use to erect a "free-standing multi-storey banking office and retail shopping complex with basement carparking the encroachment areas of which complex exceed the void areas on three faces of the building".

This was another way of saying the Bank proposed to build a 31-storey office block. Davison CJ held that this was not a case of potential objectors being deceived as to the site or nature of the building. Potential objectors could make further enquires regarding the building if they were interested. The construction of the bank — some 20 storeys high at the time of hearing — was allowed to proceed.

The case left itself open to cynical comment. Davison CJ had purported to follow earlier authority in every way save that of result. The recent case of *Cameron and Others v North Canterbury Hospital Board and Another* (High Court, Wellington. 26 April 1982 M647/81) accordingly provides a refreshing contrast. Here Roper J applied his earlier test laid down in *Godber v Wellington City and Others* [1971] NZLR 184, 191: "The application, and the public notification of it, must be such that it is plain to the ordinary reasonable man what is being applied for, how it might affect him, and the steps he should take to be heard." Here the respondent Hospital Board had made notified application for planning consent to use premises "for hospital and clinical purposes". What the hospital really planned to provide was an "alcohol and drug assessment centre". His Honour observed that if the true nature of the application had been publicly notified other parties might have raised objections. Further, failure to make proper notification was not an irregularity that could be cured by s 167 of the Town and Country Planning Act 1977. In direct contrast to Davison CJ, His Honour asked, "why should an obligation be imposed on the reader of a public notification to make enquiries to see if the notification was as innocuous as it appeared?"

Ultra Vires and Void

This was a case of the concepts in action. The applicant in Nevele R Stud Ltd v NZ Trotting Conference (High Court, Christchurch. 26 April 1982 M23/81) challenged the authority of the respondent to make rules applying to the breeding of trotting horses. The Court's response provided useful contrast between ultra vires and void. On the question of ultra vires, it emerged that the respondent had proper rulemaking authority conferred by the Racing Act 1971. Holland J was satisfied on the evidence that the rules in question were proposed and adopted by the Conference for the purpose of the better administration of trotting and not for any improper or ulterior purpose. However, there was still scope for the voiding of the rules on grounds of public policy. Here the doctrine of restraint of trade came into question. The Court first noted that the respondent had a legitimate interest in the supervision and control over the breeding of trotting horses. This was required for the security of those whose livelihood was derived from trotting. However, only a legitimate public interest could justify the restraint of an individual's right to carry out his trade according to his wishes. Accordingly those regulations that purported to impose blanket restrictions on artificial insemination were declared void as being contrary to public policy.

John McManamy

Books (concluded)

New Zealand does not have the equivalent of a Landlord and Tenant Act 1954, so that any discussion on this Act should not be regarded as law in New Zealand. However, New Zealand's Property Law Act 1952 is similar to the English Law of Property Act 1925, so that usually provisions under the Law of Property Act have a New Zealand equivalent (eg s 62 of the Law Property Act equals s 47 of the Property Law Act).

The book provides a stimulus by highlighting many problem areas in commercial leases. It will give the reader a new perspective on problems which he or she may encounter when drafting or perusing such a lease. The book is thought provoking and this in itself is a worthwhile achievement.

The "net lease" in a nutshell

W K S Christiansen FRICS DipTP MNZPI AREINZ

The author is a Senior Lecturer in Land Economy with the University of Auckland's School of Architecture. *In this article he gives a succinct account of an increasingly prevalent form of commercial lease.*

THE "net lease" is a recent arrival on the local scene. When first introduced it aroused considerable controversy in professional circles and strong hostility among lessees. In New Zealand the net lease is used exclusively for office tenancies though similar lease terms and conditions are applicable to other types of commercial and industrial property.

The net lease approach to office space leasing has come to the fore due to a combination of factors over the past ten to twenty years. It was already evolving when the crunch of the oil crises of the '70s made its adoption by landlords a matter of some importance. It is a logical evolution in leasing methodology for the conditions of today.

Net leasing, with its roots in Britain, America and Australia, is a direct product of the constant escalation in construction costs and building operating expenses and the ever decreasing value of money. In other words the net lease is a result of inflation and is a response to its ravages. Actually, there is considerable logic in the net lease formula, quite apart from the spur of inflation.

What is a net lease? It is quite simple really. It is a lease in which the rent payable is shown as two separate components: the basic rent and a service charge. The basic rent component represents, as nearly as possible, the net income to which a building owner can normally expect to be entitled as the financial return on his investment in the total development. The service charge component is the amount of all those outgoings and operating expenses required to be expended in maintaining the building efficiently and keeping everything in good order and running smoothly. While the payment of these outgoings and expenses is necessary to sustain the value of the property for the owner, this is even more directly relevant to maintaining the comfort, convenience and security of the office accommodation for the lessees and their staff, clients and callers.

The percentage lease is a specialist document for shopping centres, the net lease for office blocks.

Other examples of net leasing apply more particularly to comprehensive shopping centres in one ownership. Individual shop leases in such shopping centres will provide for what are known as "variables" which are exactly the same as the service charge in a net lease. The principle is the same as in the net lease. As shopping centre rents are usually expressed as a percentage of retail turnover the shop leases are usually termed "percentage leases". The percentage lease is a specialist document for shopping centres; the net lease is a specialist document for office blocks.

The net lease or net rent principle is also applied to single occupancy factory and warehouse leases. In these cases there is no service charge as such: the lessee pays the outgoings and operating expenses direct to the various recipients of the local rates, insurance premiums, servicing contracts, building repair bills and the like.

Without net leasing the property investor's return would be drastically eroded between rent reviews. There seems to be no justification for this happening. Without inflation it would not be an issue. It is an essential modern leasing tool for the larger and more complex commercial buildings.

A significant number of modern multi-storey office buildings in Auckland and Wellington have already been let on a net lease basis. It is to be expected that most new office buildings will be net leased in the future. There is no logical reason why net leasing should not gain general acceptance in the marketplace if, in fact, this is not already the case.

The rent and the service charge are both usually expressed as amounts per square metre per annum. The total annual amount payable by the lessee is derived by multiplying these rental components by the amount of space leased. The basic rent is reviewable at stated intervals, usually three yearly for example. The service charge on the other hand is assessed annually on the strength of what has actually been spent.

The items of outgoings and expenses normally included in the service charge are:

- Property rates and taxes
- Insurances
- Cleaning and lighting of common areas and outside window cleaning
- Lift service
- Heating, ventilation and air-conditioning
- Hot water and toilet necessities
- Servicing contracts
- Fire protection and emergency procedures
- Security
- Maintenance of plants, gardens and grounds
- Janitorial and caretaking staff
- A maintenance and repair fund.

The list varies from lease to lease but most service charges in net leases will be substantially as above. Items which might or might not be justified include ground rents, depreciation allowances, management fees.

Family Protection Act 1955 — Moral duty and adult children

J L Caldwell, Lecturer in Law, University of Canterbury

LITTLE academic attention has been accorded to the Family Protection Act 1955 for the very good reason expounded by the Court of Appeal in *In re Holmes (decd) McMaster v Holmes* [1936] NZLR s.26, s.35 that ". . . the possibilities of variations in the facts of every case are so infinite that very little assistance can be obtained from the quotation of cases".

Yet there are trends and principles of law emerging from the plethora of cases which cannot be overlooked by practitioners and this note seeks to examine some of the more important principles.

The concept of moral duty

The crucial section in the Act is s 4. This in its essence provides that if "adequate provision is not available for the proper maintenance and support" of persons who may claim under s 3 then the Court may make such provision as it thinks fit out of the estate for those persons.

At first sight these words appear objective and impersonal in their import, but from the earliest cases after 1906 (when the first Act was replaced) there has been injected a rather more subjective concept — the concept of the moral duty of the testator. Thus the Privy Council in *In re Allardice Allardice v Allardice* [1911] AC 730 approved the judgment of Edwards J in the Court of Appeal (1910) 29 NZLR 959, 973 when he stated that the Court must consider whether the testator ". . . has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children". He continued to hold that "[i]f the Court finds that the testator has been plainly guilty of a breach of such moral duty then it is the duty of the court to make such an order as appears to be sufficient, but no more than sufficient, to repair it."

Thus in a judgment which has become the locus classicus in the area Edwards J was using the concept of the moral duty to determine not only the existence of a claim but also the quantum and extent of a claim successfully established. Then in another early classic judgment Salmond J in *In re Allen (decd), Allen v Manchester* [1922] NZLR 218, 220 slightly reformulated the concept to introduce the notion of wisdom and to hold that the Court may order such provision as ". . . a just and wise father would have thought it his moral duty to make in the interests of his widow and children had be been fully aware of all the relevant circumstances."

Today the concept of a moral obligation towards one's family — *officium pietatis* as the Roman lawyers called it — has become elementary in the administration of the Act, and the Court of Appeal has declared in *Re Z (decd)* [1979] NZLR 495, 506 that this judicial gloss on the statutory words ". . . is too deeply embedded to be open to judicial reconsideration now". Indeed it has even been adopted by Parliament in s 3(2) of the Family Protection Amendment Act 1967 concerning the claims of grandchildren.

Material time for assessing a claim

An insight into the nature of the concept of "moral duty" is provided by the Court's traditional insistence that the material time for determining whether there has been a breach of moral duty is the time of the testator's death. Obviously changes in circumstances may occur from the time of death until the time of the application in Court, but the Courts when ascertaining the moral duty of a testator towards his family state that they put themselves "in his armchair" as at the time of death. (See, for example, *In re McGregor, McGregor v Beattie* [1961] NZLR 1077, *Dun v Dun* [1959] AC 272, *Bailey v Public Trustee* [1960] NZLR 741.) At the time of testamentary disposition a wise and just testator is taken to be "fully aware of all the relevant circumstances" (*In re Allen, Allen v Manchester* (supra)) and this may sometimes necessitate attributing to him truly clairvoyant powers (*In re Aspden, Aspden v Morrissey* (unreported, Supreme Court, Napier 11 February 1981 A46/75)); but apparently his powers of prophecy extend only to the time of death and not to the time of application.

However, as noted by the Court of Appeal in *Re Kallil, Kallil v Koorey* [1952] NZLR 31, there may be exceptional circumstances in which too rigid an adherence to the doctrine on material time would work an injustice. Thus although a wise and just testator is expected to take into account ". . . the reasonable probabilities as to future change of circumstances (*Welsh v Mulcock* [1924] NZLR 673 per Salmond J at p 687) and while in determining that question the Court may be guided by the events which did in fact occur (*In re Loughnan, Loughnan v Guardian Trust* (unreported Supreme Court, Auckland 10 June 1976 A 387/72)) a wholly unforeseeable change in circumstances could still render his provision for a member of the family quite inadequate. And so although on the tests for breach of moral duty the testator may have acted properly as at the time of his death, the claimant may be left badly provided for at the time of application.

However, there is a difficulty with this apparently neat solution

A possible answer to this problem was provided by Barker J when he suggested that although entitlement to further provision was determined at the date of death by the testator, the quantum was determined by circumstances existing at the date of hearing (*In re Booth, Booth v Booth* unreported, Supreme Court, Hamilton

6 October 1976 A 198/73). Dicta of Cooke J in *Re Z* [1979] NZLR 495, 505 were also consistent with such an approach. However there is a difficulty with this apparently neat solution in that entitlement to further provision arises only because of an inadequate quantum; thus it is doubtful if the Court could make an easy decision upon the basis of a composite set of facts some of which existed at one time and some of which existed at another.

The meaning of the words in s 4

It is a trite law that the Court could only derive its jurisdiction from the words of s 4 of the Act, and as Cleary J pointed out in *Re McGregor, McGregor v Beattie* (supra) the concept of the moral duty could only be justified if it arose from the interpretation of those words.

Thus the Courts have constantly maintained that they do not recast an unjust will so as to make it more fair and just in their eyes; rather they assert that they revise a will only to ensure that the claimant has "adequate provision for his proper maintenance and support". To this end a statement of Stout CJ was frequently quoted with approval that "[t]he first inquiry in every case must be what is the need of maintenance and support" (*Re Allardice, Allardice v Allardice* [1910] NZLR 959, 970).

However, in a very important opinion of the Privy Council in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 their Lordships explored the significance of the word "proper" in the equivalent New South Wales statute and concluded at 478 that "the amount to be provided is not to be measured solely by the need of maintenance". They pointed out that the Court was concerned with notions of propriety as well as of adequacy and that the notion of propriety introduced factors other than the requirements of the applicant — the most obvious factor being the size of the testator's estate. Thus their Lordships stated that in a small estate "proper" maintenance may in fact be less than "adequate" maintenance whereas the reverse is naturally true if the estate is large.

But even the word "adequate" can be given a broader meaning as Herdman J illustrated in *Welsh v Mulcock* [1924] NZLR 673. He declared at 683 that "adequate provision" means ". . . adequate having regard to the circumstances and station in life of the testator and the circumstances and station in life of the dependant. A sum that would be adequate for a child reared in humble circumstances might not be adequate for a child accustomed, because of the wealth of a parent, to live in luxury and refinement."

"adequate provision" means adequate having regard to the circumstances and station in life of the testator and . . . the defendant

Generally, however, the Courts seized on the possibilities of the adjective "proper" to give themselves jurisdiction. It was put simply by Gresson J in *Re Strawbridge, Telfer v Strawbridge* [1952] GLR 442 when he stated at 445 that "[i]t would seem that 'adequate' has regard rather to the necessities of the applicant but that what is 'proper' has regard to all the attendant circumstances."

These attendant circumstances would include, inter alia, ". . . the station in life of the claimant, [the] probable educational requirements, the size of the estate, and the nature and extent of the competing claims on the testator's bounty" (*In re Shanahan, McCarthy v Shanahan* [1957] NZLR 602, 607 per Gresson J). Thus Gresson J could conclude that "[t]he needs of the applicant have never been the exclusive test" (*In Re McGregor, McGregor v Beattie* [1961] NZLR 1071, 1089.) One can therefore say that the needs of the applicant make up but one of the factors in the determination of what is "proper", or the "moral duty" of the testator.

This became apparent from the two leading Court of Appeal judgments on adult claimants. In *Re Harrison, Thomson v Harrison* [1962] NZLR 6, 14 Gresson P once more asserted that the needs of a claimant could not be considered in vacuo, and he laid down the proposition of law that even if the adult claimant is "comfortably situated financially" there may be a moral obligation owing to the child. However the Court of Appeal in *Re Young, Young v Young* [1965] NZLR 294 expressed caution about any excessively liberal application of that principle. Thus North P and Turner J in their joint judgment stressed that the phrase "comfortably situated financially" should not be understood too literally; and their Honours held at 299 it was still necessary to establish a "need of maintenance and support" albeit in the "broad sense". Thus in their opinion "need" should be adjudged not only on a narrow economic basis but also on a moral and ethical one. That concept of needs in "the broad sense" was recently reaffirmed by both the Court of Appeal in *Re Swanson* [1978] NZLR 469, 470 and by Barker J in *Re Booker, Lugg v Booker* (unreported, Supreme Court, Christchurch A20/74).

As the concepts of "proper", "adequate" and "needs" were expanded so too were the statutory concepts of "support" and "maintenance". In the early case of *In re Allardice, Allardice v Allardice* (1910) 29 NZLR 959, 969 Stout CJ held that "support" does not mean merely having a supply of food and clothing, it means "such kind of maintenance as the widow during the life of her husband has been accustomed to".

Other cases illustrated how the boundaries of the concepts could be widely stretched indeed. In *Re Loughnan, Loughnan v Guardian Trust* (supra) Chilwell J held the words "maintenance and support" were wide enough to extend to ". . . the preservation of a mode of living, the shelter of a specific home or the retention of specific property". In *Re Horton* [1976] 1 NZLR 251, 255 the Court of Appeal included within their scope, ". . . provision likely to help in the financing of a home" and in the circumstances of *Bosch v Perpetual Trustees* (supra) the Privy Council included the costs of an Oxbridge education within the concept of "maintenance, education and advancement" under the equivalent New South Wales statute.

the Act is concerned with the protection of the family as a unit in society

The rationale of all those cases on s 4 presumably was that the Act is concerned with the protection of the family as a unit in society. For this reason the Courts became concerned not only with economic questions of necessities and subsistence but also with the ethical questions of morality and family justice.

The changing assessment of moral duty

In a now oft-cited dictum McCarthy P stated in *Re Wilson* [1973] 2 NZLR 359, 362 that the Court's assessment of moral duty may vary from period to period because ". . . the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time".

This ambulatory approach to the existence and extent of moral duty was recently confirmed by the Court of Appeal in both *Re Sutton* [1980] 2 NZLR 50 and *Little v Angus and Langstaff* (unreported, Court of Appeal, 20 March 1981 CA113/79) and was applied by Roper J in *Re McCutcheon, McCutcheon v McCutcheon* (unreported Supreme Court, Christchurch, 8 July 1977 A249/73). In the latter case Roper J concluded that where relief had been refused in the circumstances of some of the earlier cases it would today be granted and he held that "Edwardian" notions of proper conduct were no longer appropriate.

Societal changes in the role of women were acknowledged by Casey J in *Re Dawson, Nelson v Dawson* (unreported Supreme Court, Christchurch, 28 May 1975 A199/71) when, recognising the "realities of life", he held that "[w]ith changing social and economic circumstances, some adult single daughters may now find themselves in much the same position [as adult sons], whereas in previous generations it was assumed that they would need maintaining all their lives".

Conversely in modern times a "married daughter" is not regarded as being beyond the testator's responsibility for "proper provision" simply because of her husband's financially comfortable position. The Court of Appeal in *Little v Angus and Langstaff* (supra) accepted that ". . . the claims of married daughters are to be approached at the present day somewhat more liberally than in the past". (Though it can be noted that a liberal approach to married daughters had been evident in the earlier judgment of the Court of Appeal in *Re Easton, Gavin v Easton* [1958] NZLR 125).

The position of adult claimants

It has long been accepted that the widow of a testator (and presumably the widower of a testatrix) has the paramount claim under the Act. (See, for example, *In re Rush, Rush v Rush* (1902) 20 NZLR 249, 253 and *In re Wright, Wright v Wright* [1939] GLR 608, 611).

There is also a residual judicial reluctance to find that a well established able-bodied adult male claimant can fall within even the liberal interpretations of the words of s 4. (See, for example, the judgment of Haslam J in *Re Downing* [1975] 1 NZLR 385, 390).

Nevertheless the cases of *Re Harrison* (supra) and *Re Young* (supra) established that such a person is not outside the category of possible claimants and that the success of the claim will depend upon the surrounding circumstances. Some of the more significant circumstances can now be briefly examined.

(a) Size of the estate

In *Re Z* (supra) Cooke J claimed that one of the great advantages of the concept of moral duty was its flexibility in enabling full allowance to be made for the size of the testator's estate. And it is obvious that the size of the estate is clearly influential in determining both the existence and the extent of moral duty towards any claimants. Thus Salmond J pointed out in *Re Allen, Allen v Manchester* (supra) that the Court's approach differs according to whether it is dealing with a large estate or with a small estate which is insufficient to meet in full the entirety of claims upon it. In the latter situation, he said, the Court merely has to distribute the available resources amongst competing claimants; in the former situation the Court must define the absolute scope and limits in the estate within which a testator must make provision for his family. Clearly this affects the claims of adult children as is illustrated by *In re Loughnan, Loughnan v Guardian Trust* (supra). In that case Chilwell J said he was influenced by the fact that the estate had moved from the latter category at the time of death into the former by the time of application.

Similarly in *Re Young* (supra), where the estate was modest, Hutchison J explained Gresson P's dictum in *Re Harrison* (supra) (concerning the eligibility of adult claimants "comfortably situated financially") as being a dictum related to the circumstances of a large estate with small competing claims.

(b) The testator's opinion

Early judgments on the Family Protection Act frequently expounded as a starting principal the lack of judicial power to reform the will so as to make it more just (see, for example *In re Allardice, Allardice v Allardice* (supra) at p 970, *Collins v Public Trustee* [1927] NZLR 746, 750 and *Downing v Downing* [1932] GLR 441). This proposition is still frequently asserted today (see, for example, *In re Booker, Booker v Lugg* (supra) *In re Bennett, Bennett v Bennett* (unreported, Supreme Court, Auckland 12 October 1978 A1610/75) and *In re McDonald, Colhoun v McDonald* (unreported, Supreme Court, Invercargill, 21 November 1977 A 10/74)). However, this has always seemed a somewhat artificial proposition because a Court unmistakably does revise a will and interfere with the testator's opinion so as to transform it into a more wise and morally just testamentary disposition. It is indeed a basic truth that in Family Protection proceedings the Court is, in the Privy Council's words, "overriding" or "varying" the provisions of a will (See *Re Dillon, Dillon v Public Trustee* [1941] AC 294, 301 and *Dun v Dun* [1959] AC 272, 291.) In plain words this means, as Herdman J said in *Welsh v Mulcock* [1924] NZLR 673, 682, that under the Act a man's will is no more than a tentative disposition of his property pending an ultimate decision by the Court.

"a man's will is no more than a tentative disposition of his property pending an ultimate decision by the Court"

Naturally out of respect to the principle of testamentary freedom the Courts will show careful restraint in the exercise of their powers so that ". . . the intentions of the testator should be interfered with as little as possible having regard to the objects of the Act" (*In re Baker* [1962] NZLP 758, 761 per Leicester J.) Indeed s 11 of the Act serves as a reminder to the Court of the importance of the testator's reasons in making his will, and when applying this section in *Re Downing* (supra) Haslam J noted that where the testator's omission to perform his moral duty towards his children had been due to some oversight or mistake then his wishes could legitimately be taken into account. However his Honour pointed out that even in that situation the

testator's opinion could never be conclusive; and where the omission to perform the duty was deliberate then his opinion and reason would carry no weight at all (see *Bosch v Perpetual Trustees* (supra) at 481). The nature of the Act means the Courts are concerned with the objective moral propriety of the will and the testator's opinion is but of secondary importance.

(c) Applicant's conduct

The cases show that previous good conduct, dutifulness, and contribution to the testator's estate may greatly assist an applicant's claim eg *Mudford v Mudford* [1947] NZLR 837 and *In re Campbell, Moon v Curd* [1951] GLR 287.

However the Court of Appeal in *Re Young* (supra) adopted with approval the observation of Fullagar and Menzies JJ in their joint dissenting judgment in *Blore v Lang* (1960) 104 CLR 124 that "[g]ood conduct and honest worth are not to be rewarded by a generous but secondhand legacy at the hands of the Court".

The Court of Appeal thus held that while the contribution of the applicant to the making of the testator's estate was a relevant circumstance to consider, it could never be the sole ground for granting relief. Similarly in *Re Dawson, Nelson v Dawson* (supra) Casey J held that a failure to recognise work done during the deceased's lifetime did not entitle a claimant to further provision. There must be other grounds for relief as well.

A more difficult issue has been the effect of an adult applicant's prior bad conduct on a claim. Section 5 of the Act provides:

> The Court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the Court to disentitle him to the benefit of such an error.

It is clear that the onus of proof of bad character rests on any person alleging it and that mere suspicion or inference is not enough (see *Re Ward, Drysdale v Ward* [1964] NZLR 929, 933; *Re Mercer* [1977] 1 NZLR 469, 472, and *In re McCutcheon, McCutcheon v McCutcheon* (supra).) In *Re Mercer* White J noted that conduct which does not actually disentitle a claimant to full provision may still have a bearing in considering the amount, and Roper J felt obliged to accept that principle in *Re McCutcheon*.

However Roper J stressed that conduct which may have been sufficient to disentitle the plaintiff in earlier times would not necessarily do so in today's social climate. Therefore the rebellious twenty-four year old applicant son in that case was entitled to further provision because ". . . the testator should have recognised that his son's make-up was such that he would need some support".

provision for one's family unit must encompass the "black sheep"

The point seems to be that provision for one's family unit must encompass "the black sheep".

Estrangement of testator and child

An estrangement may be occasioned by the applicant's bad conduct but whatever the reason it is true that a testator's moral duty extends equally to "the lost sheep" of the family.

This has not always been so. Once the simple relationship of parent and child was not enough to justify a claim if there had been a long period of estrangement (see *Re Barkla, Kemp v Barkla* [1948] GLR 268); and even more recently a relationship with communication and contact was seen as prerequisite by Chilwell J in *Re Bennett, Bennett v Bennett* (supra).

However, subsequent cases have not supported Chilwell J's viewpoint (see *Re Wixon, Wixon v Public Trustee* (unreported, Supreme Court, Invercargill, 19 February 1981 A 4-9/79) and *Swanson v Public Trustee* (unreported, Supreme Court, Wellington 19 September 1979 A 502/78).) In much the same way it was said of a testator's neglect of an illegitimate child that ". . . the consequences to the child of illegitimacy may require the Court to make more ample provision than would otherwise be the case" (*Re Berryman* [1966] NZLR 743, 745 per Wilson J.)

Indeed, where the estrangement is caused by the testator's neglect, there may well be a moral duty lying on him to atone and make amends in his will for his prior dereliction (see *In re Booth, Booth v Booth* (supra) and *Swanson v Public Trustee*.)

Thus where there has been an estrangement the Court may expect a testator when making provision for his family to be not only wise and just but also contrite and forgiving.

Miscellaneous factors

Naturally other factors relevant to an adult claimant's application could not be exhaustively listed and the variety could only be suggested. They would include for example the discrepancy between bequests (*Re Shanahan* (supra), the previous standard of living of the claimant (*In re Wright* [1939] GLR 608, 615) and any indirect benefit given to the claimant by, for example, provision for the grandchildren *In re Baker, Baker v Public Trustee* (supra).) The factors are innumerable and these possible variations in facutal situations will ensure that the Family Protection Act 1955 remains a rich source of litigation.

Rape Study

A Study on rape is being undertaken jointly by the Department of Justice and the Institute of Criminology, Victoria University of Wellington. The terms of reference for the Study are to determine whether the law and the criminal justice system should be modified to recognise the special problems encountered by rape victims and, if so, to recommend in what ways this should be done.

In that part of the study relating to the law and legal practitioners, the Department of Justice hopes to approach those lawyers who have had experience in the prosecution and defence aspects of rape cases.

The Department would be pleased to hear from interested lawyers who would be prepared to complete a questionnaire and possibly give a follow-up interview. Please contact Prue Oxley, Senior Research Officer, Planning and Development Division, Department of Justice, Wellington, by 5 July 1982 giving your name, address and a contact telephone number.

A few comments on the Credit Contracts Act 1981

*D M Forsell**

THIS article is intended to augment the spate of justified adverse criticism of the Credit Contracts Act 1981 which has recently emanated from the New Zealand Law Journal and from other publications.

The "paid adviser"

Subsection (1) of s 15 of the Act reads, in relevant part:

(1) In this Act the term "controlled credit contract" means a credit contract —

(a) Where the creditor, or one of the creditors, for the time being is a financier acting in the course of his business; or

(b) Which results from an introduction of one of the parties to the contract to another such party by a paid adviser; or

(c) That has been prepared by a paid adviser

Section 2(1) of the Act defines "paid adviser" as "a person who, in respect of a credit contract, acts for reward as an adviser to, or as a trustee, nominee or agent of, one or more of the parties to the contract; but does not include a person who is an employee of one or more of the parties".

In relation to any particular credit contract, assuming that no creditor concerned is "a financier acting in the course of his business", and further assuming that none of the exclusionary provisions of paras (d) to (m) of s 15(1) or of s 15(2) of the Act apply, it will be very important to ascertain whether or not the contract resulted from an "introduction of one of the parties to the contract to another such party by a paid adviser" or whether or not the contract was "prepared by a paid adviser". If there was such an introduction or such a preparation, then the contract is of a controlled nature and attracts all the onerous disclosure provisions of Part II of the Act; whereas if there was neither such an introduction nor such a preparation, then the contract is not of that nature and does not attract those burdens.

Let it be supposed that there are two parties to a credit contract — a creditor and a debtor. Let it be also supposed that an adviser, acting on behalf of the debtor, has introduced the debtor to the creditor, how is the creditor to know whether or not the adviser has been paid?

Let it be further supposed that there are three persons involved in a credit contract, namely a creditor, a debtor, and a covenantor who guarantees to the creditor the performance of the debtor's obligations under the contract. Let it be further supposed that the contract "results from an introduction" of the debtor to the covenantor by an adviser — the creditor having insisted that a suitable covenantor be joined in the contract. How is the creditor to know whether the adviser has been rewarded?

If, on or before the creation of a credit contract, an adviser has been involved but has not been paid, then, (no creditor being a financier), the contract at its inception is not of a controlled character. But what is the legal situation if, at some time after the creation of the credit contract, the adviser is in fact paid? Is the contract transmuted, at the moment of payment from one of an uncontrolled character to one of a controlled character? To those questions the statute gives no answer and affords no guidance for the answering of them.

It should be noted that, for his services, the adviser does not necessarily have to be paid or rewarded by the person, (debtor or creditor or covenantor), who engaged or instructed him; and, moreover, the smallest payment or reward — the sum of $1 or a packet of cigarettes — will suffice to make an adviser a paid adviser

Consider the following circumstances: two creditors, neither of whom is a financier, are respectively and independently willing to make a modest monetary loan to a debtor — the one loan to be secured by a first mortgage, the other to be secured by a second mortgage over the debtor's estate in land. Each mortgage is a credit contract and is prepared in the same form and is in terms identical with the other mortgage. Each mortgage is prepared by a solicitor who is paid, but the solicitor preparing the one mortgage is in private practice whilst the solicitor preparing the other mortgage is the employee of the creditor concerned. The one mortgage will be a controlled credit contract: the other mortgage will not. On what basis, in the realms of logic and reason, has it been decided that this most important topic of the determination of the nature of a credit contract, controlled or not, may depend upon whether the contract was prepared by, or resulted from an introduction made by, a *paid* adviser?

Upon whom lies the burden of proving whether or not a credit contract is controlled — the debtor or the creditor?

A perusal of the pamphlet issued in April 1982 by the Department of Justice and intituled "A Financier's Guide to the Credit Contracts Act 1981" affords no answer whatsoever to any of the above questions.

The "financier"

Where, in respect of a credit contract, the creditor is a financier, the contract is clearly a controlled credit contract — see s 15(1)(a) of the Act, hereinbefore cited. A financier is defined in the statute as any person who —

(a) Carries on the business of providing credit (whether or not his business is his only business or his principal business); or

(b) Makes a practice of providing credit in the course of a

*The author is the Office Solicitor to the Housing Corporation of New Zealand. The views expressed are, however, his own.

business carried on by him; or

(c) Makes a practice of entering into credit contracts in his own name as creditor on behalf of or as trustee or nominee for any other person.

Let it be supposed that, having entered as creditor into a particular credit contract, a financier, during the subsistence of the contract, ceases to be a financier within the appropriate definition. Does the contract thereupon become one of an uncontrolled nature? To that question it seems that, albeit tentatively, an affirmative answer should be given, because of the words "for the time being" in s 15(1)(a) of the Act. Therefore if a creditor, who is a financier, goes out of business as a financier, then, even if the debtor does not know that the creditor is no longer a financier, the relevant credit contract may well be transmuted from one of a controlled nature to one of an uncontrolled character.

The body corporate as a debtor

By virtue of s 15(1)(d)(iii) of the Act where, in relation to a credit contract, every debtor "for the time being" is "a body corporate that has a paid-up capital of not less than $1,000,000 . . ." the contract is not a controlled credit contract. But what is the consequence of a body corporate, (being a debtor), reducing, after the genesis of a relevant credit contract, its paid-up capital to a sum of less than $1,000,000? Apparently, because of the appearance, yet again in the Act, of the words "for the time being" the contract may become one of a controlled nature. The pertinent words are *not* "at the time of the creation of the contract", they are "for the time being".

Do the provisions of s 15(1)(d)(iii) apply to a body corporate other than a limited liability company?

Total credit at least $250,000

By virtue of s 15(1)(f) of the Act "a contract, if the total amount of credit outstanding under that contract and under all other contracts between the said critor and debtor is or will be not less than $250,000" is not a controlled credit contract.

If, pursuant to a credit contract between a debtor and a creditor, "the amount of credit outstanding" fluctuates so that at some times it is $250,000 or more and at other times less than $250,000, it seems that there is a corresponding fluctuation in the nature of the contract from controlled to uncontrolled and from uncontrolled to controlled.

The Crown as creditor

The Act binds the Crown — see 8.

However, where the Crown is a creditor under a credit contract, and assuming that the finger of a paid adviser has not been in the pie, the Crown will be entoiled in the provisions of Part II of the Act only if it is, with regard to the contract, a financier.

But will the Crown, as creditor under a credit contract, be invariably a financier?

If the Crown makes a loan through the Postmaster-General in respect of the Post Office Savings Bank created by the Post Office Act 1959, it seems clear that the Crown is a financier. But the status of the Crown (financier or not) is by no means clear if the Crown were for example to make an advance under s 9 of the Maori Housing Act 1935, or accept security pursuant to s 16(g) of the Housing Act 1955.

Can the prohibiting provisions of s 39 of the Credit Contracts Act be made to apply to the Crown? Apparently they can: and morever it appears that they can also be made to apply to such "Government controlled" bodies corporate as the Housing Corporation of New Zealand and the Rural Banking and Finance Corporation of New Zealand.

Probable and possible effects of the Act

It is submitted that the following may be some of the consequences of the enactment of the Statute:

- Persons willing to lend money may seek to take advantage of the provisions of paras (d), (e), (f), (g), (i) and (k) of s 15(1) of the Act so as to escape the disclosure provisions of Part II. If this occurs, then loans, in sums of less than $250,000 for housing, farming, industrial and other purposes, may be harder to obtain.
- The ingenuity of the lawyers — particularly of the conveyancers — will be exercised in an attempt to nullify or mitigate the onerous provisions of Part II of the Statute. It will not be the first time that such ingenuity has been employed to such ends. For example, it is well known that the lawyers virtually put an end, by the devices of "fines and recoveries", to the Statute De Donis Conditionalibus of 1285. Again, it is common knowledge that the skill of the conveyancers in effect and ultimately rendered the Statute of Uses of 1535 an empty shell by the employment of "uses on uses".

Let the following sorts of circumstance be considered: there is a mortgage — a controlled credit contract — of land for a principal sum of $100,000: the ostensible interest rate is $14% per annum: the finance rate, properly calculated, is also stated: the mortgage then has provisions on the following lines:

> The principal sum shall be repayable upon demand — such words "upon demand" to have the meaning ascribed to them by the Fourth Schedule to the Chattels Transfer Act 1924 — but until such demand shall be made the mortgagor will to the mortgagee repay the principal sum, together with interest thereon as aforesaid, on the basis of a table mortgage over a term of 25 years from the date of advance, by 50 successive half-yearly payments of $x each, the first of which shall be paid on the expiration of a period of 6 months from the date of advance: Provided that the mortgagee may from time to time and in his absolute and unfettered discretion give to the mortgagor a notice in writing reducing the rate of interest payable hereunder to a rate specified in the notice and consequently reducing the amounts of the said half-yearly payments to amounts also specified in the notice; and whilst any such notice is in force and effect the mortgagor shall be liable to pay interest only at the rate mentioned in the notice and to make half-yearly payments in the amounts specified in the notice instead of at the rate and by the half-yearly payments first hereinbefore mentioned: Provided further, that the mortgagee may in his absolute and unfettered discretion and at any time, by a further notice in writing to the mortgagor, cancel any such notice whereupon such cancelled notice shall cease to have any force or effect.

If provisions of that sort appear in a mortgage, then, even if the mortgage be not of an "upon demand" character, the mortgagor will be chary of annoying the mortgagee by alleging that initial

disclosure was not properly made, or by seeking request disclosure or by otherwise vexing the mortgagee, for fear that the concession given to him by the mortgagee will be promptly withdrawn.

There is nothing in the Act which renders such withdrawal oppressive or improper, because the basic obligation of the mortgagor is to make payment on the footing of an interest rate of \$14% per year.

Moreover, if the credit contract is of an "upon demand" type, there is seemingly nothing in the Credit Contracts Act to prevent the creditor from making demand unless, peradventure, he does so in an oppressive manner.

Conclusions

Solicitors who have to advise clients about to enter into credit contracts will doubtless greet the coming into force of the Act with some trepidation. However, law practitioners who appear in the Courts on behalf of litigants will, no doubt, welcome the advent of the Glorious First of June with relish; for to them the Credit Contracts Act may well prove to be an even greater bonanza than the Matrimonial Property Act 1976, which has proved to be very fructiferous of fees indeed.

When the Public Issues Committee of the Auckland District Law Society criticised the Act and suggested that the coming into force thereof should be delayed — vide [1982] NZLJ 117 — the Minister of Justice adopted a somewhat hoity-toity, trenchant, unforthcoming and de haut en bas attitude, and refused to countenance the suggestion. To his credit, however, the Minister did, by way of adding a few further steps to the bucolic clog dance, introduce into the House of Representatives a Bill which led to the enactment of the Credit Contracts Amendment Act 1982. That amending Statute is, in itself, also far from being entirely satisfactory, but it is not proposed in this essay to criticise it. To do so would be merely to pile Pelion upon Ossa. But one may with confidence expect that there will be further amendments to the Credit Contracts Act.

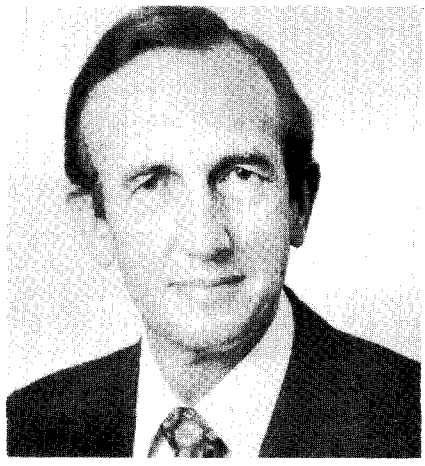
Although the Credit Contracts Act does not, unless the contract be oppressive, taint any credit contract with illegality, it is submitted that many lenders of money — particularly "institutional lenders" — are going to find several common forms and usual terms of lending occluded by the Statute, for the simple reason that, in the light of the provisions of the Act, it will, with regard to such forms and terms, be well nigh impossible properly to assess the total cost of credit and calculate the finance rate without, on each pertinent occasion, invoking the expensive skills of the actuary. How many of the people involved in the engendering of the Act are able unassisted to calculate, in accordance with s 6 and the First Schedule to the Act, an annual finance rate, given any particular relevant facts and details?

The Act seems to combine the worst features of the mind of the lawyer, the accountant, the civil servant and the legislator. It is far from clear that the existing legal provisions were working badly, and even more doubtful that the new Act will improve the situation. At least one thing is abundantly clear; in the end it is debtors who are going to bear the costs which creditors incur in complying with the Act's provisions.

High Court Appointment — Mr J H Wallace QC

The Equal Opportunities Tribunal decision in the *Eric Sides Motor* case (2 NZAR 447) drew considerable adverse comment. The case, as many remember, involved the sticky issue of whether an employer could use religious preference as the basis for a situations vacant advertisement (the answer was no). The usual outrage followed. The political heat, however, could not diminish an admirable decision. In terms of judicial technique, the decision reflected thoughtful analysis and highly literate style. In terms of result, the Tribunal emerged untainted from the crucible of publicity and political pressure. The validity of both sides of the issue could have justified a different conclusion. The choice was a hard one and it is to the Tribunal's credit that it sought no easy way out.

It is consequently a pleasure to learn that the Chairman of that Tribunal, Mr J H Wallace QC, has been appointed a Judge of the High Court. Mr Wallace was a partner for 13 years in an Auckland law firm, and has practised as a barrister on his own account since 1973. In 1974 he was appointed Queen's Counsel. He has been a member of the Contracts and Commercial Law Reform Committee since 1974, a member of the Royal Commission on the Courts in 1977/78, and Chairman of the Equal Opportunities Tribunal since its inception in 1978. Additionally, Mr Wallace served as president of the Auckland District Law Society in 1980/81 and as vice-president of the New Zealand Law Society in 1981/82.



Mr Wallace is married with two children.

Mr Wallace's appointment, which takes effect on 30 July, will be widely welcomed by the profession.

Books, bookselling and the law

The Hon Mr Justice M D Kirby

The author is chairman of the Australian Law Reform Commission.
This article is a modified version of the second part of an address which he delivered to the 61st annual conference of the Booksellers Association of New Zealand at Rotorua on 26 April 1982.

Reforming the law on defamation

ONE of the reasons for a tension in the relationship between lawyers and the writers and distributors of books is the legal minefield of dangers and traps through which book writers and booksellers must tread, whether in Australia or New Zealand. I leave aside the laws on obscenity, the criminal law generally, the law of contract and the law of contempt of Court. I want to say something about the project that brought the Australian Law Reform Commission into contact with the legal problems of authors and booksellers. I refer to the law of defamation.

The Australian Law Reform Commission received a reference from the Federal Government in Australia aimed at modernising and simplifying, and above all unifying, Australia's eight different defamation laws. In Australia, every author must tread cautiously, and booksellers too, for fear of offending not only the defamation laws of his own State or the State of publication, but also the publication laws of any State into which the book is distributed. Effectively in Australia, this means a search for the lowest common denominator of permissible publication. The lack of uniform laws on defamation is a serious blight upon free speech and free publication in Australia. This is one area where Federal diversity has not protected freedom but has encouraged uncertainty with sometimes bizarre and unexpected results. Neither in New Zealand nor in Australia is there a constitutional guarantee of free speech and a free press, as there is in the First Amendment to the American Constitution. There are merely traditions in Australia and New Zealand. They can be undone if they do not have their stalwart defenders.

After two years of the most thorough consultations in all parts of Australia, and indeed beyond, the Australian Law Reform Commission delivered its report on *Unfair Publication*.[1] The report was commended to the Standing Committee of Attorneys-General by the Australian Federal Cabinet. That Standing Committee includes participation by the Attorneys-General of New Zealand and Papua New Guinea. Lately the Attorney-General for Fiji has also been attending. At meetings over the past year, in places as far apart as Perth, Western Australia and Queenstown, New Zealand, the Ministers have been examining the draft Bill which was attached to the Law Reform Commission's report. Progress is being made. There is announced agreement, at least amongst the Australian Attorneys-General, concerning the new uniform defamation law. The proposal by the Australian Law Reform Commission had the benefit of considering the report of the New Zealand Committee on Defamation. Amongst novel suggestions in the report for the planned Australia-wide Defamation Act were:

- implementation of a single code;
- new procedures to give defamation actions more speedy hearings;
- introduction of new remedies in the place of the virtually total reliance on money damages, including remedies by way of rights of correction and rights of reply;
- new protections for individual privacy as a substitute for the vague provision in the laws of some Australian States requiring a defendant to prove that a publication complained of was not only true but also published for the public benefit;
- clarification and simplification of the law so that it could be set out for all concerned: authors, booksellers, librarians and others so they could readily find the law without having to resort to inaccessible legal texts or extremely expensive legal advice.

Unfair publication and literature

In the course of preparing the report, the Australian Law Reform Commission received a number of submissions urging that there should be a general defence to defamation and privacy actions if it could be established that the relevant publication was contained in a work of literary, artistic, historical, scientific or educational merit. Inevitably, the creative writer draws upon material from his own experience. This is scarcely surprising. Somerset Maugham in his preface to his book *Cakes and Ale* described it thus:

> When the book appeared, I was attacked in various quarters because I was supposed in the character of Herbert Driffield to have drawn a portrait of Thomas Hardy. This was not my intention. . . . I am told that two or three writers thought themselves aimed at in the character of Alroy Keir. They were under a misapprehension. This character was a composite portrait: I took the appearance from one writer, the obsession with good society from another, the heartiness from a third, the pride in athletic prowess from a fourth, and a good deal from myself. For I have a grim capacity for seeing my own absurdity and I find in myself much to excite my ridicule. I am inclined to think that this is why I set people . . . in a less flattering light than many authors who have not this unfortunate idiosyncrasy. For all the characters that we create are but copies of ourselves. It may be of course also that they really are nobler, more disinterested, virtuous and spiritual than I. It is very natural that being godlike they should create men in their own image.

Esquire magazine described Arthur Miller, for writing his book *After the Fall* following the death of his former wife Marilyn Monroe, as

"blabbermouth of the year". But submissions to the Law Reform Commission during our inquiry asserted that the fine line between malice and creative imagination, fact and fiction should not be disciplined by the law of defamation.

Creative writers have always had to contend with the rigours of defamation law. Yet, so far as we were informed, only two Australian cases, both rather special, actually came to proceedings before a Court. One was the criminal prosecution of Frank Hardy, the author of the book *Power Without Glory*. The issue tendered in that case was identification; whether John West in the novel was the real-life Melbourne millionaire John Wren. The jury acquitted Hardy. The other case was an action brought in respect of a poem which was published in a book of poems. It referred to a family, identifying the chief protagonist as "my ex-husband's wife". The daughter of the family was described as "autistic". The poem referred, in disparaging terms, to each member of the family and his or her personal habits. The writer's "ex-husband" had, in fact, remarried and had a mentally retarded (though not autistic) daughter. The case was settled. The moral may be that it is not unreasonable to expect creative writers to make some attempt at disguise.

One of the problems presently standing in the way of a plaintiff suing an author is that he must show that the book about which he complains actually refers to him. Because, like Somerset Maugham, authors are generally careful to blend the characteristics of a number of people (or do so subconsciously) it is usually quite difficult to say that this or that character represents a particular person.

There is also the problem of the innocent victim. A novelist or playwright could, in entire good faith, create a character with a particular name and occupation who is a vicious bank robber. Should this work gain general currency, it would be rather hard to deny, to an actual person of that name who shared certain characteristics with his fictitious namesake, an opportunity of establishing that he was *not* the basis of the portrayal. Accidental defamation should clearly be cheaply and quickly disposed of. The Law Reform Commission emphasised from the beginning of its project that the road to defamation law reform lay chiefly in the reform of defamation procedures.

Booksellers and defamation

One development in Australian defamation actions which needs to be watched in New Zealand is the growing tendency of plaintiffs to issue proceedings not only against authors but also against booksellers, news dealers, libraries and like distributors. In part, this tactic has developed out of an attempt to frighten off such distributors and to misuse the procedures of the Courts to intimidate distributors. By the common law of England, which applies in New Zealand and Australia, a person who republishes a libel is equally liable for it to the person damaged. In New Zealand, the position is modified slightly in the case of multiple publication of the same defamation by the provisions of ss 9 and 10 of the Defamation Act 1954. There is defence of "innocent dissemination". However, to take advantage of this defence, the defendant must show that he did not in fact know that the publication contained defamatory material, that he had no reason to believe that it was likely to contain such material, and that his lack of knowledge was not due to any negligence on his part.[2] The inadequacies of this defence were forcefully put to the Australian Law Reform Commission by representatives of booksellers, distributors and libraries in Australia. They submitted that the rule imposed too onerous a burden on innocent disseminators in at least two ways:

- First, it required the distributor to prove that he was not negligent in not noticing the defamatory material in the book or journal he was selling or distributing. It was put to us that it was unreasonable to expect a bookseller or library to read all of the publications passing through its hands and to inquire whether the facts were true or the comments fair. Yet some of the law cases suggest that this must be done in order to negative negligence. Where a particular publication or type of publication has developed a reputation for being contentious, controversial and often defamatory, the defendant would have to prove that a check was specifically made, virtually of every page, in order to demonstrate that he was not negligent.[3]
- Secondly, the rule was said to be unfair because it puts a disseminator, such as a bookseller, on notice of the likelihood of the existence of defamatory matter as soon as the person claims that he is handling a book or journal defamatory of him. The bookseller or librarian must immediately make an instant judgment whether to cease to handle the book or journal. Most booksellers, libraries, news vendors and so on are not well equipped to make such a judgment quickly and soundly. In practice, it is not worth their while to take the risk of retaining the document. In many cases it would just not be worthwhile seeking legal advice. The effect is to stifle freedom of expression by imposing a virtual censorship without any intervention of a Court. During the Australian Law Reform Commission's inquiry, this kind of censorship by the threat of a writ against a bookseller occurred on a number of occasions. It is a source of concern in Australia. It may be a concern in New Zealand, although the report of the Committee on Defamation recorded that it could find "no New Zealand case where a bookseller has been held liable for defamatory statements made in a published book". Only one case was discovered "where a distributor of any form of printed matter had been independently and successfully sued for distributing a libel". The availability of provisions for indemnity or contribution from other parties to the publication was thought sufficient to obviate the necessity of changing the law of innocent dissemination as it affects distributors.

However, the kind of problem that can arise was illustrated by two of the cases quoted in the report of the Australian Law Reform Commission. The first case involved the book of poetry I have mentioned. It was on the shelves of many Australian libraries. It was not the sort of work in which one would expect to find defamatory material. But, as I have said, a claim was made that a particular poem was defamatory. Letters were sent to various libraries and booksellers throughout Australia threatening them with action if they continued to "publish" the book by making it available to purchasers or borrowers. The libraries and vendors could hardly form a judgment on the question whether the book was defamatory; in any case it was not sufficiently

important to run a risk. In practice, as the Law Reform Commission was informed, they withdrew the book. The second case involved a political biography. The subject sued the author, the publisher, the wholesale distributor and the retailer from whom his solicitor purchased the copy needed for evidence. Allegations were made that certain sections of the book were defamatory. All defendants, including the retailer, were on notice. The retailer was advised by his solicitor that he would not thereafter be able to rely upon the defence of innocent dissemination. He would have to depend upon such defences as truth and fair comment. The retailer lacked the knowledge to make a judgment on those matters. In any case the total profits from likely sales would not approach the legal costs of an action. He withdrew the book from sale.[4]

Protection for innocent dissemination?

Having considered the present law and the criticisms which libraries and booksellers had ventured of the law, the Australian Law Reform Commission recommended reform. It concluded that any rule must attempt to protect the interests of two parties who may be presumed to be innocent. In the first place, there are the distributors, ie the librarians and booksellers, who cannot be expected to know of the existence of defamatory material, and who cannot reasonably be expected to take the time and trouble to resist a claim. In the second place, there are the persons who are interested in containing the spread of a hurtful libellous publication concerning themselves, including publication in books and journals distributed by booksellers, libraries and so on.

Subject to one qualification, the Law Reform Commission proposed that specified disseminators should be granted protection for publishing defamatory material solely in their capacity as disseminators. However, the Commission also suggested that the person who claims to be defamed should be given the right to obtain an injunction restraining republication by any person (including a protected disseminator such as a bookseller) if he could satisfy a Judge that the material was defamatory and otherwise indefensible. In this way, the Commission sought to satisfy the two interests identified. It suggested that the proposal, if accepted, would enable any of the disseminators to print, sell or lend the allegedly defamatory material with impunity unless and until a Judge, after considering the relevant facts of the particular case, granted an injunction.

In this way the Commission sought to satisfy the two interests identified

In discussing the definition of the group of disseminators who should have the benefit of this special protection, the Commission concluded that few would oppose the inclusion of libraries, news vendors and book retailers. The case of wholesalers of printed material, such as books, was considered more arguable. It was pointed out that they handled a greater volume of a publication than do libraries or small booksellers. Consequently they would have a greater financial stake in the distribution of the alleged defamatory material. On the other hand, wholesalers will often have little opportunity, in practice, to check material in advance. Frequently they simply take books and journals from printers and other reproducers and immediately distribute them to retailers, virtually as a conduit. Changing trading conditions were noted to be breaking down the traditional distinctions between wholesalers and retailers, a trend which included the book trade. It was thought that difficulties could arise from introducing a legal distinction between the position of the two. In the result the Commission concluded that wholesalers should also be removed from the damages remedy but, like other distributors, be subject to the specific injunctive relief proposed.

The draft clause of the proposed uniform reformed Defamation Act relevant to booksellers, suggested by the Australian Law Reform Commission, is as follows:

> 17(1) It is a defence to a defamation action that the defamatory matter was published by the defendant solely in the capacity of, or as a servant or agent of, a processor, a person conducting a library, a newsagent, a news vendor, a wholesaler or a retailer.

The defence is excluded where the disseminator was concerned in the content of the defamatory matter, or imported it. The reason for excluding imported material is that a damages remedy against the local distributor may, in practical terms, be the only remedy available to a person defamed. Fairness to the plaintiff dictated, in the view of the Law Reform Commission, a qualification of the general rule relating to protected dissemination, excluding its application to any person who has imported books or other material from abroad.

Progress towards the acceptance of the Australian Law Reform Commission's proposals on defamation law reform seems steady. The meeting of the Attorneys-General at Queenstown on 15 February 1982 was under the chairmanship of the New Zealand Minister for Justice, Mr J K McLay. Commenting on the decisions made at Queenstown, the Attorney-General of Australia, Senator Peter Durack QC, said that the Attorneys-General had "substantially advanced progress towards uniform defamation law in Australia". He said that they had "now agreed on most of the major issues which would form the basis of a uniform defamation law". Specifically, they have agreed on the preparation of a draft model Bill which will be placed before the next meeting. There has been some criticism of aspects of the Queenstown announcement.[5] But so far there is no indication as to the attitude to the particular provisions of the greatest relevance to booksellers and innocent distributors. So on this subject we are still in the dark — although I do not anticipate problems in the acceptance of these reforms. I know, from his several announcements on the subject, Mr McLay is closely watching the developments in Australian defamation law. Specifically, he has expressed sympathy with some of the proposals contained in the Australian Law Reform Commission report. He has before him both our report and the report of the New Zealand committee. Whether he will feel persuaded to adopt the Australian proposals, at least to the extent of adding new protections to the position of innocent disseminators such as booksellers, remains to be seen.

1 The Law Reform Commission (Aust) *Unfair Publication* (ALRC 11), 1978.
2 *Emmens v Pottle* (1885) 16 QBD 354.
3 *Gatley on Libel and Slander* 7th edition, London, 1974, paras 241-3.
4 *Unfair Publication* 98.
5 *The Age* 18 February 1982.