THE NEW ZEALAND
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# How strong is too strong?

DESPITE talk over the past years of open government, and despite promises of legislation to give greater access to information, events over the past month indicate that our system of government is as centralised, authoritarian and secretive as ever and has no inclination or intention of changing that state of affairs. And it is noticeable that increases to executive power are increasingly at the expense of that other important component of the constitution, the judiciary.

Take the proposed Clyde Dam legislation for example. This project has been much litigated and the time taken has been a sore point with the government. However, by far the greatest cause of the litigation has been the government itself. What were these causes? Failure to make information available, proceeding with work on the assumption a water right would be granted, and seeking to limit the scope of judicial proceedings as narrowly as possible. It was inevitable that it would be challenged on each point. In the most recent decision of Mr Justice Casey (*Gilmore v NWSCA and Minister of Energy* (HC) Wellington, 13 May 1982 (M183/81)) it lost in its attempt to limit the scope of proceedings. The Planning Tribunal, it was held, was wrong in law in refusing to consider the end use of the power to be generated.

The response of the government has been, not to appeal, nor to return to the Planning Tribunal and re-argue the case on the basis of the matters the High Court has held should have been considered, but to indicate it will pass special legislation. Now it is no use saying the matter has been sufficiently debated, for, in the eyes of objectors, and indeed the law, it has not been — for that is what Mr Justice Casey's decision was all about.

However the government may justify the decision to legislate to itself — work gone too far, jobs at stake, law's delays — the effect of the decision is to remove the case from the Courts and to deny the objectors access to the judicial process to pursue their challenge to the merits of the decision to dam.

In addition, the Minister of Energy Mr Birch has suggested the possibility of another Act similar to the National Development Act to avoid a repeat of the Clyde Dam situation. Apparently the National Development Act, which, it will be recalled, was enacted over considerable opposition and might be regarded as defining the bare minimum procedures that would be tolerated, has merit for local bodies, but is not quite what the government wants.

Now the availability of the judicial forum is a measure of the willingness of a government to submit itself to challenge on the merits of its decisions. Particularly is this so when that government has an assured majority in Parliament — as, with the occasional very rare exception, is the case in New Zealand. Any steps to limit the availability of a judicial forum must surely strengthen the central authority of the government.

Mr Birch is also reported as saying that the wrangle over the Clyde issue has shown that the government's "faith in the democratic process was misplaced." Just what this "democratic process" is means different things to different people. To some it may mean that those who are democratically elected should be unhindered in whatever they decide to do. Probably this is how Mr Birch understands it. Others, who do not accept such a limited definition, consider it shows little regard for the rights of others or for constitutional practice. They do not accept that their elected representatives have unlimited authority, but instead expect the opportunity to continually participate in the processes of government — and indeed, unwritten though our constitutions may be, its institutions and practices accommodate this wish. To people of this persuasion the judicial process, which is after all one of the formal components of our constitution, provides a major means of access to the decision-making process. So when Mr Birch speaks of the government losing faith in the democratic process, he should realise that moves to restore the government's faith may well destroy the faith of others. Again, what we will be seeing is a further move against participatory democracy and in favour of authoritarian democracy.

As to the merits of legislating rather than litigating, there is a danger the debate will turn not on the merits of the project, nor on considerations of the end use of the electricity, but on the plight of the workforce and the magnitude of the work done to date. By deciding to legislate, the government will at once deny both the opportunity to challenge the merits — an opportunity the objectors have fought hard for — and the opportunity for the objectors to exercise what they see as their right to participate in the decision-making process.

In May 1980 the government was charged with pre-empting the planning decision by proceeding with preparatory work, ([1980] NZLJ 161). At that stage, according to the High Court decision at the time, expenditure exceeded $45 million. Later that year ([1980] NZLJ 233) attention was drawn to a reported statement of the Prime Minister Mr Muldoon that "there is no way investment made in the Upper Clutha power project will be thrown away." More recently (*Evening Post* 25 June 1982) the Prime Minister is reported as saying that "if he was confident the government could pass special empowering legislation which it proposed to introduce, he would be justified in proceeding with work on the high dam." The workforce argument is a convenient justification for side-stepping the judicial process — but it has no relevance at all to the central issue of whether a water right should be granted. And on that, it is very clear that the government intends to have its way. How much more authoritarian can you get?

The *Evening Post* report, after the section quoted above, continued as follows:

> That [expenditure in anticipation of legislation] is a normal procedure which a government uses when it has a Parliamentary majority for passing validating legislation.

The Auditor-General (Mr Shailes) is also reported as saying:

> The Minister had been told he could have proceeded with work for a high dam if he could guarantee to the Audit Office legislative approval would be forthcoming.

This raises the shade of the dismantling of the Labour Party's Superannuation scheme. It is worth querying again (as was done at [1979] NZLJ 337) whether this "normal procedure" is acceptable constitutional practice. There may be occasions when it is necessary to act in anticipation of legislation, and indeed it is permitted in England. But as the position there is understood, there must be not only an undertaking that legislation will be passed, but that legislation must be passed immediately — immediately generally being the following day. The "normal procedure" in New Zealand is more tardy, and again, is very convenient for an authoritarian government.

So much for the Clyde Dam. The next issue is the Price Freeze Regulations which were issued, of course, under the Economic Stabilisation Act 1948 — an Act which has not escaped criticism in these pages. Here is what was said at [1979] NZLJ 169:

> It has not escaped the attention of critics that it is not necessary for a government to formulate economic policy in terms of legislation and present it for Parliamentary scrutiny and debate. In fact it is not necessary to outline policy at all. It may simply be implemented, as necessary, by regulation. And of course there are also those who point out that a government may even conceal the fact that it has no policy at all!

It was suggested Parliament should assert better supervisory powers over regulations. Here is a comment from the Report of the Statutes Revision Committee on the Remuneration (New Zealand Forest Products) Regulations 1980. Discussing regulations made under the Economic Stabilisation Act the Committee said:

> Where an Act which authorises the making of regulations on certain specified subjects lays down virtually no guidelines to indicate the circumstances in which such regulations may be made, then *any limits imposed on that power by the Courts is sure to be fairly minimal*. (Emphasis added). If the Statutes Revision Committee did not have the jurisdiction conferred on it by SO 377, then there would be virtually no institutional safeguards against any abuse of the regulation-making power at all.

As has been said before, this Act ideally suits an authoritarian government, not only because of what it enables by way of regulation but also because "any limits imposed on that power by the Courts is sure to be fairly minimal."

The next event of moment over the past month is the resignation of Mr Derek Quigley as a Minister of the Crown. Back in 1976 one of his Parliamentary colleagues, Mr Michael Minogue, made a key speech (reported at [1979] NZLJ 485 and see comment of Geoffrey Palmer, then Professor of Law at p 481). Referring to a comment by Fairlie on the "Illiteracy of Democratic Government" Mr Minogue said:

> What he means is that what is being done by government is increasingly not properly examined or debated — or that principles or motivation underlying what is being done are never adequately exposed. That seems a valid statement of our current situation.

He was referring principally to debate in Parliament but his observation applies more widely. Those who have read Mr Quigley's address to the Young Nationals will have no doubt that his resignation was required for trying to meet criticism of the type so well expressed by Mr Minogue.

The Prime Minister justified his calling for Mr Quigley's resignation on the basis that Mr Quigley had breached the principle of collective Cabinet responsibility — and certainly under a Westminster style government a constant show of public unanimity is important. But it should not be forgotten that there are no absolutes and it is very much up to a Prime Minister to decide what he will or will not condone from his Ministers — as the Prime Minister has already demonstrated in respect of the comments by another Minister, Mr Couch concerning the Springbok Rugby tour. While Mr Quigley's resignation says much for his principles, one fears the requirement that he resign says even more about the government's willingness or unwillingness to allow its decisions to be openly debated. Again it underlines the authoritarian manner of its operation.

In his speech Mr Quigley asked ". . . has the individual New Zealander been involved enough in the decision-making process so that he not only understands it, but also supports it?" The answer "No" he feels is coming through more and more as community leaders express their views on matters of concern to them and "these are now no longer isolated opinions, but I believe a reflection of the thinking of a lot of New Zealanders."

So we have a Minister of the Crown who has been forced to resign, and a respected back-bencher, Mr Minogue, who has not only been denied preferment but has also been driven to announcing his intention not to support the government on the Clyde Dam legislation through his belief that the government decision-making process should be more open. These considerable sacrifices by prominent Members of Parliament more than anything suggest that the centralisation of authority and the progressive closing of the decision-making process is going too far.

Abraham Lincoln once asked "must a government of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" Over the past six years we have seen a progressive strengthening and increasing assertion of the authority of the government — especially in economic matters. So long as the government may be defeated at the polls people may scoff at the notion that its actions threaten their liberty. But when implemented, many of the decisions being made today that concern our future will be, to all intents and purposes, irreversible. They are too important to be left in the hands of secretive authority. That is why it is important to fight strongly to ensure that the judicial process retains its constitutional position, and that the ordinary citizen is not denied the opportunity to participate in the decision-making process.

**Tony Black**

# Tony Black moves back

THERE must be some significance in a term of six years. For six years my predecessor Jeremy Pope edited this Journal and I see six years is also the length of my term of office.

It has been a most enjoyable and rewarding six years, in the course of which I have made many friends, and my decision to leave and return to private practice with the Wellington firm Brandons was not an easy one to make. However, as did my predecessor, I believe a publication can fall into a rut if an Editor sticks too long to his seat.

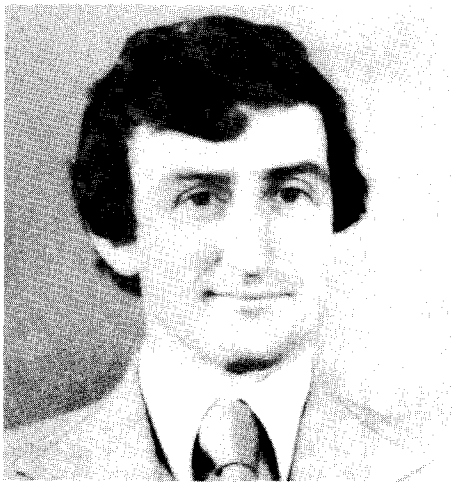
There are those who have suggested my decision has been eased by having been away from the profession for a sufficient length of time to have forgotten the demands of clients. However, I have had, in members of the legal profession, as demanding clients as anyone could wish for. And this is quite properly so, for reading patterns of professional people both here and overseas underline just how important journals and periodicals are in keeping them up to date. Now I can assure my successor that I have every intention of joining the ranks of demanding clients and I know he will not mind, for he too appreciates the value of feedback and comment from readers.

In departing I would like to record my thanks to Mr Bob Christie, Mr David Jackson and Mr Derek Day who, as successive Managing Directors of Butterworths, have very much left me to my own devices as Editor; to Peter Smailes who, in the early stages particularly, was faced with the invidious task of teaching me what publishing was all about; to Sir Alexander Turner, whose scholarly guidance was always there for the seeking; and to Peter Haig, who has done most of the donkey-work over the past year or so.

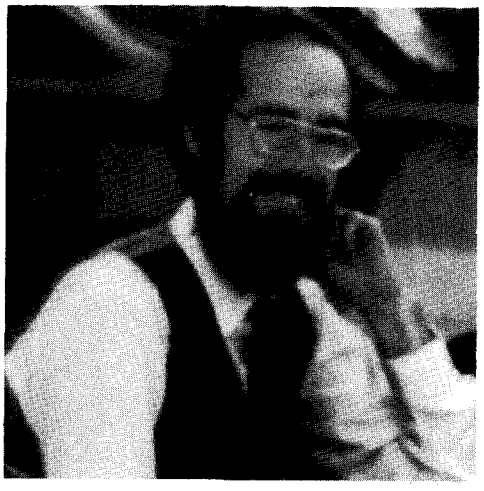
I came to be Editor as a simple conveyancer who had a profound distrust of constitutional issues. But such issues simply could not be avoided. My first editorial dealt with the consequences of the demolition of the Labour Party Superannuation scheme. My last one deals with the substitution of legislation for litigation over the Clyde Dam. In between I have seen the legal profession become very much more involved both philosophically and in practice with the many constitutional issues that have arisen, and I leave the Editorship with a strong personal belief that the role of the legal profession, and the function of the judiciary as a component of the constitution, cannot be overstated in preserving a proper balance of authority in our State.

I have, of course, a vested interest in extending my best wishes to my successor John McManamy. He has been responsible for many of the improvements to the Journal in recent months and knowing his enthusiasm and ability I am sure it is just a start. I have no doubt he can look forward to the same support that was so generously extended to me by so many.

**Tony Black**



**Tony Black**



**John McManamy**

# Case and Comment

*This feature was recently revived. We envisage up-to-date commentary on all recent NZ and overseas cases of note. We encourage regular contributors to this service, and those interested should contact the editor for details.*

## Restitution

THE field of equity at the present moment provides considerable scope for the creative judicial decision-making (and litigation). Predictably, judicial activists such as Lord Denning are often at their best in this field. This is all grist for the commentators, who enjoy speculating on the progress of developing areas, which is usually a polite way of stating that we have to guess at the rules (which may be 20 years away from being formulated). At the moment, where a litigant would ordinarily have no legal remedy there is emerging an interface of various equitable principles and maxims which may entitle a party to restitutionary relief. Surfacing as a cause of action in itself, restitution has gained acceptance in North America and there are harbingers of growth in New Zealand and the United Kingdom.

The latest reminder is the decision of Jeffries J in *McIlroy Gilkison Nominees Ltd v Van Hulzen* (High Court, Wellington. 14 May 1982 A578/78). Here, mistaken payments were made by the plaintiff to the defendant. The cause was the failure by the defendant's solicitor to make provision for further advances in the mortgage document. Advances of some $9,000 were made to the builder who was improving the defendant's property, and a further $1,000 was advanced to meet interest payments to mortgagees. The defendant complained of not being informed over the years of his true financial position, but acknowledged that the first (and perhaps the second sum) was applied to his benefit and agreed to repay. However, a dispute arose over whether he should pay interest on the advances (particularly the second).

It was not clear on the face of the judgment the cause of action argued by the plaintiff. Rather, His Honour observed: "Although not pleaded this claim readily lends itself to a decision on restitutionary principles. In restitution the emphasis is not on losses by the plaintiff, but on gains by the defendant." The Court then looked for a just remedy. The defendant had use of money over many years for which he paid no interest. In order to avoid unjust enrichment the Court ordered the interest be paid for the first sum but not the second.

In what amounts to good timing, a brief article by Melvin Easton has appeared in the [1982] *VUW Law Review* 159. Entitled *"Constructive Trusts and Unjust Enrichment in New Zealand"*, the article first lays down the factors which establish a prima facie right to restitution: (1) the defendant received a benefit at the plaintiff's expense; (2) evidence of volition in the receipt or retention of the benefit (this particular requirement is North American in origin); (3) the benefit was not voluntary conferred; and (4) the benefit is unjustly retained by the defendant.

The author then examines the opposing positions of two New Zealand Judges, Jeffries J and Mahon J. These approaches are set out in *Van den Berg v Giles* [1979] 2 NZLR 111 and *Avondale Printers Ltd v Haggie* [1979] 2 NZLR 124 respectively. Whereas Jeffries J favours unjust enrichment as the basis of a claim in restitution, Mahon J dismisses the doctrine as nothing more than a unifying title under which all the various actions (eg, constructive trust, estoppel) can be assembled.

The author prefers the approach of Jeffries J and observes that there may well be a principle in the making in New Zealand. Visitors to the Law Conference in New Zealand last year, of course, will remember Richard Sutton's conference paper (reprinted in [1982] NZLJ 67) and Donald Dugdale's reaction in describing its author as a "latent restitutionalist". Sutton will be giving expanded treatment to the topic of restitution in the Otago Law Review later this year. Lest one regard restitution as little more than an academic sideshow, one need only be reminded that down south the sons and daughters of high-country sheepfarmers are scribbling notes in earnest at the foot of this latent restitutionalist. Who knows? From today's theories may emerge as the next snail in the gingerbeer bottle.

## The Law Society — challenging the rules

IN *Re an Application for Admission* (High Court, Auckland. 30 April 1982 M1681/81) the applicant placed the Law Society in the embarrassing position of having to justify the validity of its own rules. The Law Society refused to grant a certificate of character to the applicant. Under r 7(2) of the Law Practitioners' Admission Rules, this had the effect of denying the applicant admission to the profession. No doubt, the applicant was of a different opinion as to his own character. However, instead of pursuing the standard natural justice

arguments, the applicant maintained that r 7(2) was inconsistent with its empowering legislation, the Law Practitioners' Act 1955. Section 9 of that Act required the Court to be satisfied that the applicant was of good character whereas r 7(2), it was argued, effectively left that question to the Law Society.

Chilwell J was not deterred by this argument. His Honour, somewhat sententiously, observed that the rules were made by the Governor-General acting by and with the advice and consent of the Executive Council, with the concurrence of the Chief Justice and five other members of the Rules Committee, three of those other members being Judges of the Supreme Court. More to the point, His Honour demonstrated that the rules and the Act were reconciliable: r 7 was an evidential requirement of good character that a candidate must produce in Court. In the absence of a certificate under r 7 the Court had no jurisdiction to make an order admitting (or presumably rejecting) the candidate. This judicial bar was proper in that s 9 required the application to be made in accordance with the rules.

Finally, His Honour observed that admission was governed by a clear statutory provision that displaced the Court's inherent jurisdiction. His Honour chose to distinguish four New South Wales' decisions on the matter. There, the Court's power derived from an imperial statute, the Charter of Justice 1823. Because there was no similar statute in New Zealand providing the Court with overriding power, His Honour concluded that the cases had no application here.

The case contains issues begging for resolution on a higher level. It could be said that an appeal was inevitable regardless of Chilwell J's conclusion. The Court of Appeal will have the opportunity to consider the matter later in the year.

## Unequal bargaining power — Bundy revisited

MANY readers will remember *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757 as classic Lord Denning. Who can forget a case that begins: "Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there." Enter the villain, the helpful bank manager. Bundy executes a guarantee to the bank. The guarantee amounts to little more than an outright transfer of Bundy's farm. Bundy's farm is foreclosed. He fights back but — ultimate tragedy — "He had a heart attack in the witness box." Unfortunately, "the Judge felt he could do nothing for him. . . . He ordered Herbert Bundy to give up possession of Yew Tree Farm . . . ."

Then, when everything seemed bleak — along came equity to the rescue. Faster than a speeding bullet emerged the Master of the Rolls, armed with that most formidable of judicial weapons — a single thread. "I would suggest," intoned our Caped (and bewigged) Crusader, "that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity coupled with undue influence or pressures brought to bear on him by or for the benefit of the other."

Sir Eric Sachs, with Cairn LJ concurring, took a safer approach. Sir Eric found that a fiduciary relationship existed between the bank and Bundy. A special relationship had been formed in which Bundy implicitly relied on the bank for advice. The Bank had breached this trust in compelling Bundy, an unworldly farmer attempting to help his son to execute a guarantee in favour of the bank. Whatever approach one may prefer, in the end Bundy was rescued. Sir Eric was cautious and unassuming. Lord Denning raised a cloud of dust and a hearty hi-ho Silver. The $64,000 question was whether this performance would impress a New Zealand judiciary.

In *National Bank of New Zealand Ltd v Hogan and Another* (17 May 1982 CA186/80) the Court of Appeal considered *Bundy* in relation to an interim matter. The High Court had issued an interim injunction restraining the Bank from forcing the sale of the defendant's property under a guarantee executed in its favour. The Bank appealed against the injunction, arguing that there was no serious question to be tried. The respondents pleaded unequal bargaining power. McMullin J, delivering judgment for the Court, however held that this argument could not be sustained on the facts. The respondents had gained some benefit from giving the guarantee (namely in gaining time to square the affairs of their family company). Further, the respondent had not implicitly relied upon the bank for advice and the guarantee could not be distinguished from any normal commercial transaction. This was a far cry from Bundy's situation, and the injunction was accordingly vacated.

In the future, the Court may be called upon to consider *Bundy* more closely, perhaps when the aggrieved party can advance a stronger case, perhaps when some poor old farmer suffers a heart attack in the witness box.

## Fiduciary duty of an employee

WHAT happens when a person uses information obtained during the course of his employment for his own personal gain? There is of course no firm answer. However Holland J's decision in *New Zealand Couriers Ltd v Sutton and Others* (High Court, Auckland. 10 May 1982 A332/82) provides a useful guideline.

*Sutton* was employed by *New Zealand Couriers* (NZC) as its general manager. On behalf of his employer, Sutton took part in negotiations for the purchase of another company. Later, and no doubt much to its surprise, NZC was informed that Sutton had purchased a one-third share in the target company. Not surprisingly, NZC sought an interim injunction to restrain Sutton from dealing with that company or divulging confidential information. Sutton agreed that he may have been under a contractual or fiduciary duty not to disclose information regarding NZC's plans for the future, and consented to an injunction along those limited terms. He objected, however, to a more widely framed injunction.

His Honour accepted that circumstances can create a fiduciary relationship between employer and employee; however he rejected NZC's submission that the position of Sutton in the company in itself created that relationship. Applying the dictum of Lord Wilberforce in *NZ Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163, 166, His Honour observed that duties of a fiduciary character could only be determined upon giving

consideration to the nature of the relationship between the parties. Here, His Honour was satisfied that Sutton had, as manager of NZC, acquired no knowledge which had placed him at an advantage in purchasing the business. Holland J distinguished this case from an earlier decision of his (*SSC and B Lintas (NZ) Ltd v Murphy and Another* High Court, Auckland. 14 October 1981 A966/81). That case involved a senior executive, who along with his co-defendant, was effectively in sole charge of running the business. The co-defendants had solicited customers while ostensibly carrying on their employer's business, and were in a position to use to their advantage the information acquired during their employment.

His Honour observed that there may be appropriate cases in the employment relationship for finding a fiduciary obligation, but cautioned that care must be taken not to extend the concept so as to impede the right to compete and the right to change employment. In any case the law had not yet reached the stage where it would impose upon an employee the high duties which applied to a trustee or an agent, partner, or director.

Notwithstanding the Court's finding of no fiduciary relationship, His Honour was careful to point out that the defendant may have been under a contractual obligation to reveal his intentions to his employer. This was a matter, however, to be determined at a hearing on the substantive issues; in any case the appropriate remedy was in damages.

## Right to be heard

". . . Mr Evans appeared in person. He came forward carrying not only books and papers but also a furled banner which, at the discretion of the Judge, was removed" — judicial grist from *Evans v Bradford and Another* (High Court, Christchurch 23 April 1982 M642/81). Mr Evans then pleaded guilty in the District Court to a charge stemming from the Springbok Tour. Shortly after he had been arrested, Mr Evans had filed an affidavit comprising 19 pages and a 60-page supplement. In the affidavit, Mr Evans accepted the case put forward by the prosecution, but submitted that in the circumstances the case was a proper one for discharge without conviction. Mr Evans also stated in the affidavit that he desired to make oral submissions. Before calling the case the Judge read the affidavit. Following Mr Evans' plea of guilty and the reading of the summary of the facts, the Judge told Mr Evans that he would discharge without conviction and consequently did not need to hear further submissions. Mr Evans objected, and, after hearing argument in chambers, the Judge seemed to have a change of heart. However, when the case was recalled the Judge launched straight into delivering sentence. He did not offer further explanation. Mr Evans' protests were cut short and the hearing came to an end.

Mr Evans then sought judicial review, alleging a breach of natural justice. In support, he cited the dicta of Denning LJ (as he then was) in *Jones v National Coal Board* [1957] 2 QB 55, 67: "There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the Judge." More to the point, the appellant cited a New South Wales decision where it had been held that the failure of a Magistrate to give a defendant any opportunity to be heard at all before pronouncing sentence was a denial of natural justice (*Ex parte Kent* [1969] 2 NSWR 184). Hardie Boys J accepted these submissions and further noted that an accused person has the right to be heard orally. However, His Honour observed that the Court is entitled to insist that what is said is relevant to the matter before it. There is a wider public interest in the Court being able to get on with its work. In this case the result the District Court Judge reached was the very one which Evans himself sought. Because of the inevitability of the same outcome if a rehearing were granted, the Court refused to exercise its discretion to intervene and accordingly dismissed the application.

His Honour noted that Evans' would-be submissions were tied to his sincerely held political beliefs; but the Court's task is to administer justice according to law and not to act as a forum for political or philosophical debate. His Honour appreciated that the distinction between hearing debate and relevant plea is not always easy to draw and that "many great scenes in the drama of our constitutional history have been enacted on the courtroom floor." The ultimate discretion by necessity rested on the presiding Judge. Here it was appropriate for the Court to note the applicant's strong views concerning the Springbok Tour without feeling it was necessary to permit him to use his trial as a means for airing those views.

End result: The right to be heard not abridged; the right of the Court to get on with its business upheld.

## Unjustified dismissal

TWO recent Court of Appeal decisions concerning unjustified dismissal have (1) strengthened the employee's right to be heard pending dismissal, and (2) removed some of the evidentiary burdens on the employee's union in bringing a claim for an unjustified dismissal.

In *Auckland City Council v Hennessey* (29 March 1982 CA178/81) the respondent was employed as a carpark attendant who became involved in an altercation with a customer. After investigating the matter, the employer Council dismissed the respondent and refused reinstatement. The Council argued that it need not hear the respondent on the matter. However, the Court equated unjustified dismissal with concepts of justice and fairness, which required that the employee should have an opportunity of stating his case. As this opportunity had been denied him, the Court upheld the finding of the Arbitration Court that the dismissal was unjustified, and allowed its order of reinstatement and payment of loss of wages to stand.

In *Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd* (29 April 1982 CA 70/81) the employee had been dismissed for removing without permission a roll of wire mesh from a job site. The case hinged on the interpretation of s 117 of the Industrial Relations Act 1973. Two possible approaches could be taken. A Court could examine whether the dismissal was unjustified (which would put the onus of proof on the party making the complaint), or could ask whether the dismissal had been justified (which would shift the onus to the employer). The Arbitration Court had applied the former interpretation. It had noted that although the employer may have showed lack of flexibility and understanding and the conduct in question may not have been criminal the union bringing the claim had failed to demonstrate that the dismissal was unjustified. On appeal, Woodhouse P noted that the Court was reluctant to apply technical rules to personal

grievance claims. Here, however the Court felt compelled to provide guidance: The evidential burden of proof rested on the union bringing the claim until a prima facie case had been established. This was usually satisfied once the fact of dismissal had been established together with the surrounding circumstances relied upon as reason for the complaint. At that stage the burden would shift to the employer. The issue before the Court then was not whether the worker had managed to establish affirmatively that he had been dismissed unjustifiably but whether the employer had succeeded in meeting that complaint. The union's appeal was allowed and the case was remitted to the Arbitration Court.

## Concurrent liability

IN last month's "Case and Comment", it was noted that Bisson J in *Port and Another v NZ Dairy Board and Another* (Hamilton, 10 March 1982 (A209/74)) sought to restrict the rule in *McLaren Maycroft*. Since then, the Court of Appeal has questioned its own decision. In *Turner Hopkins and Partners v Rowe* (2 June 1982 (CA31/81)), the Court ventured the following opinions:

"A few words should be added about *McLaren Maycroft*. Obviously what was said there, about the relationship of professional man and client being contractual only, requires at least reconsideration in light of such House of Lords cases as *Sutcliffe v Thackara* [1974] AC 727 and *Arenson v Arenson* [1977] AC 405 and other English authorities collected and applied in *Midland Bank v Hat, Scrubbs and Kemp* [1979] Ch 384 and *Ross v Caunters* [1980] Ch 297. In the meantime it is equally plain that, in the field of professional negligence trial Judges should apply the law as stated in *McLaren Maycroft* . . . but, similarly, findings of fact that may be needed should be made; against the day — perhaps not far distant — when the issue arises squarely in this Court." Per Cooke and Roper JJ.

"[In this case] it is unnecessary to decide whether the law of this country as it is at present expressed in the judgment of Richmond J in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100, that a man who exercises a professional skill can be liable only in contract, not in tort, for the breach of a contractual duty needs to be revised in the light of decisions of high authority in England. The judgment of Richmond J rested on what Diplock LJ . . . had said in *Bagot v Steven Scalan & Co Ltd* [1966] 1 QB 197, 204. But *Bagot's* case has not been followed in the subsequent cases in England in recent years. In the result the door which the *McLaren Maycroft* approach might have suggested was firmly closed may now be thought to rest ajar. Whether it is to be opened, and to what extent, to admit of concurrent liability of contract and tort must await further argument in this Court." Per McMullin J.

The case concerned the liability attaching to a firm of solicitors and will receive fuller attention in next month's "Case and Comment". In the meantime, in preparation for the inevitable frontal assault upon *McLaren Maycroft*, readers are reminded of a lucid and concise article by Sutton and Mulgan in [1980] NZLJ 366.

## Every case tells a story

READERS' attentions are drawn to the sad fate of champion stud bull, Penatok Nobel. On the journey from England, he was rendered lame and incapable of performing his appointed tasks. He eventually became someone's Sunday dinner. The bull is eulogised in *Port v Butcher* (High Court, Wellington. 19 May 1982 (A26/73). Quilliam J).

All was not lost, however. Sometime before the bull met his maker, a limited quantity of semen was obtained from the bull. His line could continue. Alas, it was a case of star-crossed test tubes. The artificial inseminations were bungled. The sad tale is documented in *Port and Another v NZ Dairy Board and Another* (High Court, Hamilton. 10 March 1982 (A209/74). Bisson J).

**John McManamy**

### Ouch of the month

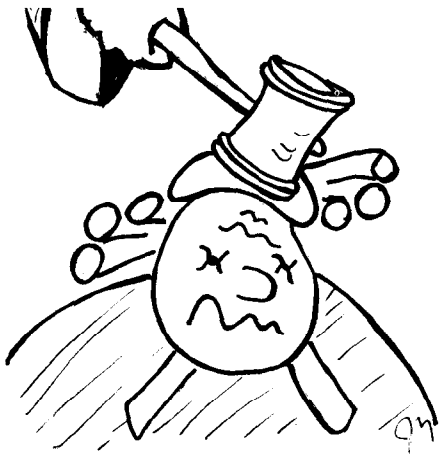
(contributed by *Dave Smith*)

The following bylaw of the Whakatane District Council must surely constitute a new high in lows. I quote:

> Any person shall be guilty of an offence against this bylaw who shall not refrain from doing anything which under this provision or clause of this bylaw he is required to abstain from doing.

I think it means it is an offence to breach the bylaw.

# Inter Alia



## Credit contracts — the Minister speaks out

OVER the past several months, the Law Journal has published articles critical of the Credit Contracts Act. The Law Journal has not been alone here. On 11 June 1982, in a speech to the Auckland District Law Society, the Minister of Justice, the Hon J K McLay, addressed himself to these criticisms — not to what they said, but the manner in which they were presented. It is appropriate here to publish the following extracts:

> The momentum of commercial law reform is increasing, to the satisfaction of some and dismay of others. But the fact of increasing change requires that lawyers generally, and not just commercial lawyers, not only be aware of the fact of change but to be aware of and participate more in the process that leads to the change.
>
> . . . .
>
> I want to start by looking briefly at the Credit Contracts Act . . . . The first thing we can learn, I think, is that there is a clear need for all lawyers to be involved, at a much earlier stage than many are at present, in proposed legislative changes affecting them and their clients . . . . The Government, once it has decided on a particular law reform measure, often must rely heavily on comments from interested parties to determine where difficulties will arise in applying broad general principles to a wide variety of practical situations; and lawyers in particular — with their skills and training — and their day to day involvement in the application of laws in ordinary situations — are in a better position than most to be able to comment and to suggest appropriate solutions. But the time for doing that, and for making changes, is at the Select Committee stage where every aspect of proposed legislation comes under close and careful scrutiny, where definite policy choices can be made, and changes and exceptions can be carefully determined.
>
> It is definitely inappropriate to decide six months after it was passed and only a month or two before an Act of the complexity of the Credit Contracts Act comes into force that you do not like certain aspects of it, and to make frantic (and, unfortunately, in some cases often ill-considered) last minute submissions, expecting them to be acted on. Those of you who followed progress of the Credit Contracts Act through Parliament will know that the Select Committee made changes through nearly every clause because of submissions from the more than 50 witnesses who appeared before the Committee. You will also know that the Select Committee took the novel step — which I hope will be followed with other complex commercial law reform — of advising witnesses of its interim decisions on the main policy issues and inviting further submissions. Moreover, the Act itself was before Parliament, and before the Statutes Revision Committee, for almost a whole year.
>
> Small wonder then that I was not particularly receptive to the many eleventh hour submissions I received which in some cases simply sought to reopen policy issues which had been decided by Parliament almost 12 months before.
>
> . . . .
>
> Headlines like "The Credit Contracts Act — New Zealand's Frankenstein Monster" and calls for the Act to be repealed because it is full of unstated anomalies may certainly ensure instant and widespread attention by the news media. But they are hardly sufficient justification for the Government and Parliament instantaneously to react and reverse the thrust of already well-settled legislative policy . . . . Those who merely want to make late submissions which amount to little more than emotive tirade against legislative proposals can hardly expect a favourable response.
>
> . . . .
>
> The point I have been trying to make is that we as lawyers have responsibilities to ourselves and our clients to be involved in and concerned about law reform in a sensible, responsible way. To be effective this involvement must be at an early stage, and it must be practical and specific rather than emotive and vague.

●

A brief glance at the list of those who made submissions to the Select Committee seems to confirm the Minister's statements. The list is divided into two groupings — those who have made submissions before the closing date of 20 October 1980 and those who made submissions in response to a letter of 24 March. Most of those making submissions consisted of various commercial groups such as banks and public interest groups such as the Consumer Council. No doubt, many lawyers were involved in helping these groups prepare their submissions. On the other hand, the list reveals very few lawyers who made submissions on their own account. More telling is that only one district law society took the trouble to make submissions. The New Zealand Law

Society appears on both lists. A quick comparison with the list of submissions made to the Penal Policy Review Committee reveals far greater lawyer participation, both at individual and law society level.

One final note is that the district law societies did respond during the embryo stages when recommendations first emerged from the Contracts and Commercial Law Reform Committee several years ago.

All food for thought. . . .

## Privy Council — then and now

TWO Law Journal entries, over 50 years apart, bear witness to the change of attitude of the Privy Council in the last half century. In the last issue, an entry in "Case and Comment" noted that the Privy Council in *Reid v Reid* failed to query a decision of the Court of Appeal on the basis that ". . . the Court appealed from is much more favourably placed than their Lordships to consider the relevant local considerations . . . ."

Contrast this with an entry in the [1932] NZLJ 1 which quotes from the autobiography of Haldane LC: "I remember one fortnight [in the Privy Council] within which, towards the end of my time, beginning with the case of Buddhist law from Burma, I went on to argue successively appeals concerned with the Maori law of New Zealand, the old French law of Quebec, the Roman-Dutch system of South Africa, the Mohammedan law and then the Hindu law from India, the custom of Normandy in a Jersey appeal, and Scottish law in a case from the North."

## Seizure of lawyer's documents

THE recent actions of the police in trying to obtain criminal evidence from two Wellington lawyers must have sent alarm bells ringing. The incidents concerned a solicitor's diary and file material of a former client. In the first case, two police officers tried to seize the appointment book of Mr George Rosenberg. Rosenberg took the view that this contained privileged information, and with the support of the Law Society has taken proceedings to determine the issue (the diary is still in his hands). In the second case, the police obtained (by search warrant) a file held by Mr Peter Boshier. Boshier's former client was being investigated on a charge of perjury and the police wanted to examine an affidavit contained in the file. With the evidence now in police hands, the ball at present is in their court. Should that case come to trial, round two will undoubtedly commence.

Apparently the overseas law is in a state of flux and one Australian High Court decision in particular may have given encouragement to the police. It is accepted that lawyer's privilege is not synonymous with a blanket protection of anything in a lawyer's office. One basis for a distinction concerns specific direct evidence of a crime such as a knife or gun (which clearly falls in the non-privileged category) as opposed to indirect evidence such as the files kept by a lawyer (which is assumed to be protected by privilege).

The crux, however, concerns what point in time privilege can be invoked. One view is that privilege is nothing more than an evidentiary matter to be decided during the trial, and before then the police can take what they like. An alternative view is that for any real protection to exist such evidence must be protected prior to trial. The Canadians are apparently moving to extend the protection while the Australians and Americans are receding in the opposite direction. In New Zealand there is the suggestion that Courts may adopt a more extended view on the basis of a case concerning the taking of information by tax authorities.

Finally, the policy considerations — the adversary process depends upon lawyers acting in complete confidence with their clients. Opposing this is the law and order view that lawyers should not enjoy special protection in withholding information from the police. We will explore these points in a future issue of the Law Journal. In the meantime, if you see the police backing a truck into your office. . . .

(Thanks to VUW criminal law lecturer Terry Arnold for the legal issues)

## Conveyancing monopoly

ONE of the most widely publicised submissions concerning the Law Practitioners Bill was made on the topic of the conveyancing monopoly by the Consumer Institute. That body was invited to expand on its submissions in the May issue of the *NZLJ*. At the same time, *Counsel Brief*, the publication of the Wellington District Law Society, published the comments of Mr Mervyn Rodgers, the Secretary-General of the New Zealand Law Society. The conceptual arguments by now are widely known. It is appropriate, however, to compare how ideas work in practice. For this, both parties went to their counterpart organisations in Australia. Thus, according to the Western Australian Government Bureau of Consumer Affairs: "The growth of competition has substantially reduced the average fee for conveyancing by non-lawyer conveyancers . . . ." And from South Australia: "Licensed land brokers now account for 75-80 percent of the total conveyancing transactions in that state."

The Law Society invoked the submissions of the Law Society of New South Wales: ". . . even though purchasers' solicitors' costs in New South Wales may be higher than land brokers' costs for acting for a purchaser in South Australia, the comparison of those figures alone is not a proper comparison of conveyancing in the two states. For example, the total costs payable on a sale and purchase of a $30,000 property where no mortgage is involved is $2,193 in South Australia compared with $2,253 in New South Wales; this is without taking into account the greater protection which is afforded two parties to a conveyancing transaction in New South Wales through being represented by a solicitor rather than by a land broker. . . ."

Stay tuned for further developments. . . .

## Legal aid

ONE aspect of the Law Practitioner's Bill concerns retaining the 1981 Amendment passed towards the end of the year. The amendment vests the Law Society with powers to grant waivers from the Act in order to allow the establishment and operation of offices such as neighbourhood law offices and community law centres. The Report from the Justice Department called *Access to the Law* favoured the establishment of an independent commission for this purpose, principally on the ground that a body which oversees community law services should be free from Government and professional pressures. Submissions made by the community law centres in Wellington and Dunedin supported this proposal on the ground that putting waiver power into the hands of the Law Society effectively grants that body de facto control over the operations of such offices. No one is suggesting here that the Law Society is some sort of bogey man; however there is a case for clear legislation to put minds at ease.

Concerning offenders legal aid, it appears that a battle may be shaping up between the Law Society and the Department of Justice. Mr Bruce Slane, President of the New Zealand Law Society is on record (see [1982] NZLJ 119) as being concerned over the way remuneration rates have slipped from parity with those of the Crown Solicitor to one-quarter of that scale. The Law Society's publication, *Law Talk*, has observed that Christchurch legal aiders are prepared to withhold their services at the direction of the Law Society. Lawyers on strike? Perhaps not, but in a society conditioned to dismissing entreaties until rash action is threatened or carried out, this option should not be overlooked. Hopefully, reason will prevail.

In the meantime, it has been noted that the new restrictions placed on duty solicitor schemes have effectively transmogrified that useful service into little more than a "remand" solicitor scheme. Observers are noting that large fines are being handed out to people who have not had a chance to see a solicitor. Cynical comment is rife. An article in 13 June 1982 *New Zealand Times* observed that Courts in Auckland are ignoring the restrictions.

Conclusion? It is all very well to ask lawyers to devote their time on a volunteer basis. Most lawyers willingly do this. It is another thing to make this the basis of a legal aid system.

## Legal education

OF all the issues before the Statutes Revision Committee concerning the Law Practitioners Bill, the Committee seemed most interested in the Law Society's proposals dealing with the training of recent admittees. This has taken the form of "Law Prac", known to most practitioners. The Law Society's main point was that it was responding in a positive way to the problems created by the "academic" orientation in university legal education. Whether the Committee was impressed will be seen when the Bill eventually emerges. One criticism from quarters other than Parliament is that the form of Law Prac is suspiciously similar to the law professionals (taught in the universities and recognised as largely ineffectual). This criticism however is more in the nature of execution than in conception. Many in the profession are of the opinion that something has to be done about legal education, and change will probably have to occur against the will of the universities.

Events at the University of Otago provide a case in point. This is detailed in an article by Gerald Fitzgerald in a recent publication called *Law in the Community*, put out by the Dunedin Law Community Centre. The Law Centre, as many are aware from reading the latest *Northern News*, is a student-run organisation with dual objects of community legal service and legal education.

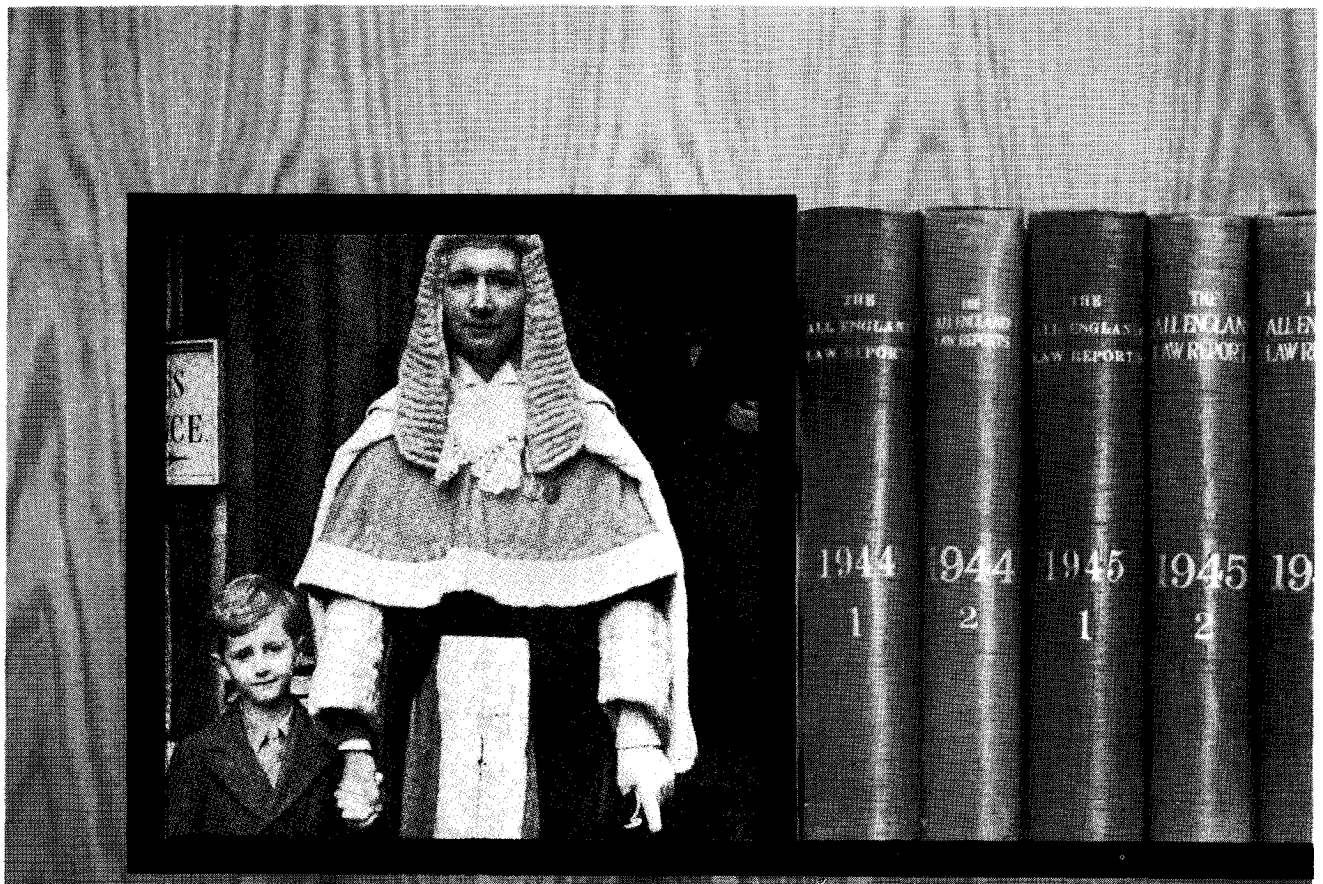
The article provides a commentary of attempts by a group of law students to gain university recognition for their efforts in establishing a programme for practical education. By way of background, the Otago District Law Society, along with numerous community groups in Dunedin, has endorsed the operations of the Law Centre. The law school, however, is split down the middle. The article makes important reading, not merely for its documentation of faculty inertia, but for its undercurrent of mutual resentment between the students and some of the members of that Faculty. It must be said in fairness that the Dean of that Faculty, Professor Richard Sutton, is favourably inclined towards the students but has the unenviable task of trying to keep everybody happy.

One often wonders why the law faculties, the profession, and the students cannot work out a rational programme for legal education and training. Academic training is useful. Practical education is essential. The tired arguments inflating the importance of one at the expense of the other are no longer credible. What is needed is effective integration of both. The American Judge, Jerome Frank, felt that the basics of the case method could be learned in six months. Even accounting for hyperbole, one wonders why competent lawyers cannot be turned out in five years.

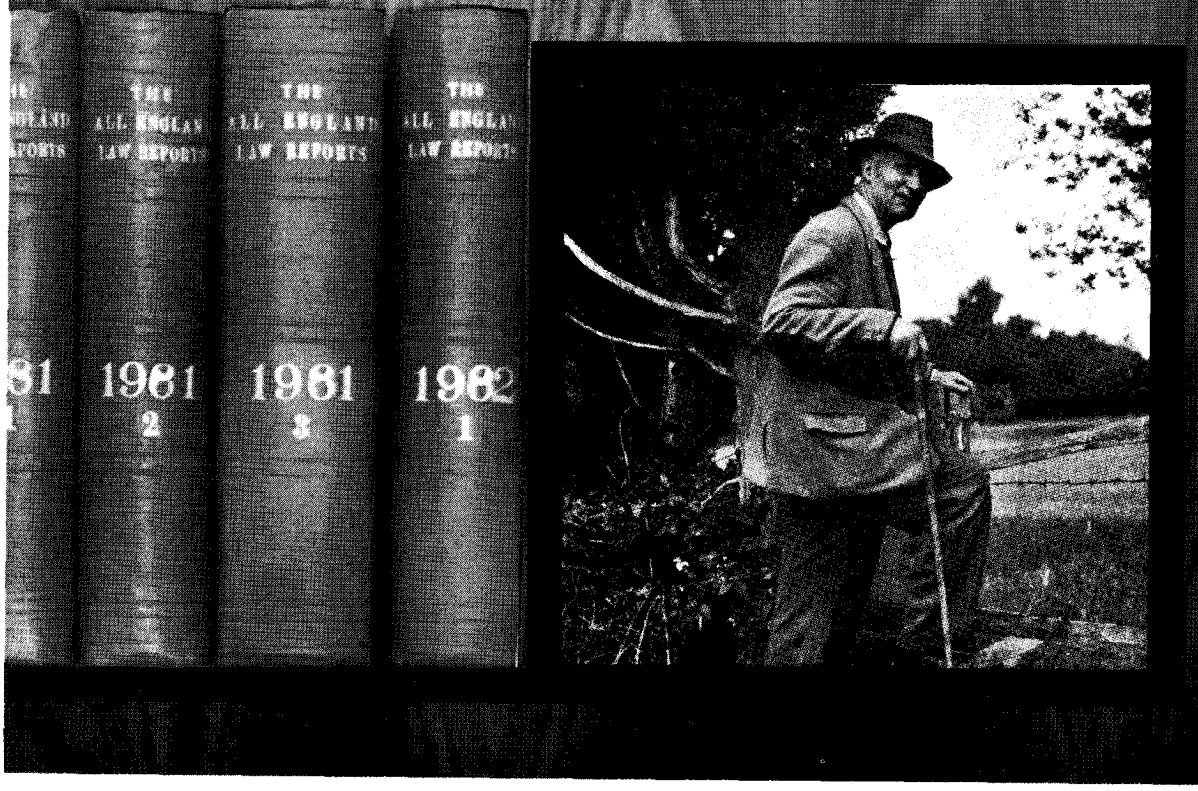
## Rule of law

BY the time this issue gets to press, the Clutha-Quigley-Minogue-Rule-of-law-Rule-of-power-Rule-of-press-release controversy will have resolved itself. Finley Peter Dunne's (Mr Dooley) observation of over eighty years ago, however, is as fresh as the day it was penned:"I tell ye Hogan's r-right whin he says: 'Justice is blind.' Blind she is, an' deef an' dumb an' has a wooden leg!"

**John McManamy**




# Lord Denning
## — in his own words



# Denning's judicial philosophy

*A library could be established devoted exclusively to the study of Lord Denning, such is his influence. It is simpler and more appropriate, however, to extract a few brief quotations, for once the basis of Denning's judicial activism has been grasped, everything after seems to follow as inevitable.*

*I know that over 300 years ago Hobart CJ said that "public policy is an unruly horse". It has often been repeated since. So unruly is the horse, it is said, that no Judge should ever try to mount it, lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice. . . .*

*Enderby Town Football Club v The Football Association Ltd and Another [1971] 1 All ER 215, 219.*

*We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis. . . .*

*Mayor and St Mellons Rural District Council v Newport Corporation [1950] 2 All ER 1226, 1236.*

*What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both. . . .*

*Packer v Packer [1954] 2 All ER 127, 129.*

*That 19th century doctrine may have been appropriate in the conditions then prevailing. But it was not suited to the 20th century. . . .*

*Dutton v Bognor Regis UDC [1972] 1 All ER 462, 471.*

*Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age . . . . We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. . . .*

*Freedom under the Law*

*But a remedy has been found. The harshness of the common law has been relieved. Equity has stretched out a merciful hand to help the debtor. . . .*

*D and C Builders Ltd v Rees [1965] 3 All ER 837, 840.*

*The day is done when we can excuse an unforeseen injustice by saying to the sufferer "It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself". We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers. . . .*

*British Movietonenews v London and District Cinemas [1950] 2 All ER 390, 396.*

# Every case tells a story

*The Lord Denning that many appreciate the most is Lord Denning the story-teller. We asked around for favourite Lord Denning cases and came up with the following samples. . . .*

## The case of the bumbling arsonist

IT was a factory at Gillingham in Kent. A firm called Photo Production Ltd made Christmas cards there, and the like. There was a lot of paper and cardboard about which would burn easily. The factory was shut up for the night, locked and secure. No one was supposed to go in except a man on night patrol. He came from a security firm called Securicor. He had a bunch of keys. His duty was to go through the factory and see that all was safe and secure. No burglars and no fire.

On the night of 18/19 October 1973, the patrolman was George Musgrove. He was a young man only 23 years old, unmarried. He came of a respectable family and had satisfactory references. He had been with Securicor for some three months. Securicor cannot be blamed for employing him on the job.

At the dead of night, ten minutes before midnight, Musgrove went to the factory. He unlocked the front door and went through the factory, switching on the lights as he went. Then he lit a match and threw it on to a cardboard box. It burst into flames. He says that he only meant it to be a very small fire and intended to put it out within a minute or two. But it got beyond his control. He was terrified and dialled 999 for the fire brigade. He tried to stop it spreading. He lost his glasses and false teeth. . . .

*Photo Production Ltd v Securicor* [1978] 3 All ER 146.

## The sad case of Herbert Bundy

BROADCHALKE is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the Bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the Bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that when he executed the charge to the Bank he did not know what he was doing; or at any rate the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The Judge was sorry for him. He said he was a "poor old gentleman". He was so obviously incapacitated that the Judge admitted his proof in evidence. He had a heart attack in the witness box. Yet the Judge felt he could do nothing for him. There is nothing, he said, "which takes this out of the vast range of commercial transactions". He ordered Herbert Bundy to give up possession of Yew Tree Farm to the Bank.

. . . .

. . . I would therefore allow this appeal. *Lloyds Bank v Bundy* [1974] 3 All ER 757.

## Wales — for better or verse

LAST Wednesday, just a week ago, Lawton J a Judge of the High Court here in London, was sitting down to hear a case. It was a libel case between a naval officer and some publishers. He was trying it with a jury. It was no doubt an important case, but for the purposes of today it could have been the least important. It matters not. For what happened was serious indeed. A group of students, young men and young women, invaded the Court. It was clearly prearranged. They had come all the way from the University of Aberystwyth. They strode into the well of the Court. They flocked into the public gallery. They shouted slogans. They scattered pamphlets. They sang songs. They broke up the hearing. The Judge had to adjourn. They were removed. Order was restored.

When the Judge returned to the Court, three of them were brought before him. He sentenced each of them to three months' imprisonment for contempt of Court. The others were kept in custody until the rising of the Court. Nineteen were then brought before him. The Judge asked each of them whether he or she was prepared to apologise. Eight of them did so. The Judge imposed a fine of £50 on each of them and required them to enter into recognisances to keep the peace. Fourteen of them did not apologise. They did it, they said, as a matter of principle and so did not feel able to apologise. The Judge sentenced each of them to imprisonment for three months for contempt of Court.

. . . .

But now what is to be done? The law has been vindicated by the sentences which the Judge passed on Wednesday of last week. He has shown that law and order must be maintained, and will be maintained. But on this appeal, things are changed. The appellants here no longer defy the law. They have appealed to this Court and shown respect for it. They have already served a week in prison. I do not think it necessary to keep them inside it any longer. The appellants are no ordinary criminals. There is no violence, dishonesty or vice in them. On the contrary, there is much that we should applaud. They wish to do all they can to preserve the Welsh language. Well may they be proud of it. It is the language of the bards — of the poets and the singers — more melodious by far than our rough English tongue. On high authority, it should be equal in Wales with English. They have done wrong — very wrong — in going to the extreme they did. But, that having been shown, I think we can, and should, show mercy on them. We should permit them to go back to their studies, to their parents and continue the good course which they have so wrongly disturbed. . . .

*Morris v The Crown Office* [1970] 1 All ER 1079.

## The litttle man who sought relief

TO some this may appear to be a small matter, but to Mr Harry Hook it is very important. He is a street trader in the Barnsley Market. He has been trading there for some six years without any complaint being made against him but, nevertheless, he has now been banned from trading in the market for life. All because of a trifling incident. On Wednesday, 16 October 1974 the market closed at 5.30 pm. So were all the lavatories, or "toilets" as they are now called. They were locked up. Three-quarters of an hour later, at 6.20 pm, Mr Hook had an urgent call of nature. He wanted to relieve himself. He went into a side street near the market and there made water, or "urinated" as it is now said. No one was about except one or two employees of the council, who were cleaning up. They rebuked him. He said "I can do it here if I like". They reported him to a security officer who came up. The security officer reprimanded Mr Hook. We are not told the words used by the security officer. I expect they were in language which street traders understand. Mr Hook made an appropriate reply. Again we are not told the actual words, but it is not difficult to guess. I expect it was an emphatic version of "You be off". At any rate, the security officer described them as words of abuse. Touchstone would say the security officer gave the "reproof valiant" and Mr Hook gave the "countercheck quarrelsome". (*As You Like It*, v. iv).

*Hook, ex parte R V Barnsley Metropolitan Borough Council* [1976] 3 All ER 452.

## Protecting the English way of life

IN summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a Judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the Judge to stop the cricket being played. And the Judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.

I would allow this appeal accordingly. *Miller v Jackson* [1977] 3 All ER 338.

## The God-fearing limited liability company

IN the cause list the parties in this case were concealed by letters of the alphabet. I will adopt a different device.

Ruritania is an imaginary country. The name was invented by Anthony Hope in his novel *The Prisoner of Zenda*. I will use it so as to conceal the identity of a real country and its people. There was a large company, with its head office in Ruritania and a London office here. It had its main banking account with a Bank in Hentzau. Then some conspirators got to work to defraud the Ruritanian company. Telexes and cables were sent purporting to come from the company's head office in Ruritania. These authorised huge sums to be transferred from the company's bankers in Hentzau to London, and

paid to suppliers of goods. The telexes and cables were forged. No goods had been supplied. The moneys went into the hands of the conspirators. The Ruritanian company was defrauded of £2m. The moneys were believed to have been paid into divers accounts at various banks in London, and used to buy motorcars and other things. When the fraud was discovered, the Ruritanian company was anxious to trace the moneys into the various banking accounts, and also the goods. It was important that any dealings should be stopped before the conspirators knew that the fraud had been discovered. . . .

*Z v A* [1982] 1 All ER 556.

## The cosmopolitan crooks gigantic ship caper

A gigantic ship was used for a gigantic fraud. She was the Salem, a supertanker. It was in December 1979. She loaded 195,000 tons of crude oil in the Arabian Gulf for carriage from Kuwait to Italy. Going down the east coast of Africa, she suffered a sea change. She changed her name from Salem to Lema. Done by painting out "Sa" and adding "a". Then instead of going straight down to the Cape she turned off to Durban. She made fast to a single buoy mooring 1½ miles offshore. She pumped most of the oil through hoses into the tank farms ashore. She pumped ashore 180,000 tons, leaving only 15,000 tons in the ship. The South African importers paid for the oil through their banks. It came to over $US 50m. This money was paid at once into numbered accounts in Switzerland where no one could get at it. That payment was done by telex in a few minutes. The Salem then took in sea water to take the place of the oil. She set off again on her voyage round the Cape, looking to all the world as if she still had her full cargo of oil. She sailed northward until she was off Dakar and Senegal. Then in a calm sea there was a series of explosions on board. She was in danger of sinking. Not far off there was a British tanker, the British Trident. She put out her lifeboats and picked up the crew. The Salem went to the bottom. The captain of the British Trident took a film of the sinking. It came in useful afterward to find out why she sank. A little oil slick was seen on the water, only 15,000 tons. The rest was all sea water.

She had been scuttled. Those aboard, of course, denied it. The Salem had sunk, they said, because of the explosions.

The captain and chief officer were Greek. There was a Tunisian crew of 22. There was a preliminary inquiry in Senegal. The captain produced his credentials. It was a Liberian master's certificate. But it was forged. He and the chief officer were extradited to Liberia. The Tunisian crew were paid substantial "hush money" and went back to Tunisia. Not long afterwards there was a change of government in Liberia. The master and chief officer were set free. The Liberian government apologised for their "illegal detention". They went back to Greece where proceedings have been instituted, but not completed. Will they ever be?

Behind this gigantic fraud there were of course gigantic swindlers. The captain and chief officer were only the tools in their hands to do the dirty work. The wicked minds behind it were those of a group of cosmopolitan crooks. They have never been caught. They are still at large. . . .

*Shell International Petroleum Co Ltd v Gibbs* [1982] 1 All ER 1057.

## Protecting the English way of life (part II)

NEARLY five years ago Mr Blackburn came before us saying that the commissioner of police was not doing his duty in regard to gambling clubs: see *R v Metropolitan Police Commissioner, ex parte Blackburn*. He comes again today; but this time it is in regard to obscene publications. He comes with his wife out of concern, he says, for their five children. He draws our attention to the shops in Soho which sell "hard" pornography (that is, publications which are extremely obscene). There are about 60 of them. They usually have the one word "Books" over the door or window, but no name of the proprietor. He also draws our attention to the many, very many, shops in other districts, usually sweetshops and newsagents, which sell "soft" pornography (that is, publications which are moderately obscene). He says that all these publications, be they hard or soft, are plainly obscene. Yet they are openly on sale. Anyone can go into the shops and buy them without let or hindrance, if they are willing to pay the price. Mr Blackburn has done so himself: so has a solicitor. They went out during the course of the case and produced them to us. Whenever a point arose as to this shop or that, or as to this publication or that, he went and bought a copy.

Mr Blackburn condemned the evil in a telling phrase. Pornography, he said, is powerful propaganda for promiscuity. So it is for perversions. To those who come under its influence, it is altogether bad. We have been shown examples of it. The Court below declined to look at them. We felt it our duty to do so, distasteful as it is. They are disgusting in the extreme. Prominent are the pictures. As examples of the art of coloured photography, they would earn the highest praise. As examples of the sordid side of life, they are deplorable. There are photographs showing young men and women, who appear to have worked themselves up into a state of extreme lust for the sake of the photographers. In their lust these young people have adopted positions natural, and positions unnatural; and have indulged in sexual relations and perversions, not only between themselves, but also between themselves and animals. The photographers have crouched close — inches close — to them and to their most private parts. They have photographed them apparently in the very act in the utmost detail. They have taken these photographs in bright colours. They have enlarged them. Then the printers have multiplied them in their thousands and hundreds of thousands.

*R v Metropolitan Police Commissioner, ex parte Blackburn and Another (No 3)* [1973] 1 All ER 324.

## The man who was promised his yodler and cakes

THE plaintiff, Mr Jarvis, is a solicitor employed by a local authority at Barking. In 1969 he was minded to go for Christmas to Switzerland. He was looking forward to a ski-ing holiday. It is his one fortnight's holiday in the year. He prefers it in the winter rather than in the summer.

Mr Jarvis read a brochure issued by Swan Tours Ltd. He was much attracted by the description of Morlialp, Giswil, Central Switzerland. I will not read the whole of it, but just pick out some of the principal attractions:

HOUSE PARTY CENTRE with special resident host. . . . Morlialp is a most wonderful little resort on a sunny plateau. . . . Up there you will find yourself in the midst of beautiful alpine scenery, which in winter becomes a wonderland of sun, snow and ice, with a wide variety of fine ski-runs, a skating-rink and an exhilarating toboggan run . . . . Why did we choose the Hotel Krone . . . mainly and most of all, because of the "Gemutlichkeit" and friendly welcome you will receive from Herr and Frau Weibel. . . . The Hotel Krone has its own Alphutte Bar which will be open several evenings a week. . . . No doubt you will be in for a great time, when you book this houseparty holiday. . . . Mr Weibel, the charming owner, speaks English.

On the same page, in a special yellow box, it was said:

Swans Houseparty in Morlialp. *All these Houseparty arrangements are included in the price of your holiday.* Welcome party on arrival. Afternoon tea and cake for 7 days. Swiss Dinner by candlelight. Fondue-party. Yodler evening. Chali farewell party in the "Alphutte Bar". Service of representative.

Alongside on the same page there was a special note about ski-packs: "Hire of Skis, Sticks and Boots . . . 12 days £11.10."

In August 1969, on the faith of that brochure, Mr Jarvis booked a 15 day holiday, with ski-pack. The total charge was £63.45, including Christmas supplement. He was to fly from Gatwick to Zurich on 20 December 1969 and return on 3 January 1970.

The plaintiff went on the holiday, but he was very disappointed. He was a man of about 35 and he expected to be one of a houseparty of some 30 or so people. Instead, he found there were only 13 during the first week. In the second week there was no houseparty at all. He was the only person there. Mr Weibel could not speak English. So there was Mr Jarvis, in the second week, in this hotel with no houseparty at all, and no one could speak English, except himself. He was very disapp inted, too, with the ski-ing. It was some distance away at Giswil. There were no ordinary length skis. There were only mini-skis, about 3 ft long. So he did not get his ski-ing as he wanted to. In the second week he did get some longer skis for a couple of days, but then, because of the boots, his feet got rubbed and he could not continue even with the long skis. So his ski-ing holiday, from his point of view, was pretty well ruined.

There were many other matters, too. They appear trivial when they are set down in writing, but I have no doubt they loomed large in Mr Jarvis' mind, when coupled with the other disappointments. He did not have the nice Swiss cakes which he was hoping for. The only cakes for tea were potato crisps and little dry nutcakes. The yodler evening consisted of one man from the locality who came in his working clothes for a little while, and sang four or five songs very quickly.

*Jarvis v Swans Tours Ltd* [1973] 1 All ER 71.


**I haven't read his cases, but I wear the T-shirt.** *Law student Juliet Murphy models the hottest thing in lawyers fashions since the pin-stripe suit. Law students at the University of Otago produced the shirt for fund-raising purposes, and have sold hundreds to Bar and Bench alike. Lord Denning received a complimentary shirt, and the students were rewarded with a flattering letter of appreciation.*

# The mortgagee's sale: Part I — waiver

*S D Walker and*
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*The two authors are Dunedin practitioners who presented this paper as part of a Law Week seminar in Dunedin. Part II, concerning caveats, will be published in next month's issue.*

## Introduction

THE present climate for those of us who manage nominee companies of any size is not heartening. It seems likely we suggest, that interest rates will not fall (and may even continue to rise). The ability of our clients to service their borrowing, is in many cases marginal when all is going well. If clients fall on hard times or become ill or their marriage breaks down, their ability to meet mortgage commitments and perhaps their resolve to do so may cease. The picture is plainly shown by the statistics:

> 1979 saw the highest number of applications for mortgage sales of any year in that decade. There were 753 applications made and 290 sales were notified (cf the low in 1974 100 applications, 19 sales; in 1978 693 applications 283 sales)
>
> 1980 saw 928 applications (and 394 sales)
>
> 1981 January to July (inclusive). Of 413 applications filed in the first seven months of 1981, 111 were made by the Housing Corporation.

If the number of applications to the High Court for mortgagee sales continues to rise as the figures suggest, then it is necessary for us all to develop the skills needed to quickly and efficiently cause a sale to take place. It scarcely needs to be said that a delay of 3 months in realising a security for $40,000 increases the debt of the mortgagor by $2,000 (at 20%), a sum sufficiently large to potentially be the difference between you getting costs out of the exercise and not doing so.

This paper is intended to be intensely practical. There are many scholarly areas in the field of mortgagee's sales which are stimulating but rarely met. We want to discuss the two areas we have met on a number of occasions in the past year and which we needed time to become familiar with.

One further preliminary. The general scheme of the mortgagee sale has been fully set out — in a very practical way — in a number of easily found publications. Some of them are:

(1) The Auckland District Law Society's Legal Practice Manual (2nd Edition); Chapter on "Mortgagee Sales".
(2) The Justice Department's High Court Manual which is available for inspection at all High Court Registries. (At Dunedin there is a set of precedents compiled by the Wellington Registry and which can be photocopied on request).
(3) The Auckland Continuing Legal Education Seminar Series has a paper by R B Whale (delivered in July 1977) which lists the necessary steps to effect a sale.
(4) Dunedin practitioners can inspect at the University of Otago Law Library G Lang's paper for the Honours Subject in Real Estate Transactions called "The Mortgagee's Power of Sale."

This paper contains a helpful discussion of the relative advantages and disadvantages of the private sale and the Registrar's sale with particular reference to the mortgagee who wants to buy in and acquire the property for himself.

The two topics we wish to canvass are:

(1) Waiver: What is the effect of accepting a payment after issue of a notice (pursuant to either or both ss 90 and 92 of the Property Law Act 1952) and before sale?
(2) Caveats: What is the consequence for a mortgagee attempting to exercise his power of sale of a subsequently registered caveat. What can be done about it? (This topic will be covered in the next issue.)

## Waiver

### The Court's power to grant injunctions

The High Court has inherent jurisdiction to grant injunctions restraining mortgagees from exercising their powers of sale (*Clark v National Mutual Life Association of Australasia Limited* [1966] NZLR 196). In *Land Law* (1979 at p 828), Hinde McMorland and Sim cite four situations where the Court can grant such injunctions:

1 Where the mortgagee has no right to exercise the power at all.
2 Where the proposed mode of exercise of the power is improper.
3 Where there is a dispute as to the amount due under the mortgage.
4 Where the exercise of the power is harsh or oppressive.

Most claims in New Zealand have in the past been based on the first category. The High Court, in a series of recent decisions, has focussed attention on the factors which are relevant when considering applications brought under this category. The decisions

concentrate primarily on one issue — when will a mortgagor be able to prevent a mortgagee from exercising his power of sale on the grounds that the mortgagee has by his conduct, waived such power?

### Doctrine of waiver

Once a mortgagee gives formal notice to the mortgagor in terms of the mortgage document and the Property Law Act 1952, he may by his conduct, estop himself from being able to continue with a sale of the mortgaged property. The rationale is that if the mortgagor properly assumes that the mortgagee is not going to proceed with a sale of the mortgaged property, he should not be disadvantaged by the mortgagee exercising his power of sale without giving fresh notice to the mortgagor.

> . . . [if] persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of equity to enforce those rights until such time has elapsed, without at all events placing the parties in the same position as they were before. (*Birmingham & District Land Co v London & Northern Western Railway Co* (1888) 40 Ch D 268, 286 per Bowen LJ (CA), applying dicta of Lord Cairns in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL)).

Under what circumstances will the Court hold that the doctrine of waiver operates to prevent a sale of mortgaged property?

### The recent decisions

*Blakely v Teal Investments Limited* (High Court, Auckland. 12 Dec 1980 (A1273/80). Holland J).

The defendant was mortgagee under a second mortgage registered over a property owned by the plaintiff. The defendant issued notice pursuant to s 92 of the Property Law Act 1952, alleging default by the plaintiff in failing to pay the sum of $33,240 made up as follows:

| | |
|---|---|
| Balance of Principal Sum due on 25 November 1978 | $29,000 |
| Interest on $29,000 being the balance of the monthly instalment due on 25 June 1979 and the monthly instalment due on 25 July, August, September, October and November 1979 respectively and 25 January 1980 | $ 4,240 |
| | $33,240 |

The notice required the default to be remedied by payment of this sum plus $30 costs by 7 March 1980, and notified the plaintiff that failure to so remedy would result in the power of sale and entry into possession and other powers given to the mortgagee becoming immediately exercisable.

The defendant did not immediately proceed to sell the mortgaged premises because the first mortgagee had indicated its intention to conduct such a sale. The first mortgage was subsequently refinanced, and in June 1980 the defendant instructed its solicitors to proceed with a mortgagee's sale. This fact was made known to the plaintiff's solicitors.

On 16 September 1980 the plaintiff went to the offices of the defendant's solicitors without prior notice or appointment. He gave to an accounts clerk at the firm a cheque for $1,000 advising her that it was interest for the defendant, Teal Investments Limited. The clerk issued a trust receipt for the money for the credit of the defendant, detailing the payment as "interest". The receipt was given to the plaintiff without qualification.

When a solicitor in the firm ascertained what had occurred, he gave immediate instruction for an entry to be made in the trust account, detailing that the money was held on account of the plaintiff.

The plaintiff made no further payments, and the defendant proceeded with its preparations for a mortgagee's sale pursuant to the notice. The plaintiff made application for an interim injunction to prevent the defendant from exercising the power of sale on the grounds that the acceptance by the defendant's solicitors of interest after the issue of a Property Law Act notice and the expiry of the period for complying with the notice, amounted to waiver of the notice, and accordingly the defendant was prevented from selling the mortgaged premises without issuing a fresh notice.

Holland J noted:

> The question which must accordingly be asked is whether the issue of a receipt for interest by an accounts clerk in a solicitor's office of a payment of a sum well short of the arrears of instalments let alone the principal sum, and made without any evidence of any prior discussions or correspondence and without any conditions attached to the payment or to the receipt is an *unambiguous representation* by Teal Investments Limited that it did not intend to pursue its rights under the mortgage following the notice of 1 February 1980.

On the facts Holland J held that the issuing of the receipt did not amount to an unambiguous representation as would amount to a waiver of the Property Law Act notice. Three factors influenced Holland J in reaching this decision:

1 There was no evidence of any prior discussions or correspondence concerning the payment of $1,000.
2 There were no conditions attached to the payment.

*Quaere:* Application of conditional payments — "accord and satisfaction": *Homeguard Products (New Zealand) Limited v Kiwi Packaging Limited,* an unreported decision of Mahon J (Auckland. 10 September 1980, (A1963/79)) where the appellant sent a cheque to the respondent in "full settlement" of a disputed claim.

Mahon J noted:

> In the present case, the condition upon which the cheque was sent was recorded in writing and delivered to the respondent contemporaneously with the cheque. The cheque was then banked and its proceeds credited to the account of the appellant. In my view these events constituted an irretrievable manifestation of assent by the respondent to the condition imposed by the appellant, and the whole of the debt then due to the respondent, in whatever amount it was, became extinguished by accord and satisfaction. . . . The only two options open to the respondent, once it received the cheque subject to the known stipulation that it was sent in full settlement was either to accept the cheque in full settlement or return it to the appellant and one for the full amount.

3 The receipt was issued by a junior employee of the firm of solicitors.

*Mercantile Developments Limited v Kendall & Wilson Securities Limited* (High Court, Auckland. 15 December 1980 (A1293/80; A1296/80). Holland J).

Mercantile Developments Limited was the registered proprietor of a property in Auckland. There was a first registered mortgage to Kendall & Wilson Securities Limited, securing the principal sum of $550,000, due on 1 December 1980.

By Deed made in 1980 several companies, including Equinus Holdings Limited guaranteed all interest secured by the mortgage. Default was made by the mortgagor and the guarantors, and on 4 August 1980, a notice pursuant to s 92 of the Property Law Act 1952 was served on Mercantile Developments Limited. The default referred to in the notice was default in payment of the quarterly instalment of interest due on 30 June 1980 amounting to $20,625, and default in payment of three years rates, penalties in relation to rates, and costs totalling $23,030. Further, the companies which had guaranteed the interest were served with s 218 Notices threatening winding-up proceedings because of the default.

On 24 October 1980 the solicitors acting for Equinus Holdings Limited wrote to the solicitors for Kendall & Wilson Securities Limited enclosing a cheque for $41,250 which represented payment of the instalment of interest due on 1 June 1980, and a further instalment of interest due on 1 September 1980 which had become due after the Property Law Act notice had been issued. The payment did not make provision for the rates, which were referred to in the notice; such omission was deliberate, for Equinus Holdings Limited was not liable under the guarantee given by it, for the payment of rates. The letter accompanying the cheque was in the following terms:

> Further to our telephone discussion we enclose our trust account cheque for $41,250 in payment of interest due under the abovementioned mortgage for quarter ending 1 June and 1 September 1980 in the sum of $20,625 per quarter. Kindly acknowledge receipt accordingly.
>
> We would be pleased if you would note your receipt to the effect that this payment is made by Equinus Holdings Limited as guarantor of the interest under the abovementioned mortgage. We would be pleased of your confirmation that this payment satisfies the amounts claimed by Kendall Wilson Securities Limited, from Equinus Holdings Limited, International Shippers Limited, John B Chibnall Limited, Thoroughbred Horse Transport Limited, Transport Fabricators Limited (1979) and Tudor Park Stud Limited under notices issued pursuant to s 218 of the Companies Act 1955.
>
> Furthermore, we would be pleased of your confirmation in accordance with our telephone discussion yesterday, and on the basis of which payment is made herein, that you will appear at the appropriate time at the High Court to withdraw the Petition to wind up Tudor Park Stud Limited issued under M No 1520/80 and any other Petition which may have been issued against other of the previously named companies in the Equinus Holdings Limited group. Furthermore you have agreed that no advertisement of any of these Petitions will be placed in the Public Notices of the newspapers and we would be pleased if you would confirm the same in reply.

The solicitors acting for Kendall & Wilson Securities Limited issued a receipt on 24 October 1980 recording the payment as coming from Equinus Holdings Limited, and being two quarters interest on $550,000 at 15% per annum to 1 September 1980. A letter was then sent to the solicitors acting for Equinus Holdings Limited, in the following terms:

> Thank you for your letter of 24 October. We confirm that we have received your cheque for $41,250 being a payment from Equinus Holdings Limited. This is accepted without prejudice to our right to continue with our mortgagee sale of the Star Hotel Site.
>
> We confirm that receipt of your cheque satisfies the amounts claimed by Kendall Wilson Securities Limited against Equinus Holdings Limited, International Shippers Limited, John R Chibnall Limited, Thoroughbred Horse Transport Limited, Transport Fabrication Limited (1979) and Tudor Park Stud Limited to date. This payment does not discharge these companies from further obligations which may occur under the mortgage. We also confirm that the petitions to wind up Tudor Park Stud Limited and Equinus Holdings Limited will be withdrawn. They will not be advertised as a result of this payment.

Although there was a conflict of evidence as to whether the trust receipt was sent together with the letter, Holland J held that the letter and the trust receipt were sent in separate envelopes, and were received by the solicitors acting for Equinus Holdings Limited on 28 October 1980.

The plaintiff sought an interim injunction to restrain the defendant from proceeding with a sale of the mortgaged property. Holland J repeated the test which he enunciated in *Blakely v Teal Investments Limited*. He stated:

> The principle, however, is whether the issuing of the receipt, in the circumstances of this case, was an unambiguous representation by *Kendall & Wilson Securities Limited* through its agents, that it did not intend to proceed with the Property Law Notice.

Holland J accepted that a waiver by a mortgagee to a guarantor could be enforced by the mortgagor under the doctrine of principal and agent. He was prepared to read the letter and the trust receipt together and held that the unqualified receipt did not amount to waiver of the Property Law Act notice. The terms on which the payment was sent were complied with, but in the letter from the defendant's solicitors it was stated that the acceptance of the payment was without prejudice to the mortgagee's rights to exercise the power of sale. Accordingly, the applications for an interim injunction were dismissed.

In *Miles v Hussey* (1909) 28 NZLR 382, a decision of the New Zealand Court of Appeal, the mortgagee had issued a receipt for overdue interest endorsed "without prejudice to mortgagee's right to exercise the power of sale in mortgage incurred through default". The Court held that the acceptance of interest did not amount to waiver and accordingly the mortgagee was entitled to proceed with a sale of the mortgaged premises. It is therefore important for a mortgagee to accept all such payments strictly on a "without prejudice" basis, and for the mortgagee to indicate to the mortgagor that he proposes to continue with a sale of the mortgaged premises, notwithstanding receipt of such payments.

**The effect of waiver**

If a mortgagee waives notice, he will be required to give a fresh notice before exercising the power of sale. If however, the mortgagee gratuitously

waives compliance with any terms of the mortgagor before the default occurs, he may, if he wishes to proceed with a sale, have to proceed again in terms of the mortgage contract. If for example the mortgage contract specifies that the power of sale is not acquired until after defaults have occurred for fourteen days, and prior to default the mortgagee waives compliance for say seven days, then he cannot subsequently acquire the power of sale until fourteen days after the expiration of the seven day period. It will however depend essentially on the circumstances of each particular case, and whether there is a waiver of the acquisition of the power of sale, or merely waiver of the exercise of the power.

**Agreements suspending the exercise of the power of sale**

A mortgagee as well as being able to waive a Property Law Act notice, may by his conduct induce a mortgagor to believe that the power of sale of the mortgaged premises will be kept in suspense or abeyance for some particular time.

In what circumstances will the Court find such suspension, and what is the result thereof? Chapman J in *Masonic Hall Limited v Hardwick* (1873) 1 NZ Jur 93 noted:

> The mortgagee may wait for a longer period. . . . I think he may also promise to wait; and if a verbal promise so to wait be given, though I think it may be revoked, it is against good conscience to proceed in violation of such promise without revocation and notice thereof.

In equity, in the absence of a separate contract, and in the absence of "equitable estoppel", once the power of sale has been acquired any promise to suspend its exercise is gratuitous and can be revoked. The mortgagee will be restrained from exercising the power of sale if he does not revoke his forbearance or if he does not give notice to the mortgagor of the revocation of his forbearance and of his intended exercise of the power.

**Summary**

1 Where following default under a mortgage, a mortgagor pays to the mortgagee or to the mortgagee's solicitors, only part of the moneys required to remedy default:

(a) Endorse receipt as being "without prejudice" to the rights of the mortgagee to proceed with a sale of the mortgaged premises.

(b) If payment has already been accepted by a mortgagee or if a receipt has already been issued by a solicitor's accounts clerk, immediately notify the mortgagor by letter that the payment is accepted on a "without prejudice" basis. Similarly where money is paid to the mortgagee's bank account by way of Automatic Bank Authority, a letter in the above terms should also be sent to the mortgagor.

2 Where the mortgagee has gratuitously agreed to allow the mortgagor extra time to remedy default:

(a) Document all arrangements fully. State precisely whether there is waiver of the acquisition of the power of sale, or merely waiver of the exercise of the power.

(b) If a precise time is given for the mortgagor to remedy default, then on the expiration of that time, a mortgagee may proceed with the exercise of the power without further notice to the mortgagor.

(c) If no precise time is given (for example, where the mortgagee's solicitors indicate to the mortgagor that pending receiving instructions from the mortgagee, they will suspend exercise of the power of sale), notice should be given to the mortgagor before proceeding with the exercise of the power.

3 At all times:

(a) Check whether there are conditions attached to any payments made by a mortgagor. Acceptance of the payment may amount to acceptance of the conditions.

(b) Be aware of doctrine of "equitable estoppel".

# Exemplary damages and the Accident Compensation Act

*K I Bullock,* Barrister

AFTER almost a decade of controversy, both judicial and academic, the Court of Appeal (Cooke J presiding, Richardson and Somers JJ) has in *Donsellar v Donsellar* (CA 145/77; 19 March 1982), ruled that a claim for exemplary damages arising from the tort of battery continues in New Zealand, notwithstanding the provisions of s 5(1) of the Accident Compensation Act 1972.

It is not the purpose of this article to review the reasons why the Court came to this conclusion but to examine, in the light of the judgments delivered, the circumstances in which such a claim will be likely to succeed.

## The nature of exemplary damages

In the words of Richardson J, "It is well settled that ordinary damages (including aggravated damages) and exemplary damages serve essentially different purposes: the former are compensatory: the object of the latter is to punish and deter."

So too, Somers J commented, "Exemplary damages, though payable to the victim, are in proper cases a salutary punishment of and a deterrent to high-handed contumelious activity."

It is well known that in the United Kingdom the power to award exemplary damages has been limited, as described by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, to two particular classes of case. The first is that of oppressive, arbitrary or unconstitutional action by persons in authority, the second is that of actions intended by the defendant to yield for himself a profit over and above any compensation which may be payable. In his decision, Cooke J made it clear such limitations do not apply in New Zealand; he said:

> Although there is not a great deal of reported New Zealand authority on the point, and none that could be said to be compelling, I do not doubt that professional and judicial opinion in New Zealand, both before and after *Rookes v Barnard*, has generally tended to the view that exemplary damages may be awarded in this country in some tort cases outside the two categories. . . .
>
> Lord Devlin might retort that the difference between aggravated and exemplary damages, and particularly the extensive scope of aggravated damages, has been inadequately explored here. . . . Nevertheless I respectfully think that a high handed trespass, whether to person or property and whether by a public officer or a private citizen, is the very type of case in which the power to include some punitive element in the damages awarded to the victims might occasionally be found to satisfy the community's sense of justice.

In the writer's respectful view, all three Judges of the Court of Appeal have made it clear in *Donsellar* that they regard the right to claim, and the power to award, exemplary damages as being in full force in New Zealand, unfettered by any statutory limitation arising from non-judicial forms of compensation for injury or by any overseas tendencies to limit such awards to restricted categories of cases. Provided there has been some interference, deliberate and not merely fortuitous in nature, with the rights of the plaintiff the claim will lie.

At the same time, the Court of Appeal has made it clear that not every deliberate interference will justify an award of exemplary damages. In a most interesting and powerful passage, notable also for its explicit statement of judicial policy, Cooke J made several points:

"It is a matter of everyday observation that New Zealand society has become more vocal, factional and discordant. There is a scepticism about established institutions. Allegations of misuse of power by the police and other authorities seem quite common. Individuals and groups are readier to pursue their goals by protests and similar action, sometimes on or beyond the fringes of the law, no doubt because rightly or wrongly they feel driven to such courses.

"Perhaps not all of this is unhealthy. And perhaps the appearance of a rather restive and abrasive surface gives partly a false impression, leading one to underestimate the extent of broad social unity underneath. But at all events this is no time for the law to be withholding constitutional remedies for high-handed and illegal conduct, public or private, if it is reasonably possible to provide them. It would be absurd to suggest that such isolated awards of exemplary damages as may occur will be a panacea for the country's social ills. On the other hand a useful weapon in the legal armoury should not be sacrificed without compelling reason. . . .

"All in all, in a situation where the right course for this Court is far from self-evident, I think that we should try to meet a problem occasioned by the Accident Compensation Act by consciously moulding the law of damages to meet social needs. The only feasible way of doing so, without intruding into the field of compensation which the Act has taken over, appears to be to allow actions for damages for purely punitive purposes; and to accept that, as compensatory damages (aggravated or otherwise) can no longer be awarded, exemplary damages will have to take over part of the latter's former role. In other words, as benefits under the Act are in no sense punitive, exemplary damages will have to do not only the work assigned to them by *Broome v Cassell & Co* [1972] AC 127, but also some of the work previously done by the other heads of damages.

"The Courts will have to keep a tight rein on actions, with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate. Immoderate awards will have to be

discouraged. Trial Judges will have to be clearly satisfied that the case is a proper one for considering exemplary damages, bearing in mind the kind of conduct which such damages are designed for, and not lightly to allow a claim to go to a jury. Cases of this kind are apt to raise difficult questions of mixed law and fact for which trial by a jury may not be appropriate; the present case is an example. Whether a case is one which may reasonably be considered fit for an award, and the level of damages, are matters which at times may have to be scrutinised carefully on appeal also.

"If, such precautions notwithstanding, unmeritorious claims are successfully brought in any numbers, the remedy of abolishing exemplary damages for certain classes of case is in the hands of Parliament."

In this passage, and particularly in the last two paragraphs cited, His Honour is offering a double warning. To potential claimants he seems to be saying that their claims must not be excessive in either number or amount and must be limited to the wrongfulness of the defendant's conduct, divorced from any effect it may have had on the claimant himself. To the legal system he seems to be saying that a plethora of successful claims will invite an intervention by Parliament which would deprive the public of a useful protection, but not the only protection, from oppression and injustice.

It seems, therefore, that although the Court of Appeal considers the claim for exemplary damages remains available in suitable torts it would allow it only in the clearer and more extreme cases.

### Some particular considerations

Not only Cooke J but each of the Judges was at pains to point out that, notwithstanding their acceptance of the availability of exemplary damages in suitable cases, *Donsellar* was not such a case. For one thing, the plaintiff's case as pleaded and presented concentrated not on the defendant's wrong but on the plaintiff's injuries, both to his body and to his feelings; in a regime in which the source of compensation is the Accident Compensation Act 1972 exemplary damages will not supplement entitlement under that Act.

Another, and perhaps more compelling, reason why the plaintiff failed was the background to the litigation. The evidence showed a long feud between the parties, the battery complained of was a comparatively minor incident in their differences, and there was apparently some provocation on the part of the plaintiff. As Richardson J put the matter:

> What for me is decisive is the evidence of [the plaintiff]. That evidence supports the pleaded claim for what were in reality compensatory damages. It cannot in my view, when set in the context of the fraternal wrangling between [the parties] — in which as Quilliam J found [the plaintiff] was the principal irritant — reasonably attract an award of exemplary damages against [the defendant].

The general approach to the assessment of exemplary damages was discussed by Somers J:

"In the end I have reached the conclusion that, the primary purpose of exemplary damages being to punish and deter, the fact that no other sanction in the form of compensatory damages exists affords no sufficient reason to dispense with an objective which is still capable of serving a useful social purpose. The assessment of exemplary damages in cases of personal injury will not be easy. The substratum of compensatory damages has disappeared and with it all practical possibility of taking account of their award in estimating whether and to what extent there should be any addition by way of exemplary damages. A new approach is necessary. That which is appropriate in such cases may prove to be whether the circumstances as a whole merit punishment and if so what sum should, in those circumstances, be awarded in order to achieve that end. In the latter consideration the means of the parties will be material; see eg *Rookes v Barnard* [1964] AC 1129, 1229; *Pollock v Volpato* [1973] 1 NSWLR 653. I express my agreement with the observations of Cooke J about the need for restraint in this area.

"It remains only to refer to the present case. As pleaded I am of the opinion it is not a case of exemplary damages at all. More importantly the evidence of the plaintiff — which by the course of the trial the defendant has had no opportunity to refute — does not support such a case. . . . Indeed without some additional feature, as for example an abuse of power or the invasion of other rights of the plaintiff, it is not easy to envisage a case of personal injury which would not have been met by compensatory or aggravated compensatory damages the recovery of which is barred by the Accident Compensation Act."

### To summarise:

The judgments in *Donsellar v Donsellar* make it plain that the action for exemplary damages arising from the tort of battery survives in New Zealand, but also that there are limitations on such a claim. In particular:

(a) The purpose of such damages is not to afford the plaintiff compensation over and above that available under the Accident Compensation Act 1972. Accordingly the effect that the battery complained of has had on the plaintiff is irrelevant and, if that effect is stressed either in the pleadings or the evidence, may well cause the claim to fail.

(b) The purpose of such damages is to punish the wrongdoer and to deter future wrongdoing. Accordingly it is essential that the battery complained of be deliberate and furthermore it must represent either an abuse of power by the defendant or an invasion of some right of the plaintiff additional to his or her right to personal inviolability.

That is to say, the Courts will have regard to the motives and objects of the defendant when he committed the battery.

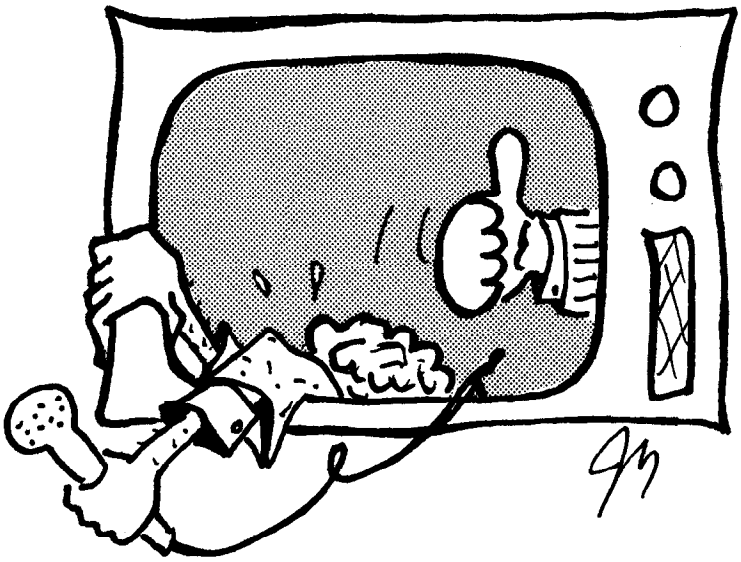
(c) The award of exemplary damages is not limited to the particular circumstances described by Lord Devlin in *Rookes v Barnard* but will be available in any sufficiently serious case of highhandedness, whether directed to person or property and whether committed by a public officer or private citizen.

(d) Both in deciding whether to award exemplary damages and in assessing the quantum of an award, the Courts will have regard to the relationship between the plaintiff and the defendant, to the extent, (if any) to which the plaintiff brought trouble upon himself, and to the respective means of the parties.

(e) The Courts will be slow to award exemplary damages, doing so only in the clearest and most extreme cases, and will be reluctant to assess an amount greater than is necessary to serve as a punishment and a warning. □

# The day Mike Bungay socked it to Fair Go

*On 27 April, Television One devoted 15 minutes of its Fair Go programme to the topic of lawyers' fees. Fair Go had previously surveyed a number of firms on charging-out rates. Fair Go's reporter made a few observations on the survey, then the Broadcasting Corporation turned loose its top inquisitor, Brian Edwards, on Wellington criminal lawyer, Mike Bungay. Readers can determine for themselves who was the hunted or hunter. . . .*



*Edwards:* Well, Mike Bungay, it's quite interesting that so few of these lawyers were willing to reply to our questionnaire at all. And one wonders whether lawyers are a bit cagey about letting people know about what they earn and what they charge.

*Bungay:* Oh, I don't think that's the reason. They might have felt they wouldn't get a fair go.

*Edwards:* Well, no, I think they probably will get a fair go and I'm a bit bewildered by so few replying. In general do you think lawyers are willing to give their clients estimates, quotations, a rough idea of what the thing's gonna cost?

*Bungay:* Well you see, you got replies from 28 legal firms but I think in New Zealand there's something like 4200 lawyers so it's a pretty limited survey and certainly lawyers, they will give estimates of their costs and disbursements and everything else. They'll tell you as best they can and you can't be always accurate in these things how much it's going to cost because you don't know until you start, how much . . . what's involved, how long it's gonna take . . . you mentioned in your survey a careless driving charge. Well you can go along there at 10 o'clock, ready to be heard at 10 o'clock and not be heard by the Court until 2.30 in the afternoon.

*Edwards:* Yes, I would have thought the same situation applies when you go to your garage. Before the guy takes the head off he's not sure what he's going to find in there. But he'll still give you some sort of estimate won't he?

*Bungay:* No he won't. He'll give you the estimate once he's got the head off . . . and knows what it's all about.

*Edwards:* The hourly rate that was revealed in this survey, the average hourly rate, was around $60 an hour. To a layman like me that's a hell of a lot of money in an hour to earn. Do you agree it's a lot?

*Bungay:* Well, it is a lot of money but you see the one question you didn't ask in that survey is what is your overhead? Now the average overhead for a legal lawyer in New Zealand is $35 an hour. Now, you deduct that from the $60 an hour, and I think $60 an hour would be about right . . . that gives a profit of $25 an hour or on 1300 hours work a year, that gives him a taxable income of $42,225. The equivalent of a detective senior sergeant, half that of an airline pilot, half that of a watersider on overtime. Lawyers don't get sick leave, they don't get pensions or anything like that and they work a lot of overtime.

*Edwards:* I think I'd better stop you, my heart's bleeding already.

*Bungay:* Can I see it? (laughter)

*Edwards:* If you look at the results that we get, one of the fascinating things was there were enormous differences between the estimates that people gave . . . there were enormous differences between what you pay one firm and what you'd pay another firm and there were big differences in the total cost that you were going to be charged. How do you account for those huge differences?

*Bungay:* Well, you see . . . (I'd answer?) that survey . . . some of the replies were $50 an hour and somebody else said $80 an hour. Now, one would expect to pay for expertise. And it doesn't cost any more in the long run. The expert in that particular legal field, he'll do it in half the time. So if he's charging $80 an hour and does it twice as quick as the ordinary lawyer it works out at $40 an hour. And you can get a lot of cheap jobs. You can even get legal advice for nothing and you certainly get value for money.

*Edwards:* In many cases you were paying for the seniority of the person doing the work weren't you? I mean I wouldn't pay my doctor more because he's 67 instead of being 25. You are often paying a lot more money for a senior partner, aren't you?

*Bungay:* Yes, because he's usually more specialised. And doctors, it doesn't matter whether they're 65, 25 . . . they're by and large looking at spots and saying things like that and saying, well, that's not a bad spot but you'd better have a pill or something. And I don't think you can compare them.

*Edwards:* No. Can we change to the one area which did seem to be of good value and that was the area of wills. You can get a will done for about $30 and three of the lawyers said they would do a will for nothing at all. What's the reason for this extraordinary generosity?

*Bungay:* Well, it's not extraordinary at all really because it doesn't take much to draw up a will except the more complicated ones but . . . you see, there again it is comparative. You compare lawyers' charges with those of the trust companies, the public trustee in particular. The public trust will draw you will up for nothing but if you die and you must do sooner or later . . . if you've got, say for example just one asset and that's $100,000 in a bank account. The public trustee works on a commission . . . a three percent commission. That means he takes $3000 for closing that account. A lawyer does it for nothing. But the public trustee who prepares a will for nothing . . . he gets $3000.

*Edwards:* Yes, so what you're really saying is it's the competition of the public trust office that makes the lawyers charge so little.

*Bungay:* I would say there's an element of that.

*Edwards:* An element of that. Is it also because if they do your will cheaply they know they're gonna get the job of administering the estate when you die?

*Bungay:* I don't think so at all because a lot of legal firms will not become executors in an estate. They don't want the responsibility of being an executor. They'd sooner have a member of the family as the executor because they know the extent of the estate, they know the relations and all that sort of thing and lawyers don't want to be involved in that.

*Edwards:* We're constantly telling people in this programme that when they go to buy things or consume various services, these days in times of recession they should haggle, they should put up a bit of a fight. Now when you go to your lawyer do you think people should haggle? Try and get a cheaper price?

*Bungay:* Well, they do . . . they do. And you explain to them what your fees are as best as you can ascertain . . . if they don't like it . . . I mean . . . lawyers don't chase the public. The public are perfectly entitled to shop around . . . do what they like. They really are.

*Edwards:* Are you telling me that if I were to come . . . go to my lawyer, or a lawyer and say, this is what I want done, give me an estimate 'cause I'd like to shop around a bit . . . a lawyer would go to the trouble of drawing up an estimate for me like that?

*Bungay:* He could give you some idea of what you're involved . . . what financial commitment you're facing. If you don't like it, I mean, you can try somebody else.

*Edwards:* One of the areas we didn't cover in this survey was conveyancing, you know when you go along and have your house sorted out for you, buying or selling a house, that sort of thing. We didn't cover it because there are scale fees and I wanted to quote you something that Dick Smithies of the Consumer Institute said in his recent book . . . he said, "It's a scandal that the Law Society operates such a cushey scale of fees for conveyancing work." That is helping you through the legal parts of buying and selling a house or land. "This cost setup," he said, is "indefensible". How do you feel about that?

*Bungay:* I don't know this gentleman . . . what was his name again?

*Edwards, laughing:* You know him very well.

*Bungay:* Did he say something about a minimum scale?

*Edwards:* Yes.

*Bungay:* There's also a maximum. Why doesn't he say that?

*Edwards:* He says this scale of fees is a minimum. Lawyers are not allowed to go below the scale and at least in theory run the risk of being disciplined by the Law Society if they do so. Yet they are permitted to go above the scale. But (?) he disagrees with your interpretation (?).

*Bungay:* Well, he wouldn't (?) know . . . but it's also a maximum. It's a minimum and a maximum. It's a scale and in certain circumstances you can go above it . . . if you can justify it. But look, lawyers aren't worried about having a scale fee for these things. They're quite happy to abolish the fee and charge out on a timeout basis.

*Edwards:* Are they happy to do that? (Bungay says "Yes"). I mean this is a classic case of price fixing by what is in effect a very powerful trade union.

*Bungay:* I think you'll find that lawyers . . . and I'm not substantially involved in conveyances . . . but I think you'll find that lawyers would be quite happy to scrub those scale fees and work out on an hourly basis.

*Edwards:* Can I ask you how lawyers are paid . . . because I think most of us don't know that?

*Bungay:* Usually in money . . . occasionally you get a (one

ıle due to audience laughter) or a bottle of ısually in money.

by whom? Are they salaried, are they getting nds? How does a lawyer make his money?

ll, occasionally you're paid by the mean criminal legal aid now, the top rate is r, you know, that's in the Court of Appeal p serious crime, $13.50 an hour. Half what e your car greased. And that's after six years training and numerous years of

*upting:* But the average bloke working in a is he paid? Does he get a salary or what?

f he's not a partner then of course he gets a

f he is a partner, how does it work out

depends on how well the firm's doing. It really does. I mean, some lawyers are paid more than they should be but then so are some broadcasters. So are Members of Parliament. I accept some lawyers are paid more than they should be.

*Edwards:* Yes . . . actually lawyers are the highest earning of the professionals, self-employed lawyers. But what comes out of this survey again and again and again is that the lawyers feel that they're misunderstood on their fees. They feel a bit sorry for themselves.

*Bungay:* No, I think that lawyers . . . they're not sensitive about their fees. And if they're unjustifiably criticised then they feel sensitive and angered about that. The same way as a broadcaster who is misunderstood is justified in defending himself. And I think lawyers are misunderstood over their fees by and large.

*Edwards:* Right . . . alright Mike, we'll be having lunch on you (couple of words inaudible due to audience laughter).

[At this point, the interview concluded.]

# Butterworths Travel Awards 1982

**Ms Jocelyn Afford**

Born in Liverpool, Ms Afford completed her BA at Victoria University in 1977, then her LLB (Hons) in 1980. She was admitted in 1981. She has been employed as a junior lecturer at Victoria and is working on an LLM thesis concerning the sale of goods. She was awarded the University Grants Committee Postgraduate Scholarship this year and will be studying for an LLM at Cambridge University.

**Mr William Napier**

Mr Napier is a Wellingtonian and a junior lecturer in the Faculty of Law at Victoria University. He is completing his LLM and has published articles in administrative and family law. He is co-author of the recently published book, *The Law and You*. Mr Napier will study at Harvard.

# Small Claims Tribunals

## PREFACE

THE advent of the Small Claims Tribunals Act 1976 was greeted by lawyers with what Kai Lung would have called "a deep feeling of no-enthusiasm"; and in the intervening years the profession has tended to avert its eyes from the fledgling forum. This attitude is understandable. The Small Claims Tribunals were designed to provide cheap, quick and rough justice for would-be litigants in certain common kinds of dispute involving modest amounts, which the prospective costs burden formerly deterred them from taking to Court. To achieve this some degree of informality was inevitable, but the profession was dismayed at the extent to which this was to go — eg, hearings in private, severely restricted rights of appeal or review, emphasis on mediation, ouster of strict legal principles, exclusion of legal advocates, and discretion to appoint lay Referees. Strong submissions by the New Zealand Law Society, particularly on the last two aspects, were fruitless. In 1977 the first three Tribunals were established, on an experimental basis.

Thirteen Tribunals are now operating, serviced by 19 Referees — and the only major geographical area where citizens have not a Tribunal within reasonable reach is Nelson/Marlborough/Westland. The Small Claims Tribunals are clearly here to stay.

We are fortunate to have access to a comprehensive paper prepared by Mr Alex Frame last year and published in this issue. Mr Frame puts the scheme in its historical perspective, describes what it set out to do, discusses its controversial aspects, assesses how it has been working in practice, and concludes that by and large the right decisions were taken at the outset and the Tribunals are fulfilling their professional purpose. He warns that with the large increase in the numbers of Tribunals over the past two years the real test of their effectiveness may be still to come.

The cost of the scheme so far has been modest. The cost to the taxpayer of the three original Tribunals (four Referees) for the three years 1978, 1979 and 1980 amounted to $66,068. In that time 3,933 claims were filed at a cost of $4 per applicant, and a vast majority of these were either settled before or during the hearing or were the subject of orders made at the end of the hearing — see Appendix B of Mr Frame's paper.

The inherently unsatisfactory features of such Tribunals from a legal viewpoint are unavoidable if the aim is to be achieved, and perhaps the time has come when as lawyers we should accept the shortcomings in the interest of widening the scope for settling small-scale civil disputes. There must be few practitioners who have not from time to time felt unease at having to tell a client that his or her apparently reasonable claim is one which, because of the small amount involved, cannot without disproportionate financial risk be taken beyond the "solicitor's letter" stage. Those who study Mr Frame's article will be better able to advise such clients on how the Small Claims Tribunals actually work, and explain their advantages and limitations.

**Peter Haig**

*Alex Frame, Senior Lecturer in Law, Victoria University of Wellington*

*The article that follows is an abridged version of a chapter prepared for eventual inclusion in a comparative study of Small Claims Courts to be published in London. The writer wishes to acknowledge financial assistance from the Department of Justice and the Legal Research Foundation in Auckland.*

## INTRODUCTION

THE enactment of the *Small Claims Tribunals Act* 1976 (which will generally be referred to as "the Act") was not the earliest recognition by legislators in New Zealand of the value of a dispute-resolving system freed both from the technical rules of law and, to a large extent, from the services of the profession which organises and conducts orthodox legal contests. The first resident Attorney-General, Ward, explained the intention of an 1846 measure as follows:

> The difficulty of carrying English law into operation amongst the natives, so far as arises from the technical character of our ordinary legal proceedings, was remedied by the appointment of magistrates empowered, by a law specially framed for the purpose, to arbitrate in a summary way between the two races, according to equity and good conscience, and without being bound by the technicalities of our ordinary legal tribunals; so that without cost, without legal knowledge or assistance, the complainant, whether native or European, might personally go before the Magistrate, state his own case, and obtain a judgment in his favour.[1]

Ward had emigrated from England in 1854 and later became a Judge. The jurisdiction was recaptured by the profession by the introduction of legal qualifications for Magistrates, the allowance of appeals on law and of legal costs, and the introduction of procedural complexity. See Acts 1856 (No 29), 1858 (No 30), and 1862 (No 36). It may be relevant to some European hostility to the Resident Magistrates' powers that "Reports in the 1850s disclosed that in cases between the Maori people and Europeans, Maoris were most frequently the complainants; these reports also suggested that they always appeared satisfied with the decisions of the Courts, even when they were losers".[2]

This jurisdiction was gradually technicalised and recolonised by the legal profession. The justification advanced by one lawyer-legislator was that:

> Those summary and arbitrary decisions, that disregard the strict letter of the law in favour of abstract principles of justice, which are absolutely necessary in dealing with native cases, would naturally be most unpopular if applied to Europeans. . . .[3]

The Courts of Requests, imported soon after the assumption of British sovereignty in New Zealand with the express ambition of providing for "the more easy and speedy recovery of small debts", also featured a jurisdiction limited as to amount, a bar on advocates, and finality of decision on law and fact, although the tribunal was instructed to "proceed according to the laws in force". This jurisdiction was merged with that of the reformed Resident Magistrates in 1867.[4]

We have begun with an incursion into legal history because it cautions the "social engineer" who seeks to develop in New Zealand an abbreviated process for small claims that it has been done before and that it did not long survive. It reminds him of Roscoe Pound's "continual movement in legal history back and forth between wide discretion and strict detailed rule, between justice without law, as it were, and justice according to law".[5]

This study attempts an assessment of the present New Zealand Small Claims Tribunals.[6] It assumes that the system is "working" if it provides a reasonably speedy, acceptable and inexpensive means of settling an appropriate range of disputes where the main-stream Courts are, for a variety of reasons, unable to offer worthwhile prospects for resolution. If the scheme attains the foregoing, it still does not "work" if it is in practice co-opted by organised, multi-action litigants (such as debt-collection agencies) and is seldom used by relatively powerless individuals. Again, the scheme cannot be said to "work" if it entails the collapse of principles and process to the point where arbitrariness, rather than commonsense fairness, comes to be seen as the main feature of the work of the Tribunals.

## BACKGROUND TO THE LEGISLATION

There is an agreement between the two major political parties in New Zealand as to the worth of the small claims forum concept. Indeed, something of a race seems to have occurred between the Minister of Justice in the Labour Government, Hon Dr A M Finlay, whose administration had promised small claims legislation in the Speech from the Throne in 1975, and an opposition Member, Mr Downie, who sponsored a private member's Bill. It seems to have been agreed to treat the matter in a bi-partisan spirit before the Statutes Revision Committee to which the government Bill was referred (26/9/75).

The present Minister of Justice has explained his government's approach to the experimental stage, and to the eventual extension, of the Tribunals:

> The original pilot schemes were set up to test public reaction to the tribunals in different social environments. Christchurch was selected as a metropolitan area, New Plymouth as an urban/rural area and Rotorua as an area with significant cultural variations . . . . As a matter of policy the Government is committed to establishing more tribunals and ultimately achieving a nationwide coverage. However, progress towards this objective is entirely dependent on the availability of resources and I am unable to release any definite timetable at this stage.

## FUNDAMENTAL ELEMENTS OF THE SCHEME

### 1 Method

The method by which the Tribunals are to determine claims before them is prescribed in the Act. The first instruction is that "The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement".[7] The prominence thus given to the mediating function has both theoretical and practical implications, and the question arises as to the proper limits of the mediating role. One recent writer has taken a firm view against conciliation and mediation in the small claims context:

> Whilst conciliation has obvious merit in some areas . . . it would be pernicious in the area of small claims . . . . Far from allowing conciliation, we should prohibit Judges from ever suggesting or hinting at possible terms of settlement.[8]

The New Zealand scheme, both in theory and in practice, has declined the advice just cited, although no doubt our Referees would wish to avoid the dangers to which it points in favour of an approach such as is sketched by Professor Fuller:

> . . . By this view the arbitrator has a roving commission to straighten things out . . . . If he senses the possibility of a settlement, he will not hesitate to step down from his role as arbitrator to assume that of a mediator. If despite his conciliatory skill negotiations become sticky, he will . . . exert the gentle pressure of a threat of decision to induce agreement.[9]

Hearings observed in the New Zealand Tribunals followed a pattern in which, after an initial uninterrupted statement from each of the parties, a specific period was provided for negotiation. The Referees seemed able to permit and even assist this process without incurring the costs to which Ison has referred.

The second direction provided by the Act to New Zealand Referees is that:

> The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities. (s 15(4)).

The Act goes on to specify (s 16(e) and 16(f)) that the Tribunal may disregard exclusion clauses in agreements, and, further, that it may rewrite agreements found to be "harsh and unconscionable". These are wide powers indeed, and some attempt must be made to assess their limits. The formula itself was the subject of some dispute at the drafting stage, Parliamentary counsel preferring an emphasis which would require the Tribunals to decide according to law unless the merits point elsewhere, whilst the Department of Justice officials pressed for a clean and explicit break with any requirement to follow the law. The Departmental view prevailed after reference to the government caucus committee.

*These are wide powers indeed, and some attempt must be made to assess their limits*

What then does the requirement to "have regard to law" entail? As the Department urged in defence of its successful formula, there are observations in such cases as *Horner v Franklin* [1905] 1 KB 479 and *Stuckey v Hooker* [1906] 2 KB 20 to the effect that judicial officers empowered to decide on a "just and equitable" basis, "regard being had to the terms of any contract . . .", must *consider* but are not bound to *apply* the matters to which they are to have regard. Even this interpretation might seem unrealistic in a context where the majority of Referees are without formal legal training. In practical terms the limit on a Referee's freedom may lie in the right to appeal against the decision of a Referee where the hearing is "unfair".[10] It seems sensible to postulate that failure to *consider* the law could, in certain circumstances, and especially where a party has requested consideration, indicate "unfairness" on which an appeal could be founded.

*We have already seen lawyerly hostility to this kind of jurisdiction*

As to the mandatory basis for Tribunal decisions, "the substantial merits and justice of the case", one need only compare traditional New Zealand judicial attitudes to the similar and long-standing formula used to free the Resident Magistrates, and their successors, from the strict letter of the law in minor cases: they were enjoined to decide according to "equity and good conscience". We have already seen lawyerly hostility to this kind of jurisdiction and it is not surprising to find a degree of judicial suspicion as well.[11] The high point is probably reached in *James v Crockett* [1920] GLR 368, where the Chief Justice, Sir Robert Stout, observed (p 369):

> At the present time . . . although the Magistrates are men trained and learned in law, they are empowered to act — to quote a remark long since made by one of our most eminent Judges — as if they were Turkish Kadi, lawyers as well as law administrators. Selden's gibe regarding English Equity Courts might, in many instances, be readily applied to them.

The Chief Justice went on to say (p 369) that the "equity and good conscience" jurisdiction could not permit a Magistrate:

> to inaugurate or allow a procedure which is not sanctioned by the Act under which his Court is constituted — nor does it allow him to repeal a statute . . . . The words in the statute could be given wide scope without going to the lengths of making contracts for the parties, contracts that otherwise might never have been made or accepted.

There is, however, good reason for regarding the observations in *James v Crockett* as inapplicable to the Tribunals constituted under the 1976 Act, since the modern Act explicitly allows, and in some cases enjoins, Referees to disregard and to amend contracts.

## 2 Jurisdiction

### (a) Acceptable causes of action

The jurisdictional formulae provided by s 9 of the Act set out the limits of the Tribunals' powers to entertain claims. In practice, however, they are instructions to the Court staff, who have the initial responsibility for accepting or rejecting claims.[12] Section 9(1)(a) permits claims "founded on contract or quasi-contract". The contractual category, into which most claims fall, presents little difficulty although there may have been some early hesitation in giving full scope where a concurrent cause of action arose in tort. For example, the failure of a garage attendant to fasten a car bonnet, resulting in damage when the motorist drove away, would disclose a cause of action in tort, but also one in contract sufficient to commence a claim before the Tribunal.

The category "quasi-contract" presents more problems of definition — at the drafting stage the attempt to provide in the Act amplification which might assist Referees without legal training was abandoned. In fact, of course, "quasi-contract" is a miscellaneous common law category with the function of relieving the concept "contract" of distortions which would result from requiring it to accommodate equitable exceptions in situations which might broadly be characterised as involving the passing of a benefit to a party who ought not to be permitted to retain it against other claims. Lord Scrutton observed of "quasi-contract":

> Now ever since the time when that great Judge, Lord Mansfield, with no doubt a praisworthy desire to free the Courts from the fetters of legal rules and enable them to do what they thought to be right in each case . . . the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought.[13]

In practice, the solution has been to send the Tribunals notes prepared by the legal advisers in the Justice Department which set out the headings adopted by standard texts to treat "quasi-contract", and give simple examples of each.

In addition to the contract-based jurisdiction, the Tribunals have a limited jurisdiction in tort, under s 9(1)(c) of the Act "for damage to property resulting from negligence in the use, care, or control of a motor vehicle". In practice this heading gives rise to a large number of cases[14] with claims from uninsured parties and, very frequently, insured parties whose insurers have either enforced an excess clause or have withheld a no claims bonus. Observation suggests that such cases strain the procedure of the Tribunals considerably, with highly conflicting evidence as to the circumstances of the accident and an absence of cross-examination of reliable corroborative evidence. There seems to be a greater danger than elsewhere in the jurisdiction of the Tribunal either going seriously wrong or of unsatisfactory "middle-of-the-road-ism". Additionally, there is a danger that insurance companies will see the Tribunals as an encouragement to increase the levels of excess clauses whilst reassuring customers that they can recover in the Tribunals.

However, the fact is that minor car damage due to accident is one area of dispute into which many citizens will unwillingly venture. It is therefore important that the legal system offer some realistic remedy without bringing the procedure into disrepute.

#### *Two suggestions for reform*

The suggestion has been made to the writer that the tortious jurisdiction be extended to *all* damage to property resulting from negligence, howsoever caused, provided the claim is within the monetary jurisdiction. It is difficult to see why this step should not be taken. The anomalous distinction between damage by a motor vehicle and damage, say, by a bicycle or boat, would be removed without presenting the Tribunals with any essentially new causes.

A further suggestion has been made from time to time that the jurisdiction exercised since 1973 by the Rent Appeal Boards — that of determining an "equitable rent" for any dwellinghouse in respect of which a tenant or landlord has made application — could conveniently be transferred to the Small Claims Tribunals. The advantages of such a move would be a saving of public money, a rationalisation of jurisdictions in the minds of the public, and an increased geographical coverage. The opportunity was not taken with the passage of the Small Claims legislation in 1976 to fuse the jurisdictions. The Minister in charge of the bill observed that "the committee did not feel it appropriate to give the tribunals jurisdiction in this sensitive area". However, developments since make it sensible to examine the question afresh.

*The Small Claims Tribunals have shown themselves capable of determining a range of issues of no less "sensitivity" than rent levels*

First, the Small Claims Tribunals have shown themselves capable of determining a range of issues of no less "sensitivity" then rent levels, including a number of cases relating to tenancies, particularly cases concerning refunds of bonds. Secondly, the existing Rent Appeal system, under the administration of the Housing Corporation, has suffered a considerable decline in applications since 1973-4. Although the addition of the Rent Appeal jurisdiction to that of the Tribunals presents some technical problems, in the writer's view they are surmountable. The appropriate time to accomplish the change might be when there are Tribunals in place in each of the four localities currently hosting a Rent Appeal Board.[15]

### (b) The monetary limit

The Act sets a monetary limit of $500 on the jurisdiction of the Tribunals (s 9(3)). The level can be no more than an intuition on the part of the legislators. The Minister has written:

> The principle in establishing the tribunals is to provide a forum for speedy and inexpensive resolution of disputes without recourse to complicated legal argument. Where large amounts are at issue it is probable that the parties would feel a sense of injustice if the legal aspects involved in the dispute were not fully explored. . . .[16]

The problem now arises of maintaining the real value of the level at a time of continuing inflation. The most realistic

method is probably an adjustment from time to time. It has been suggested that these periodic adjustments should be by regulation. In the writer's view it is undesirable that a jurisdiction as radical as this should be extended other than by Act of Parliament. The occasions for review will also provide an opportunity to monitor the general health of the system.

**(c) Requirement that there be a "dispute" before a debt can be claimed**

It seems to have been appreciated by the legislators and their advisers, no doubt from overseas experience, that any substantial flow of debt-collection cases brought by a few professional collection agencies and commercial enterprises could not only distort the conciliatory thrust of the scheme, but also have adverse effects upon public perception of the Tribunals as popular forums. The device settled on as an attempt to stem this tide was to require a claimant seeking to recover a "debt or liquidated demand" to satisfy the Registrar, as a preliminary step, "that the claim, or a part thereof, is in dispute" (s 10 of the Act). The requirement that there be a "dispute" disclosed to the Registrar applies only to a "debt or liquidated demand" and not to other claims. The meaning of the expression "debt or liquidated demand" was discussed by Barrowclough CJ in *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 468 at p 471 where it was observed that:

> important factors are that it be capable of arithmetical calculation and that no investigation of the amount claimed should be necessary other than inquiry as to well-established scales of charges, etc.

The justification for this limitation must be that the scheme ought not to make itself available to a party seeking only a cheaper version of enforcement procedures available in the ordinary Courts. The Minister has written to one businessman, who had expressed the hope that the Tribunals might assist him to recover debts, that; ". . . the establishment of a Tribunal will not provide businessmen with a system to improve the collection of bad debts. I would expect that the majority of cases to which you refer relate to unpaid accounts in which there is no dispute as to amount. Such matters do not come within the jurisdiction of the Small Claims Tribunals and actions for recovery of such debts must still be taken through District Courts".

The sensible interpretation of this requirement seems to be that a claimant must convince the Registrar that the respondent denies liability to pay the sum, or part of the sum, claimed. The question arises whether the respondent's silence could satisfy this test. Generally, it is suggested, the simple assertion by a claimant that there is a "dispute" would not suffice but would require some confirmation from elsewhere, though it has been held in the industrial context, where jurisdiction only arises where there is a "dispute", that silence in the face of a demand can amount to a refusal to accede and can thus bring a "dispute" into being, *In re An Application for Award by Canterbury Agricultural and Pastoral Labourers' Union,* Book of Awards, Vol XII p 918.

## 3 Assistance from Court officials

Section 38 of the Act takes the novel step of requiring the Registrar and his officials to *assist* the public in the matter of claims before the Tribunals. The completion of forms, the lodging of a claim, applications for re-hearing, appeals, and the enforcement of orders are all matters which expressly engage the duty to assist. As the Minister of Justice has indicated:

> Under earlier civil legislation, Court officers maintained a neutral stand in proceedings, their functions being essentially to record and administer. The Small Claims Act, however, places an onus on the Registrar to assist . . . . It is plain that in order to be of assistance the Registrar will often be required not only to complete documents but also to give parties some guidance on such matters as jurisdiction and remedies . . . .[17]

The task imposed on the Court officials is critical to the success of the Tribunals. It has both problems and dangers. Clearly respondents must be assisted as well as claimants, those seeking to resist enforcement must have their share of guidance along with the pursuers. Is it "legal advice" which is passing across the counters of District Court offices? How is an official to remain even-handed as between successive claimants, let alone as between a claimant and a respondent in the same case? The officials are of course well aware of these problems. One or two officials expressed some resentment towards what they saw as "too much free justice being handed out". It seems to the writer to be important to recognise the demands of this task both in the level and calibre of appointments and also in providing opportunities for the officers concerned to discuss this work with their counterparts elsewhere. Further, the importance of the Court officer's role suggests that it may be desirable to extend to their work the protection conferred upon Referees by s 3 of the Small Claims Tribunals Amendment Act 1979. There have already been instances of litigants applying pressure of one sort or another on Court officials attempting to carry out functions under the Act.

## 4 Appeals against decisions of the Tribunals

Section 17 of the Act insists than an order made by a Tribunal "shall be final and binding on all parties . . . and, except as provided in section 34 of this Act, no appeal shall lie in respect thereof". The modern view would be that such a clause could not protect an inferior tribunal from the supervisory jurisdiction of the superior Courts where a tribunal had exceeded its jurisdiction, and the important gloss would be added that jurisdiction is exceeded where a tribunal acts *contrary to law,* on the basis that Parliament cannot have intended to confer a jurisdiction to act contrary to law.[18] However, in the case of the Small Claims Tribunals, Parliament did confer, and explicitly, a jurisdiction to act contrary to law.[19] However, if a Tribunal strays from the situations in which it is entitled to act under the Act, it would be subject to review by the High Court. The Court might be more than usually reluctant to interfere in all but clear cases, as was the Supreme Court of Queensland in a 1977 case.[20] Kelly J observed:

> It is not for this Court to speculate as to the nature of the material before the Tribunal . . . it was open for the Tribunal to determine . . . that the claim was a "small claim" within the meaning of the Act and that it therefore had jurisdiction to hear and determine it.

The only true appeal provided for by the Act is on the ground that proceedings of the Tribunals were "unfair to the appellant and prejudicially affected the result" (s 34).

This is clearly a very narrow ground, requiring an appellant to direct the District Court Judge to some "unfairness" in the *form* rather than simply in the result of the hearing. An aggrieved party may also apply for a re-hearing under s 33 of the Act.

## 5 Qualifications and attributes for Referees

The Act deals with this question in a pragmatic way. A barrister or solicitor who has practised for three years or more may be appointed as a Referee. Equally entitled to be appointed, however, are persons "otherwise capable by reason of special knowledge or experience of performing the functions of a Referee" (s 7(2)). The New Zealand Law Society strenuously resisted this extension to non-lawyers. The recent report of the *Royal Commission on the Courts* (1978) came close to supporting that view: "Lay referees would generally have difficulty in making decisions where questions of law arise" (para 455). "We would expect that referees would normally be barristers or solicitors with substantial experience although some laymen with special qualifications could also be considered" (para 461). The Royal Commission's views on small claims matters must be seen in the context of the admission that "it did not prove possible . . . to examine the experimental small claims tribunals as closely as we had hoped" (para 458).

In the appointments so far, non-lawyers have outnumbered lawyers by 17-2. In the writer's view, the primacy given to the mediatory role of the Referee indicates the importance which mediating skills must be granted. One thoughtful commentator has written:

> The expertise required of a mediator is different [from that of a rule-oriented adjudicator]. Since successful mediation requires an outcome acceptable to the parties, the mediator cannot rely primarily on rules but must construct an outcome in the light of the social and cultural context of the dispute . . . . Mediation, then, flourishes where mediators *share the social and cultural experience of the disputant*.[21]

Whilst it is not impossible that some lawyers share the social and cultural experience of the parties to small claims proceedings, it is suggested that many able non-lawyers will be closer to that ideal.[22] The suggestion here made is that the present policy regarding appointments should continue: there should be no presumption either for or against lawyers.

### Procedural matters

A small claim may be initiated in either of two ways. First, a claim may be lodged directly with a Tribunal in accordance with s 18 of the Act. The claim form is admirably simple and, as we have seen, the assistance of the Court staff may be requested for its completion. Secondly, claims may have come before the Tribunals following transfer from the District Court, under s 23 of the Act. If a defendant requests that proceedings within the jurisdiction of the Tribunals be transferred, the Registrar *shall* transfer them, and it appears that preliminary costs may not be recovered (s 23(1)(a)). "In every other case a [District Court Judge] or a Registrar may, on the application of either party, or of his own motion" transfer the case. In these "other" cases, costs may be provided for. In fact, a considerable number of claims originate in this way.[23]

One result of this procedure may be that a litigant who has incurred trouble and cost in commencing an action in the District Court, in the reasonable expectation that the matter will proceed to be determined according to law, may feel some understandable resentment to learn that his action has been transferred to a forum in which his lawyer is unable to appear, he may be unable to recover his costs, and his legal rights may take second place to other principles. This is, of course, a necessary corollary of the existence of the system. However, it would seem better that the request for transfer should come from one or other of the parties, rather than be the result of automatic administrative procedures.[24] A further difficulty arises from the wording of the provision relating to "upwards" transfer of cases from the Tribunals to the District Court, which appears to preclude the *return* of a case to the District Court (s 22). This "upwards" transfer may occur when the case appears to be out of jurisdiction or when the Tribunal concludes that it "would more properly be determined" in the Court. However, this power applies only to proceedings "commenced in a Tribunal". For examples of cases which might usefully have been returned to the Court in view of the legal complexities and the approach of the parties, see Cases 3 and perhaps 4 in App A, both of which were transferred from the District Court.

### Some residual matters

The present cost of filing a claim is $4. Costs may not, however, be awarded against a party unless a claim is found to be "frivolous or vexatious".[25] The prohibition against costs is perhaps embarrassing in cases where an action has been commenced in the District Court and lawyers' and other fees have been incurred. However, it would reintroduce the possibility of "costs blackmail" to permit a successful claimant to recover these in the Tribunal. Also, the necessity of dealing with such applications might prejudice attempts at settlement by agreement.

The Act allows (s 27) "investigators" to be appointed to assist the Tribunal. In practice these are used very infrequently, perhaps because their use tends to prolong the time span between the lodging of a claim and its disposal.[26]

The provision made in s 40 for publication of orders has not been used and it is difficult to see at present what useful purpose could be served by sporadic publication of decisions unless patterns of general concern to, for example, consumers are found to emerge over a period.

Generally the list of orders available under s 16 to be made by the Tribunal has been found to be adequate. Of particular interest perhaps is the "work order" by which a respondent may be required to make good a defect in chattels.

## GENERAL CONCLUSIONS

### 1 Tribunals for whom?

A question which must be at the forefront of any inquiry into the health of a modern small claims jurisdiction is "how does it affect the balance of power as between the relatively poor, resourceless, individual on the one hand, and the relatively rich, resourceful, commercial enterprise on the other"? Another way of putting that question is provided by Galanter's analysis of the balance of power as between "one-shotters" and "repeat players".[27] Galanter points to some of the advantages enjoyed by "repeat players" in orthodox litigation: beyond the obvious factor of financial and professional resources lie the more

subtle benefits of being able to structure the transaction (drafting the contract, requiring the bond etc. . .), to "play the long run" (eg by picking cases to establish favourable rules for the future), and establishing informal relations with officials over a period. Perhaps the most thought-provoking study of this question in relation to small claims jurisdictions is provided by Beatrice Moulton.[28]

The nature of Moulton's answer will be gathered from her title, and her specific conclusions are that:

> The rural study, like the urban, revealed that the individual litigant appeared most often in small claims Court as a defendant, and that he usually lost . . . . Now it is clear that the majority of small claims cases pit an experienced claimant against an inexperienced, frequently inarticulate and uninformed defendant . . . .[29]

It seems appropriate to inquire whether these conclusions are applicable to the New Zealand context. Accordingly, 50 completed files were analysed from the records of each of three Tribunals with a view to estimating the frequency of different combinations of litigants according to types. The types chosen were "Individual" and "Organisation".

The results were as follows:

**Samples from three Tribunals according to types of parties***

| | Individual v Individual | Organisation v Individual | Individual v Organisation | Organisation v Organisation |
|---|---|---|---|---|
| Christchurch | 20 (40%) | 9 (18%) | 12 (24%) | 9 (18%) |
| New Plymouth | 24 (48%) | 12 (24%) | 10 (20%) | 4 ( 8%) |
| Rotorua | 19 (38%) | 7 (14%) | 15 (30%) | 9 (18%) |
| TOTALS | 63 (42%) | 28 (18.6%) | 37 (24.6%) | 22 (14.6%) |

*The samples of 50 cases were in each case sequentially numbered files with a random starting number. The categories "individual" and "organisation" are, of course, woefully crude. A party was classified as "organisation" where it was a company, city council, club, association, trade union, etc. Needless to say, some "individuals" are economically powerful, and some "organisations" are in reality struggling individuals. However, methods should be chosen to suit needs: the present need is to determine whether the New Zealand Tribunals have been co-opted by commercial associations.

On the basis of this limited study, it is not true of the New Zealand scheme that "organisations" predominate as claimants.

Overseas studies suggest that individual litigants appear most often as defendants, but this seems not to apply to the New Zealand context at present. By far the most frequent situation pits an individual against another individual and, indeed, individuals pursue organisations more frequently (24.6%) than organisations pursue individuals (18.6%).

In its submission to the Committee hearing evidence on the proposed small claims legislation, the Consumer Council had reported on a study carried out by Consumers' Institute in 1973 into over 2000 claims under $300 in Magistrates Courts in five New Zealand cities. One of its findings was that:

> in 82% of the claims a corporate identity was suing an individual. In only 1% of cases was an individual suing a corporate identity, and in 16% of cases individuals were suing individuals.

The results of the limited study on the earliest New Zealand Tribunals present an encouraging reversal of both the earlier Magistrates Court profile and of the generalisation reported from overseas. However, it may be only as business groupings of various kinds begin to develop strategies for maximising the usefulness to them of the Tribunal system that it will become clear whether the legal and administrative filters are adequate.

## 2 Guarding against arbitrariness

An example of the sort of well-intentioned and apparently harmless action which can erode the integrity of a system aiming at "justice without much law", to adapt Roscoe Pound's phrase cited at the outset, is provided by the following. Study of the Departmental files shows there to have been a few cases in which dissatisfied litigants have written to their Member of Parliament, or to the Minister, or to the Department, complaining that jurisdiction has been declined by the Tribunals. There then follows a process of consideration ending sometimes in a reversal of the decision against jurisdiction. There may be a danger that this process, on the face of things rather like an informal appeal system proceeding without the knowledge of the respondent, could introduce an arbitrary element.[30]

The introduction to this study attempted to stress the danger to the development of a healthy small claims jurisdiction which would arise from any widespread sense of arbitrariness or incoherence in the system. In the writer's view, the present New Zealand legislation has made the correct choices as to the fundamental elements for a small claims system. Of particular significance are the freedom from legal rules, the exclusion of advocates, the duty placed on Court officers to assist, and the determination to scrutinise claims to prevent simple debt-collecting. However, it may be with the proliferation of Tribunals to full national coverage, and a consequent increase in opportunities for comparison, contrast and comment, that the real test is still to come. It is of particular importance that both Referees and Court officers with responsibilities in the small claims area have opportunities, indeed duties, to confer among themselves on a regular basis in order to harmonise to the greatest degree possible the methods and principles they apply. It should be remembered that the operators of the small claims system do not enjoy the flow of law reports and journals which perform this function for Judges in the ordinary Courts.

# APPENDIX A

## Six Case Descriptions

*The writer was permitted to observe hearings before the Tribunals in Christchurch, New Plymouth and Rotorua. Hearings are normally held in private, as required by s 25 of the Act, but there is a proviso under which the Tribunal may consent to the presence of "a person who has a genuine and proper interest . . . in the proceedings of Tribunals generally" (s 25(3) of the Act). The accounts are necessarily impressionistic.*

### 1 The concrete case

The claimant-tradesman had performed some concreting work for a building contractor. He claimed $470 and appeared before the Tribunal in work-clothes with cement on his hands — he had clearly come straight from a job. The respondent had declined to pay anything because, he claimed, a substantial proportion of the job had failed and required the expensive attention of another tradesman. The claimant replied that *he* would have put the job right had he been informed of the state of affairs. The respondent asserted that he *had* been so informed. It became obvious that the notification to the claimant had come after an opinion had been obtained from another tradesman, and that the claimant had resented the intrusion and "washed his hands" of the job. The bargaining session was becoming rowdy, with both parties reciting their long, trouble-free experience, etc, when the Referee asked pointedly whether she should open a window in the room since the parties seemed a little warm. This had a very calming effect and the respondent offered to pay $150. The claimant held out for $200. The Referee awarded $200 at the end of a hearing lasting about an hour.

### 2 The motor vehicle accident case

The claimant sought to recover $50, being an "excess" which the insurer required on the repair bill to a motor vehicle following an accident said to be the fault of the respondent. The respondent was a 16-year-old youth whose mother had accompanied him to the waiting-room. The Referee asked the youth whether he wished his mother to be present at the hearing, and after some hesitation the mother was brought in. The evidence as to the circumstances of the accident was highly conflicting and it was clear that compromise was unlikely since it would require one or both sides to repudiate their own versions of the accident. A Traffic Officer who had attended the scene after the accident and who was called as a witness by the claimant gave evidence which seemed marginally helpful to the claimant. He was cross-examined by the respondent and his mother. The Referee decided that the claim for $50 succeeded, and discussed the timing of the payments with the youth and his mother. The hearing lasted about 45 minutes.

### 3 Sharemilking gone sour

The parties were formerly in a sharemilking arrangement with a traditional legal agreement, a provision of which required the respondent to keep equipment in good repair. Unhappy differences having arisen between the parties (there being considerable disagreement as to the causes), the arrangement was ended. The claimant alleged that a rotary mower was not in repair and sought the cost of refitting. The respondent argued that he had never enforced the full extent of *his* rights under the agreement. The legacy of bitterness was clearly such that compromise was unlikely. Much brandishing of alleged legal rights occurred. There was also doubt whether the claimant had notified his complaint within 3 months of termination as required by the agreement. The Referee should perhaps have informed the parties that he was not bound by these legal provisions. On the other hand, it is arguable that a case with so high a legal component should not have been transferred from the District Court. The Referee awarded $241 to the claimant but the respondent declared his intention of filing his own action in the District Court. The dispute could not be regarded as disposed of.

### 4 The asparagus case

Here the claimant was the head of a small company supplying plants for horticulture. Asparagus plants to the value of $450 had been supplied to X and the respondent on the basis (the supplier claimed) that X and the respondent were partners and jointly liable. X had left the area and the suppliers now sought recovery of the remainder of the price from the respondent. The respondent claimed that his contribution to the joint venture had been to provide the land and some of the labour, he denied that any partnership existed, and asserted that the plants were X's. The matter was complicated by some evidence that the respondent had, by words and conduct, assumed responsibility for payment. When it was clear that agreement could not be reached, the Referee decided in favour of the claimant-supplier partly on the basis that the debt had been accepted and partly on the equitable ground that the respondent grower had the plants and could soon expect a crop.

### 5 The bush contractor case

The claimant was a Maori bush-cutting contractor who had been pursued to default judgment by a Pakeha repairman and was now, in turn, seeking a sum from the repairman for machinery which he claimed was left with the repairman on the understanding that it was to pay or reduce the outstanding repair account. The default procedure, which had taken place whilst the claimant was away, and which had added legal costs to the bill, had so angered the claimant that he had declined to pay anything. The parties were courteous towards each other and prepared to see that a misunderstanding had arisen as to the machinery. The Referee skilfully steered the parties towards a compromise and ingeniously "constructed an outcome" which left undisturbed the existing judgment against the claimant by arranging an exchange of cheques through the Court Office. There is no doubt that such a solution could not have been reached through any other process. The hearing lasted a little over half an hour and both parties were clearly pleased at the ending of a long-standing dispute.

**6 The unfinished steps**

The tradesman claimant had contracted to build garden steps for $69. The respondent, an articulate lady, explained that completion of the work had been slow and that whilst her sons were visiting her they took over the job and finished it. At her sons' suggestion she had offered the tradesman $20. The tradesman refused, claiming $40 for his work. The tradesman was clearly offended that "his" job had been taken over, whilst the lady recited the delays which had led to her frustration. When the time came for the bargaining session, the lady offered to pay $30 and this was accepted. In a sense both parties had received some validation for their grievances. The hearing had lasted half an hour.

# APPENDIX B

## TRIBUNAL ACTIVITY FOR YEARS 1978, 1979 AND 1980 AS REPORTED BY COURT OFFICES

| | Christchurch | | | New Plymouth | | | Rotorua | | | Invercargill | Gisborne |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1978 | 1979 | 1980 | 1978 | 1979 | 1980 | 1978 | 1979 | 1980 | 1980 | 1980 |
| **Applications filed** | | | | | | | | | | | |
| First instance | 607 | 673 | 647 | 119 | 228 | 122 | 193 | 228 | 229 | 60 | 23 |
| Referred by Court | 231 | 178 | 164 | 64 | 60 | 40 | 43 | 60 | 47 | 13 | 8 |
| TOTAL | 838 | 851 | 811 | 183 | 288 | 162 | 236 | 288 | 276 | 73 | 31 |
| **Type of application** | | | | | | | | | | | |
| Goods supplied | 176 | 174 | 146 | 33 | 24 | 14 | 25 | 24 | 36 | 18 | 4 |
| Work done | 288 | 289 | 278 | 48 | 84 | 32 | 74 | 84 | 75 | 30 | 10 |
| Motor vehicle accident | 207 | 216 | 192 | 46 | 48 | 83 | 37 | 48 | 60 | 6 | 6 |
| Other | 167 | 172 | 195 | 56 | 132 | 33 | 100 | 132 | 105 | 19 | 11 |
| **Claims settled prior to hearing** | 88 | 99 | 123 | 39 | 27 | 28 | 17 | 27 | 27 | 12 | 5 |
| **Claims settled by agreement at hearing** | 79 | 128 | 110 | 16 | 16 | 8 | 4 | 16 | 31 | 10 | 3 |
| **Orders made by Tribunal** | 616 | 685 | 525 | 153 | 164 | 95 | 116 | 164 | 121 | 34 | 11 |
| **Applications for enforcement** | 56 | 94 | 83 | 25 | 47 | 8 | 24 | 47 | 46 | 3 | 2 |
| **Applications referred back to Tribunal** | 10 | 7 | 27 | 0 | 7 | 3 | 0 | 7 | 6 | 1 | 0 |
| **Number of sittings** | 222 | 240 | 220 | 43 | 42 | 38 | 43 | 42 | 34 | 29 | 16 |
| **Cost of Tribunal ($NZ)** | 13004 | 15811 | 19961 | 2776 | 2909 | 2816 | 2736 | 2909 | 3146 | 2850 | 526 |

# APPENDIX C

## Further statistical information based on Tribunal activity 1978, 1979 and 1980

TABLE A — Referrals by Magistrates (District) Courts as percentage of applications to three Tribunals

| | Total Applications | Referrals | Percentage |
|---|---|---|---|
| **Christchurch** | 2500 | 573 | 23% |
| **New Plymouth** | 633 | 164 | 26% |
| **Rotorua** | 800 | 150 | 19% |
| TOTALS | 3933 | 887 | 22.5% |

## APPENDIX C (continued)

TABLE B — Types of application as percentage of total applications to three Tribunals

| | Goods Supplied | Work Done | Motor Vehicle Acc |
|---|---|---|---|
| **Christchurch** | 20% | 34% | 25% |
| **New Plymouth** | 11% | 26% | 28% |
| **Rotorua** | 16% | 32% | 24% |
| TOTALS | 16% | 32% | 24% |

TABLE C — Claims settled by agreement at hearing as percentage of cases heard by three Tribunals

| | Cases Heard | Settled by Agreement | Percentage |
|---|---|---|---|
| **Christchurch** | 2143 | 317 | 15% |
| **New Plymouth** | 452 | 40 | 9% |
| **Rotorua** | 452 | 51 | 11% |
| TOTALS | 3047 | 408 | 13% |

1 William Swainson, *New Zealand and its Colonization*, London, Smith & Elder & Co, 1859, p 177.

2 *Royal Commission of the Courts* (1978), Govt Printer, Wellington, p 15.

3 C D R Ward, *New Zealand Parliamentary Debates*, 1856, p 153

4 *An Ordinance to Establish Courts of Requests*. 1844 Session III, No 8. Repealed by the *Resident Magistrates' Act* 1867, No 13.

5 Roscoe Pound, *An Introduction to the Philosophy of Law*, Yale UP, (1954) p 54.

6 The law is stated as at May 1981. At that date five Tribunals were operating: Christchurch, New Plymouth and Rotorua (established 29 March 1977) and Invercargill and Gisborne (established 7 April 1979). Four further Tribunals in the Auckland area began work in June 1981, and in June of this year four more, at Hamilton, Palmerston North, Upper Hutt and Dunedin.

7 Section 15(1) of the Act. Over a period of three years in the Tribunals at Christchurch, New Plymouth and Rotorua, an average of 13% of cases heard were settled by agreement at the hearing, see App C, Table C.

8 T Ison, "Small Claims", 35 *Modern Law Review*, p 18, pp 30-31.

9 L Fuller, "Collective Bargaining and the Arbitrator", *Wisconsin Law Review*, Vol 3, (1963) p 3. Fuller discusses a range of approaches and offers criticism of both extreme views. The "Bush Contractor"case described later in this study provides a good example of the broad approach. (See App A, Case 5).

10 Section 34 of the Act, which is discussed later.

11 In *Elliott v Hamilton* 2 NZ Jur 95, Richmond J had observed that ". . . the power of the Resident Magistrate's Court to decide otherwise than according to law must be taken to be subject to an implied proviso that this power shall not be used to give effect to transactions prohibited by a penal statute" (p 97). In *Mete Kingi v Davis* 1 NZ Jur NS 117, Prendergast CJ had declined to review a decision made explicitly under the equity and good conscience jurisdiction.

12 The strong impression is that in Tribunals other than at Rotorua (the legally trained Referee), the Referees regard acceptance of a claim by the Court Staff as settling the jurisdiction question. The process at the counter must be seen in the context of the requirement that Court Staff actively assist a claimant, see note 17.

13 *Holt v Mackham* (1923) 1 KB 504,513. Quoted in T J Sullivan, "The Concept of Benefit in the Law of Quasi-Contract", *Georgetown Law Journal*, Vol 64 (1975) p 1.

14 See App C, Table B which reveals that an average of 24% of all cases are of this type.

15 There are Boards in Auckland, Wellington, Christchurch and Dunedin. Wellington must be high on the list of candidates for new Tribunals.

16 Letter to Mr A Friedlander MP, 22 Jan 1981, Justice File Leg 8/4/5. This "sense of injustice" is an elusive quarry: it may be countered that some disputants over very large sums of money are anxious to secure arbitration outside the legal system.

17 Minister of Justice, Mr J K McLay to Mr A Friedlander MP, 2 Nov 1979. Justice File Adm 31/20/1.

18 See, for example, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

19 Section 15(4), but only, it is suggested, with respect to the rights of parties *inter se*.

20 *The Queen v Small Claims Tribunal*, Queensland Supreme Court, No 31 of 1977. The Queensland scheme shares a number of features with the New Zealand system, including the possibility of non-legal adjudicators and a ban on legal representation.

21 William Felstiner, "Influences of Social Organization on Dispute Processing". *Law and Society Review*, Vol 9 (1974) pp 63, 73. The emphasis is the present writer's.

22 It happens that the non-lawyer Referee whose work the writer observed in Christchurch showed the same skill in "constructing an outcome" (to use Felstiner's expression) for the disputes before her as did the lawyer-referee in Rotorua. Both can be regarded as very successful Referees.

23 See App C, Table A: 22% of applications originate in this way.

24 The writer understands that there is, in some cases, a policy of automatic transfer by the Court staff without reference to the parties.

25 Section 29 of the Act. Some Tribunals appear to have disregarded this prohibition on occasions.

26 A rough average for that time span from the writer's observation is four weeks although difficulties in serving documents can extend that considerably.

27 "Why the 'Haves' Come Out Ahead; Speculations on the Limits of Legal Change", *Law and Society Review*, Vol 9 (1974) p 95.

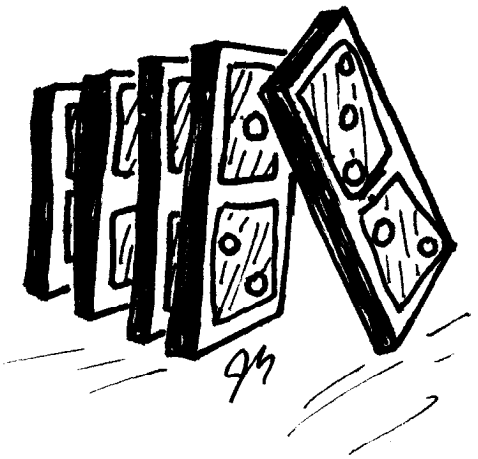
28 Beatrice Moulton, "The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California", 21 *Stanford Law Review* (1969), p 1657.

29 Moulton pp 1660, 1676.

30 Apart from the danger to the *audi alteram partem* principle, it is probably better that this process should not depend on the mediation of political representatives.

# Compensation for the "mental consequences" of an accident — an addendum

*A P Blair*



IN my article on "Mental Consequences", *[1982] NZLJ 105*, I referred to a decision of the Court of Appeal, *McLoughlin v O'Brian* [1981] 1 ALL ER 809 as authority for the proposition that the Courts may be guided by "policy considerations" in deciding whether a duty of care is owed to a plaintiff claiming mental injury though physically remote from the accident alleged to have caused the mental damage. In that case, the plaintiff was the wife and mother of the accident victims and was two miles away when the accident occurred. She became mentally disturbed after hearing of the accident and later seeing her family in hospital. The Court of Appeal decided that, though her nervous shock could be regarded as reasonably foreseeable by the defendant, policy considerations prevented the duty of care being extended to her in the circumstances.

I suggested in my article that the "policy considerations" approach might also be resorted to in mental injury claims under the Accident Compensation Act where the claimant was physically remote from the scene of the accident alleged to have caused the injury or generally where the association between accident and mental damage is unclear. It is hardly necessary to mention that, while under a statute the policy of the law is governed by the terms of the statute itself, the ability to use policy considerations in the common law is less restricted. While the judiciary does not purport to create law, it is inherent in our system that the Judges will develop and adapt the common law to changing conditions — *Donoghue v Stevenson* is an obvious example.

The Court of Appeal's decision in *McLoughlin's* case has now been reversed by the House of Lords (the only report presently available to me is that in *The Times*, 7 May 1982). Their Lordships held that the Court of Appeal was wrong to dismiss this claim on public policy grounds when it had found that the mental injury was a reasonably foreseeable result of the defendant's negligence. With regard to the views of their Lordships on the influence that policy considerations should have in negligence cases of this nature, it is interesting to notice the varying opinions of the five Judges. These were summarised in last month's Editorial "Following the logic of reasonable responsibility" [1982] NZLJ 189, which commented that the decision "gives a slight feeling of living dangerously."

It might be said that the law has always lived dangerously in dealing with problems of causation. Lord Simon once said that the problem of cause and effect was something which on various aspects had long vexed the human mind, and few lawyers would disagree. Different tests such as "foreseeability", "proximate cause", and the "but for" test, have been employed from time to time, but each has its limitations. It is suggested that the "policy considerations" approach is just one of the devices which the law may use to find the liability cut-off line in claims where the association between the damage complained of and its alleged cause is remote or blurred. In the House of Lords case just referred to, it may be thought that Lord Wilberforce was applying policy considerations when he indicated that the right to damages for shock suffered by persons not at the scene of an accident would be affected by the closeness of the relationship between the person claiming nervous shock damage and the accident victim. He said, "the closer the tie, the greater the claim for consideration".

Like Judges in negligence actions, the administrators of the Accident Compensation Act are compelled to grapple with causation problems. Though not concerned with fault or foreseeability, the Corporation must satisfy itself that the damage complained of was the *consequence* of an accident. In dealing with, say, a claim for nervous shock by a person not physically involved in an accident, the statute itself does not have any express provisions. Whether cover can be granted in a particular case may depend upon the application of policy considerations to the particular facts, eg the closeness of the personal relationship between claimant and accident victim. The question that must be answered is — what is the policy of the Act in the kind of case referred to? That question can only be answered by reference to the intention and philosophy of the Act as revealed by the phraseology used in the statute. This in my opinion is an application of policy considerations.