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Status of the profession

The suggestion by the Attorney-General that he proposed to "restructure" the legal profession so soon after the new Law Practitioners Act had come into force will have been a shock to many lawyers.

Be that as it may, however, there is an even more serious issue involved. In this country it is not at all unusual for professional bodies to have a statutory constitution. There has always been an "understanding" amounting to a convention, although not of course a Constitutional Convention, that the statute constituting the professional bodies was passed by Parliament with the advice and consent of the professional body in question. The reason for this is simply to emphasise that the professional bodies are not the creation of the State nor its creature.

Any suggestion that the Government could simply reorganise the Law Society of its own volition, and for its own particular political purposes, irrespective of the wishes of the legal profession should surely be anathema to anyone concerned with the idea of political freedom. It is not a question of whether the Government can legislate to change the structure of a professional body, even against the wishes of its members, but whether in fact it ought to do so.

To some considerable extent it appears the issue that is raised comes about because the Government is unwilling to argue the case for a distinction between a trade union and a professional body. This in itself is disturbing. A very fine exposition of the difference was made by Professor C Northcote Parkinson (of Parkinson's Law fame) in his book on socialist thought and practice *"Left Luggage"* published in 1967. The few pages on this topic of the professions are written with Professor Parkinson's customary verve and vigour. One does not need to accept everything he says in order to recognise the value of the essential points that he makes in his argument.

Those who are interested can read the whole passage for themselves at pp 66 to 70. A few extracts will, however, indicate the general line of his argument.

> Seekers of professional status have voluntarily limited the area of competition. Whereas the fishmonger might conceivably wish to drive all other fishmongers out of business, the dentist has accepted the idea that the other dentists are almost equally useful to the community. He joins with them in asserting the respectability of his calling and theirs, as also in barring from practice all those not properly qualified. Grocers or tailors may war with each other until half of them are bankrupt, but there is no comparable rivalry among chartered accountants or veterinary surgeons.
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> One might expect to find that the aim of these quasi-professional associations is to raise or maintain their members' income. The fact is, however, that their discussions centre more often upon entrance qualifications, educational programmes, examinations and prizes for excellence and current research into the arts or sciences with which they are concerned. With their interest in professional status goes a sense of responsibility towards the public and towards the pursuit of knowledge. . . . There are many actions which a professional etiquette must make impossible and these are broadly the deeds which seem ungentlemanly. The member of a professional association has a respect for the public and a still greater respect for himself.
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> Among the Labour Unions, by contrast, there is little talk of service to the community. The average Trade Union offers little more than a tried and traditional method of gaining higher wages by working for fewer hours; a method which depends upon the wage earners' unity of purpose.

Whether one agrees with Professor Parkinson's description of the function of a trade union or not he does at least make a valid point as to the distinction between the two types of body. What one must be excused for suspecting in the Government's present view of maintaining that the same issue of voluntariness should apply to professional organisations as to trade unions, is of course an attempt to pretend that the proposals are not an attack on the trade union movement as such, but are concerned with some larger philosophical principle. The confusion in the Minister's attitude is indicated by the fact that he feels that it will be necessary to set up two bodies in place of the Law Society when there is no demand or expectation of any such need from either the members of the legal profession or from the general public.

If this change is forced on the legal profession against its will, or even accepted grudgingly by the legal profession against its better judgment, then the situation will be one where the legal profession is clearly seen to be subordinate to and indeed a creature of the executive government.

P J Downey

Law Society reaction

The initial reactions of lawyers as expressed through the New Zealand Law Society and the Auckland District Law Society to the suggestion that compulsory membership by legal practitioners of their professional association would be abolished, was moderately worded but clear. The statement made on behalf of the New Zealand Law Society and that made by the Auckland District Law Society are reproduced in full below.

NZ Law Society

The Acting President of the New Zealand Law Society, Richard Collins, confirmed today that the Society had not received any letter from the Minister of Justice, the Hon J K McLay, about plans to introduce voluntary membership of the Law Society. Mr McLay told representatives of the news media last week that such a step was contemplated.

Mr Collins said he and his fellow Vice-Presidents, with whom he had discussed the matter, were puzzled that a proposal of this nature might be made only five months after the new Law Practitioners Act had come into force. Years of time and effort on the part of the Law Society and a great deal of attention by Members of Parliament had gone into the preparation of the Law Practitioners Bill and it was given a thorough airing in Parliament and by the Statutes Revision Committee. Many people and organisations made submissions on it but not one of these suggested voluntary membership of the Law Society. "As far as we can recall no-one on the Statutes Revision Committee mentioned it," said Mr Collins.

When the Bill came into the House the Minister himself said, "In my view, the enactment of this measure will provide the Law Society with a solid legislative foundation upon which to continue its task of taking the practice of law into the latter part of the 20th century." "However," said Mr Collins, "the Minister's statement of last week seems to be a complete reversal of direction related more to the concept of voluntary unionism than to effective restructuring of the Law Society."

"The Society," Mr Collins continued, "has clear public functions spelt out for it in the Law Practitioners Act and in the performance of these functions the present organisation seems to us to be ideal. The Law Society has not shied away from public participation in its affairs. The Society itself with Government approval initiated lay participation in the complaints and disciplinary processes. We cannot see the need for such early reappraisal of the structure of the Society, particularly if this is likely to lead to the creation of an expensive new quango."

Auckland District Law Society

The Council of the Auckland District Law Society has unanimously resolved to oppose any proposal to make membership of law societies by practising barristers and solicitors voluntary.

The objects for which the New Zealand Law Society and district law societies exist are set out in s 4 of the Law Practitioners Act passed only last year. The first of these objects is "to promote the interests of the legal profession and the interests of the public in relation to legal matters". By subscribing the considerable sums that they do to enable the law societies to function, members of the legal profession are in effect taxing themselves to provide services in large measure designed to further the public interest.

The Law Society is a watchdog dedicated to protecting the public. Stamping out malpractices, speaking out on public issues and the presentation as a public service of submissions to parliamentary select committees are all examples of the ways the public interest is served by the law societies. These have no counterpart in industrial union activities.

To perform their watchdog role effectively, the law societies must be able to speak for all members of the legal profession. It is more important that there should be strong and effectively functioning law societies than that a system which has worked well for a long period should be thrown over merely to enable the present government to achieve an industrial pattern.

INTERNATIONAL PRIZE TO LAW LECTURER

Dr Jerome Elkind, a Senior Lecturer in the Auckland University Law School, has been awarded a rare prize by the Institut de droit international, an exclusive European-based organisation of international lawyers.

Born in the United States, Dr Elkind graduated BA from Columbia University and JD from New York University, and later completed an LLM at King's College, London, in the field of international law. He has been on the staff of the Auckland Law School since 1973.

The award to him of the Prix Francis Lieber, worth 4,000 Swiss francs ($2,800), was announced at a session of the institute held in Cambridge, England. Membership of the institute is limited to 132 international lawyers from all over the world.

The Information Officer of the University of Auckland explained in a statement that the competition won by Dr Elkind was established in 1937 by Professor James Brown Scott. Every few years the institute sets a topic, usually a problem on its agenda, and names that particular prize after a prominent historical figure.

For the Prix Francis Lieber the topic was "Non-appearance before the International Court of Justice", and Dr Elkind made a functional and comparative analysis of this. His study will be published by Martinus Nijhoff at the Hague.

The institute has awarded such prizes only half a dozen times since 1937. The winners have included the Secretary of the International Court of Justice.

Case and Comment

Shareholders' Protection

Section 209 of the Companies Act was substantially amended in 1980. In particular, the ambit of the section was extended to cover acts which were not only "oppressive" to a shareholder, but also "unfairly discriminatory, or unfairly prejudicial".

To date, it has been a matter for speculation as to what interpretation the Courts will place on these new words. Some guidance might be gained from the United Kingdom, which enacted similar amendments to its equivalent section in the Companies Act 1980 (UK) s 75.

Firstly, it is clear that the intention was to widen the basis for relief. The term "oppressive" had come to be given a fairly restrictive meaning, in that the petitioner had to establish some lack of probity on the part of the respondents.

Clearly the new standard will be less demanding of the petitioner in respect of the burden of proof and of the kind of conduct of which he is entitled to complain.

He will presumably have to show that prejudice or detriment has been caused to his rights, which is of such a nature as not to be "just, unbiased, equitable, or legitimate". It should be noted, however, that he will not be limited to having to show impairment of the value of his shareholding in the company, since the new s 209 expressly provides that the shareholder may petition where he is affected in his capacity as a shareholder "or in any other capacity".

The English provision came under scrutiny recently in the Chancery Division, in *Re a Company* [1983] 2 All ER 36. The basic facts were that a deceased testator had held a minority shareholding in a private family company. His executors were holding his shares for the benefit of his two young children. The shares were the only asset from which the executors could obtain money to maintain and educate the children, and pay Capital Transfer tax. The executors therefore wished to sell the shares. They realised that they would obtain a better price by selling to a member of the family than by selling to an outsider. However, no existing shareholder would buy the shares, neither would they agree to a scheme of reconstruction. Furthermore, the company would not exercise the power to buy its own shares, which had been conferred by ss 46 and 47 of the Companies Act 1981 (UK).

The executors presented a petition alleging that the company's affairs were being conducted in a manner which was unfairly prejudicial to them, because the company's failure either to formulate a scheme of reconstruction or purchase the shares prevented the executors from realising the full value of the shares. The executors also alleged that the proposed use of the company's assets to finance a wine bar business (an activity unrelated to the company's present interests) was unfairly prejudicial to them because if the proposal went through the company would have insufficient liquid resources to buy out the executors' shareholding. The petition sought either the formulation of a scheme of reconstruction or an order that the company's directors purchase the shares.

Lord Grantchester QC (sitting as a Deputy Judge) granted an application by the company to strike out the petition. He did so on the ground that the facts as pleaded could not prejudice the petitioners qua shareholders. (This obstacle was removed in New Zealand in 1980, see above.) Until a scheme of reconstruction was actually proposed, a member had no rights qua member in such a scheme; and, similarly, until a contract for purchase of the shares was entered into, a member had no rights qua member to have them purchased. As to the complaint regarding the wine bar, Lord Grantchester QC accepted the submission of counsel for the respondents that "unfair prejudice" could not arise from the mere consideration by the directors of different proposals for use of the company's assets.

The main obstacle to the petitioners, then, was one which does not exist in New Zealand. Therefore, the facts of the instant case could present at least an arguable case here. However, the situation is a little unusual, and there are potent arguments which could be raised against allowing a petition in such circumstances.

It could be said that there is (in the absence of an express provision in the Articles) no obligation or duty on the company or the other shareholders to buy out the petitioners, or indeed to assist them to realise their share in any way. The object of s 209 is not to assist a shareholder who wishes to sell his shares to do so at an advantageous price and thereby to gain preferential treatment.

Of course, the presence of other facts could tip the balance. For instance, if all of the dividends in a company were applied towards directors' fees, and a minority shareholder was removed from the office of director by the majority, then a refusal by the majority to buy out the minority could amount to unfair prejudice. Equally, any other evidence tending to show that the majority or the directors were actuated by anything other than the good of the company would assist a petitioner's case. It seems, however, that it would be dangerous in principle to allow petitions of this nature to be brought in circumstances where no such additional facts can be proved. One would think that Courts in New Zealand would be most reluctant to interfere in the management of a company to such an extent. Certainly, the history of s 209 has evidenced such reference previously.

Against all this, though, is the plain wording of the section. On the face of it, a petitioner need only prove objectively that he has suffered prejudice, to such a degree as to render it unfair. He apparently is not required any longer to show bad faith or lack of probity on the part of those who control the company. On this argument a petitioner in the position of the executor in the instant case could show at least an arguable case.

The answer to the question lies in the view which the Courts will take as to the extent of the new ambit of s 209. Some authoritative word on the matter is therefore awaited.

S Dukeson
Whangarei

Vendor and purchaser — Relief against forfeiture — Specific performance

In *Legione v Hateley* (1983) 57 ALJR 292 (HC), (noted [1983] ANZ Conv Rep 83), an agreement for sale and purchase was entered into on 14 July 1978 between Legione, the vendors, and Hateley, the purchasers. Settlement was scheduled for on or before 1 July 1979. The purchasers agreed to pay 8 percent interest on the balance of the purchase moneys from the date of the agreement until the date of settlement. Upon default, interest at 14 percent was payable. The agreement expressly provided that time was of the essence in all respects. However, before any remedy under the agreement could be exercised, notice had to be given to the defaulting party specifying the nature of the default and requiring the default to be made good within a period of not less than 14 days from the date of giving the notice.

The purchasers entered into possession and erected a dwellinghouse. Although not wilfully, they defaulted in paying the balance of the purchase price and the vendors' solicitors gave a notice requiring the purchasers to complete. In the notice, the rate of interest that was payable under the agreement was misstated. The purchasers' solicitors had a discussion with the vendors' solicitors' secretary and advised her that they required further time to settle. The secretary said "I think that'll be alright but I'll have to get instructions". However, the vendors purported to rescind the contract. The purchasers' solicitors denied the validity of the rescission on two grounds:

1 That the notice of default was invalid because the rate of interest had been misstated.

2 That the vendors were estopped from rescinding the contract because their solicitors' secretary had advised the purchasers' solicitors that the vendors would not exercise the right of rescission without giving further notice.

The purchasers sought specific performance of the contract and the vendors sought a declaration that the contract had been validly rescinded. The High Court held that, despite the misstatement of the interest rate in the default notice, the notice was valid. Further, the vendors were not estopped from rescinding the contract. However, notwithstanding that time was of the essence, the Court considered that it had jurisdiction to grant relief against the forfeiture of the purchasers' interest in the property. As this issue was not raised in the lower Courts, the case was remitted to the Supreme Court.

It is submitted that the Court correctly decided that the default notice was valid, despite the misstatement of the interest rate. On a broadly similar point, note the New Zealand decision of *Parker v Rock Finance Corporation Limited* (23.9.81, CA116/78, noted *Capital Letter* 4/37; [1981] Butterworths Current Law para 941).

It is also submitted that the Court correctly decided the issue of estoppel. Gibbs CJ and Murphy J considered that the secretary's statement to the purchasers' solicitors constituted a representation, binding upon the vendors and the vendors' solicitors, which made it inequitable for them to plead that time was of the essence and to rely on non-compliance with the default notice as a ground for rescinding the contract. However, the majority of the Court (Mason, Deane and Brennan JJ) disagreed. Even if the secretary had authority to make statements of the kind suggested, her statement had been equivocal.

It is submitted that the Court's discussion of the principles relating to relief against forfeiture is not without difficulty. All members of the Court (except Brennan J) considered that equity had jurisdiction to relieve a defaulting purchaser not only against forfeiture of instalments but also against forfeiture of the purchaser's interest in land (by decreeing specific performance). The question was in what circumstances equity could exercise this jurisdiction.

Gibbs CJ and Murphy J referred to *Shiloh Spinners v Harding* [1973] AC 691, where Lord Wilberforce considered that, although equity generally expects parties to abide by their bargain, equity will grant relief against forfeiture where the forfeiture clause is intended to secure a stated result (eg the payment of money) which can be attained when the matter comes before the Court — ibid, pp 722-723. The Judges considered that it was not necessary for the forfeiture provision to be penal in nature in order for equity to have jurisdiction. (Cf *Stockloser v Johnson* [1954] 1 QB 476.) However, if the provision must be penal, then the Judges considered that the provision in the present case was penal — ibid, pp 298 — 299.

Assuming jurisdiction, the next question was whether equity could relieve a defaulting purchaser when time is of the essence. Gibbs CJ and Murphy J considered that relief would have been possible in these circumstances prior to 1916. The Judges cited *Kilmer v British Columbia Orchard Lands Limited* [1913] AC 319 in particular for this proposition. In that case, the purchaser had defaulted under an agreement for sale and purchase with respect to the second instalment and the vendor extended time for payment. When the instalment was not then paid, the vendor rescinded the contract. The vendor sought to enforce a forfeiture provision and the purchaser sought specific performance. The judgment of the Privy Council (delivered by Lord Moulton) concentrated on the question of relieving the purchaser from forfeiture (of the instalment paid). Relief was granted as the forfeiture clause was regarded as a penalty. Although specific performance was also decreed in favour of the purchaser, the decree was referred to only incidentally. (The head note to the case does not refer to the decree.)

Kilmer was explained in *Steedman v Drinkle* [1916] 1 AC 276, 279 as being a case where time had ceased to be of the essence. However, Gibbs CJ and Murphy J preferred the interpretation of *Kilmer* given by Dixon J in *McDonald v Dennys* (1933) 48 CLR 457. Dixon J considered that in *Kilmer*, the Privy Council had relieved against forfeiture of the purchaser's interest rather than against forfeiture of instalments paid by the purchaser — ibid, p 478. On this interpretation, in the view of Gibbs CJ and Murphy J, *Kilmer* demonstrated that relief could be granted even when time is of the essence — ibid, pp 299-300. However, the Judges pointed out that the law was considered to have changed as the result of the decisions in *Steedman v Drinkle* (supra) and *Brickles v Snell* [1916] 2 AC 599 and these cases had been followed in Australia.

In *Steedman v Drinkle*, Viscount Haldane (delivering the judgment of the Privy Council) refused to decree specific performance because time was of the essence. However the case was remitted to the Court of first instance for the purchaser to obtain relief against forfeiture of instalments on terms considered appropriate by that Court.

Steedman v Drinkle was followed in *Brickles v Snell* (supra) where the purchaser sought specific performance. (There was no claim for relief against forfeiture.) Again, it was considered that because time was of the essence and because the parties had freely negotiated the contract, specific performance should be refused — ibid, pp 604-5. (Most of the

case was involved with the question of whether the vendor was ready and willing to perform, so as to be entitled to rescind and forfeit the instalments paid by the purchaser.)

Gibbs CJ and Murphy J considered that it was not explained in *Steedman v Drinkle* why the purchaser should have been relieved against the forfeiture of instalments but not against forfeiture of his interest under the contract – ibid, p 300. The Judges postulated that *Stickney v Keeble* [1915] AC 386 may have been considered, in *Steedman v Drinkle*, as demonstrating that specific performance should not be decreed when time is of the essence. (This postulation is surely well founded. In *Steedman v Drinkle*, Viscount Haldane expressly stated that specific performance could not be decreed because time was of the essence – ibid, p 279.) But, in their view, *Stickney v Keeble* did not deal with the question of relief against forfeiture and could not be regarded as an authority for the proposition that specific performance could not be decreed, in order to relieve a defaulting purchaser against the forfeiture of his interest, when time is of the essence. (With respect, it is submitted that specific performance and relief against forfeiture are simply opposite sides of the same coin. When specific performance is granted to a defaulting purchaser, the purchaser is relieved against forfeiture, ipso facto. It is therefore submitted that *Stickney v Keeble* (supra) cannot be sidestepped as easily as Gibbs CJ and Murphy J have suggested.)

Gibbs CJ and Murphy J considered that the three Privy Council cases taken together were unsatisfactory and that a reinvestigation of the position was required. The Judges formulated the principle to be applied as follows – ordinarily, when time is of the essence, it would be inequitable to decree specific performance to a defaulting party. However, there might be occasions when specific performance should be decreed where this would not cause injustice to the innocent party. In the preseant case, the purchaser was in possession, had built a house and had not defaulted deliberately. The Judges considered that it would be harsh to strictly enforce the vendors' rights in these circumstances. However, as the case had not been argued on this basis in the Supreme Court, it was remitted to that Court on the question of relief against forfeiture and for assessment of the vendors' damages – ibid, p 300.

Mason and Deane JJ also considered that *Steedman v Drinkle* and *Brickles v Snell* were unsatisfactory and that Dixon J's analysis of the cases in *McDonald v Dennys* (supra) should be accepted – ibid, p 306. The Judges considered that equity will relieve a defaulting purchaser whenever a vendor endeavours to exercise a legal right in an unconscionable manner. In their view, the present case did not involve any question of a penalty (relief against forfeiture of instalments), but of relief against forfeiture of the purchasers' interest in the land. They considered that it was important to distinguish between these types of actions because the availability of specific performance has been considered to be crucial to a purchaser who seeks relief against forfeiture of his interest under the contract. The traditional view has been that the purchaser's interest is only commensurate with his ability to obtain specific performance – ibid, pp 307-308. (The Australian authority is *Brown v Heffer* (1967) 116 CLR 344, 349.) In this respect, a defaulting purchaser faces a Catch-22 because the traditional view, deriving from *Steedman v Drinkle* and *Brickles v Snell*, has been that a defaulting party cannot obtain a decree of specific performance when time is of the essence – ibid, p 308. Mason and Deanne JJ resolved this matter by stating that, on a correct interpretation, *Steedman v Drinkle* and *Brickles v Snell* did not deny the existence of an equitable jurisdiction to grant relief against forfeiture when time is of the essence, but merely its exercise on the facts of those cases. (With respect, it is submitted that this analysis of the cases is incorrect.) While the Judges accepted that, ordinarily, when time is of the essence, specific performance should not be decreed, they considered that if there be fraud, mistake, accident, surprise or some other element which would make it unconsionable or inequitable to insist on the forfeiture of the purchaser's interest under the contract, there would be no injustice to the vendor in granting relief against forfeiture by decreeing specific performance with or without compensation. Thus, in the view of Mason and Deane JJ, equity can decree specific performance in exceptional cases; for example, where the conduct of the vendor has been unconscionable – ibid, p 308.

However, Judges have not always been able to agree as to what conduct will be unconsionable. In *Mussen v Van Diemans Land Co* [1938] Ch 253, the vendor rescinded the contract and the purchaser sought relief against forfeiture of instalments paid. Farwell J stated that the mere insistence by the vendor on his contractual rights could not constitute unconsionability – ibid, p 262. In the view of Farwell J, where the purchaser is ready and willing to perform, equity might regard it as inequitable to allow the vendor to forfeit instalments and might decree specific performance – ibid, pp 263-4. However, except for this type of case, Farwell J knew of no other case where relief should be granted. As for *Steedman v Drinkle* (supra), Farwell J considered it to be a special case. The Judge considered that, although the Court could not have granted specific performance because of the express terms of the contract, the Court had been prepared to relieve the purchaser against forfeiture because the vendor might have waived time being of the essence – ibid, p 265. (With respect, this is incorrect. Viscount Haldane expressly stated that time was of the essence – ibid, p 279.) In the present case, time was of the essence and the purchaser had not been ready and willing to perform the contract. Accordingly, in the view of Farwell J, relief was not possible.

The majority of the Court of Appeal in *Stockloser v Johnson* (supra) rejected the notion that a purchaser could only obtain relief against forfeiture if he could demonstrate that, despite his default, he was now ready and willing to perform the contract. In that case, the purchaser sought relief against forfeiture of instalments when the vendor rescinded the contract. All members of the Court of Appeal agreed that forfeiture clause was not penal in nature, so that equity's jurisdiction was not called into play. Accordingly, their comments on the question of relief against forfeiture were obiter. Romer LJ considered that it was only in cases of fraud, sharp practice or other unconscionable conduct that relief against forfeiture (of instalments) could be granted. The Judge accepted Farwell J's view that the mere insistence on contractual rights is not unconscionable conduct. Equity generally expects parties to adhere to their bargain – ibid, pp 495-6; 501. Romer LJ also considered that when equity grants relief, it does so only by giving a party further time to perform. This was, in his view, the explanation of cases like *Kilmer* and it was therefore imperative that the purchaser be ready and willing to perform in order to obtain relief – ibid, pp 496-9. *Steedman v Drinkle* appeared to go further because relief was granted even though the purchaser was not ready and willing to perform. (Cf Farwell J in *Mussen* (supra).) However, Romer LJ pointed out that the question of relief against forfeiture was only incidentally considered in *Steedman v Drinkle* (specific performance being the main issue) and that the case was therefore

not a satisfactory authority for the view that an equity exists in a purchaser to recover instalments from a vendor who has rescinded the contract and who is contractually entitled to forfeit those instalments – ibid, p 499. Whatever the explanation of *Steedman v Drinkle*, Romer LJ considered that it was an exceptional case – ibid, p 501.

Sommervelle and Denning LJJ disagreed with Romer LJ and considered that relief against forfeiture (of instalments) was available in wider circumstances. (It is this view that has found favour in New Zealand – see *Hinde McMorland & Sim* para 10.080, p 1088.) In their view, the basic test is whether it is unconscionable for the vendor to retain the moneys – ibid, pp 484-5; 490. This does not, in the Judges' view, depend upon whether the purchaser is ready and willing to perform. They considered that readiness and willingness to perform relates to an action for specific performance – ibid, p 487; 489; 491. As for *Steedman v Drinkle* (supra), Denning LJ considered that relief was granted in that case not because the purchaser had been ready and willing to perform, but because the vendor had rescinded sharply and that it was unconscionable for the vendor to retain the moneys – ibid, p 491. (This is the third interpretation of *Steedman v Drinkle* in this line of cases.) In the view of Sommervelle and Denning LJJ, it was not unconscionable in the present case for the vendor to retain the moneys and relief against forfeiture was refused. (Remember that the question of relief against forfeiture was considered by way of obiter.)

In summary, it can been seen that there has been some confusion surrounding the actions for relief against forfeiture and specific performance. The cases cited and analysed in *Legione* have been variously rationalised. It is submitted that the actions by a defaulting purchaser for relief against forfeiture of instalments and specific performance should be distinguished. This would enable the separate criteria for "relief" in each action to be isolated. It would then be understood that the reason why the purchaser must be ready and willing to perform the contract in an action for specific performance is because he seeks to enforce the contract. However, if the purchaser only seeks relief against forfeiture of instalments paid, he seeks equitable intervention against the unconscionable conduct of the vendor. There is no question of enforcement of the contract and in fact, the purchaser seeks to persuade equity to relieve against the strict provisions of the contract.

The question arises as to what conduct of the vendor should be regarded as being unconscionable. It is clear that the mere insistence on his contractual rights (by rescinding the contract when time is of the essence) is not unconscionable conduct. There must be some other conduct of the vendor or some other reason which the purchaser must point to in order to persuade the Court that it would be unconscionable to allow the vendor to forfeit instalments.

Another question is whether cases like *Steedman v Drinkle* and *Brickles v Snell* should be accepted as authority for an inflexible rule that equity will never decree specific performance when time is of the essence. A more flexible principle would accord with the discretionary nature of the remedy of specific performance. However, it should be noted that the texts generally state that when time is of the essence, equity will not decree specific performance in favour of the defaulting party. (See for example, *Hinde, McMorland & Sim* para 10.083 p 1099.)

In New Zealand, a purchaser in possession (as was the purchaser in *Legione*) may apply for relief against forfeiture of his interest pursuant to ss 50 and 118 of the Property Law Act 1952. Section 118 derives from the law of Landlord and Tenant and is therefore couched in terms of relief against forfeiture rather than specific performance. However, on the authorities, s 50 extends the application of s 118 to agreements for sale and purchase where the purchaser is in possession. (See *Hinde McMorland & Sim* para 10.077 pp 1080-82.) It should be noted, incidentally, that cancellation under the Contractual Remedies Act 1979 does not affect the jurisdiction of the Court to decree specific performance – section 15(a).

S Dukeson
Whangarei

Problems of the inquisitorial system

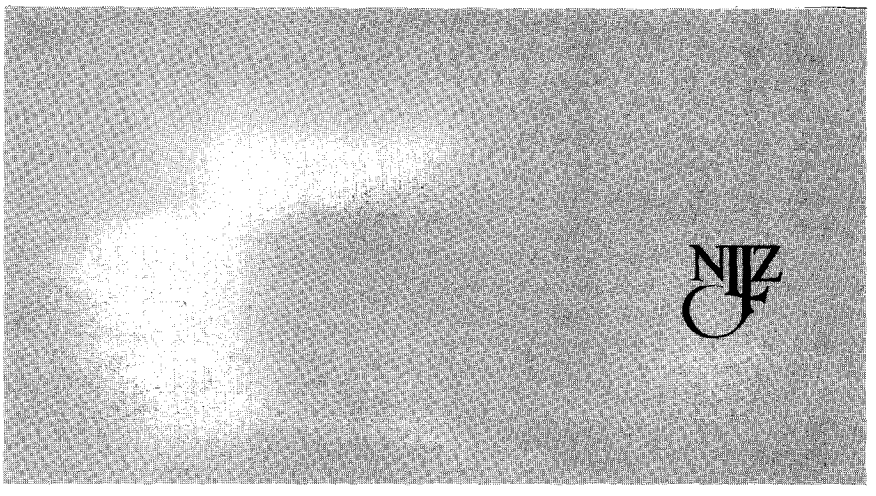
The recent oral judgment of Bisson J in *Lothian v Ministry of Transport* (unreported M108/83, Rotorua, 24 June 1983) is of interest in the importance it attaches to the role of the Judge in the adversarial system.

The appellant was charged with riding his motorcycle at a speed which, having regard to all the circumstances of the case, might have been dangerous to the public. He defended the charge, but was convicted in the District Court.

On appeal to the High Court, Bisson J expressed the view that in this case there did not seem to be any occasion for the appellant to be questioned by the Court because he could have been convicted on his own evidence. What had happened at the hearing, however, was that after the witnesses had been re-examined the District Court Judge embarked on a long series of questions, which in the view of Bisson J amounted to a cross-examination. His Honour noted that the questions asked by the prosecutor numbered 17 and those asked by the District Court Judge numbered 23.

There were two grounds of appeal. The first was not upheld. The second ground of appeal, however, was that the questioning of the appellant by the District Court Judge went beyond what could be regarded as proper. In this respect reference was made to two cases. The more recent was that of *Wilson v Collector of Customs* (unreported M604/79, Auckland Registry, 28 June 1979). In that case Thorp J had set out the classic judicial commentary on the desirability of judicial officers keeping themselves outside the forensic arena given by Denning LJ in *Jones v National Coal Board* [1957] 2 All ER 155 at p 159:

> The Judge's part in all this is to hearken to the evidence, only himself



asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a Judge and assumes the role of an advocate; and the change does not become him well.

As Bisson J pointed out in the case before him it was not a question of intervention but whether what was in effect a cross-examination by the District Court Judge "could reasonably have left the appellant with the belief that he had not had a fair hearing". His Honour considered that the questions asked were both unnecessary and undesirable. He considered that:

> The appellant could have been left with the impression that the case was not decided in a judicial weighing of the evidence but by a Judge who had entered into the arena and put him under pressure. . . . A conviction must only follow a fair trial, in which justice is not only done but seen to be done — in that the appellant deserved to be convicted — but unfortunately justice was not seen to be done.

The end result was that His Honour quashed the conviction and sentence, but added a sombre warning when he expressed the hope that the appellant would take heed of the wise words of the District Court Judge on sentence. "If he does not," His Honour said, "his days on this earth will be numbered."

This is a particularly apt illustration of the role of a Judge in the adversarial system which we have. There is much criticism of this system today and it is good to have a reminder that an inquisitorial system in which the judicial officer, who is going to have to decide whether to convict and if so what sentence to impose, can be seen by the accused as being biased because of the line of questioning that the Judge follows. Whatever value an inquisitorial system may have in attempting to affect a compromise settlement, as in family proceedings, it does not necessarily follow that it will be equally successful or appropriate in criminal proceedings.

P J Downey

Communications — What to say in front of who

J M von Dadelszen, Solicitor, of Hastings

The author continues the series of articles on the topic of effective communication the first of which is to be found at [1983] NZLJ 120. In that article incidentally some arrows in a diagram on p 121 were transposed and should have pointed in a clockwise direction. In this article he writes about the need to tailor the message and its presentation to the particular audience to be persuaded.

"The subject of oratory alone is not truth, but persuasion." (Lord Macaulay)

I THE APPROPRIATE TOPIC

1 General principles

To present a speech on the "Social and Moral Benefits of Massage Parlours, Sun Clubs and Abolition of Censorship" to the Society for the Promotion of Community Standards would be to select a patently inappropriate topic for the audience. This example highlights the need to tailor the subject-matter of a speech to the needs and attitudes of the audience. The style of presentation may also be influenced by the nature of the audience.

The subject-matter of any speech (whether or not it is presented in a legal context) should be:

- appropriate to the audience;
- appropriate to the purpose;
- appropriate to the time available;
- appropriate to the speaker.

The purpose of communication is to bridge the gap between the speaker and the audience. The speaker's first consideration must therefore be the audience. No matter how strongly the speaker may feel about the subject-matter and how it should be presented it may well be that the audience does not have the same interest in the subject. That interest must be aroused, stimulated and maintained. Thus the speaker must ensure that what he has to say is appropriate to his audience, having regard to the age, sex, race, interests, educational background, occupations and social or religious characteristics of the audience. The size of the audience and the size of the auditorium are also factors to be taken into account.

The subject-matter of the speech must also be appropriate to the purpose of the speech. The speaker must know (or decide) whether his purpose is to inform, to persuade or to entertain the audience. In some cases a speech may have more than one purpose. A distinction must also be drawn between a formal speech, such as a speech of presentation or a valedictory speech, and an informal speech, such as an after-dinner speech. These factors will influence the speaker in the preparation of the speech structure, choice of language, and preparation of speech notes.

The subject-matter of a speech must be appropriate to the time available to the speaker. Where a speaker is given a definite speaking time, to go over time indicates a lack of preparation and is discourteous to the audience. If the speaker is asked to nominate a speaking time then he must fully consider the subject-matter and what he wishes to say before nominating the time required by him.

The subject-matter of the speech must also be appropriate to the speaker. If a speaker is not confident of his subject-matter his lack of confidence is likely to be sensed by the audience.

2 The lawyer speaks

The general principles given above are applicable in any speaking situation. The practising lawyer will find himself in many differing situations having to exercise his skills as a communicator. The nature of the lawyer's speech will almost invariably be determined by the circumstances which gave rise to the speaking situation.

In his book, *Advocacy in our Time*, O C Mazengarb referred to the need for the advocate to develop self-confidence. He tells of a female advocate who, when awed by appearing before those more experienced than herself, "told herself silently that these men had come from the same stock as she had, and that at one time they all wore 'nappies' as she had done. Her confidence in herself was always restored when she met them on the level by bringing that thought to mind" (p 24). The point of the story, of course, is that Judges are, fortunately, human, and both male and female advocates of whatever experience may take heart from that knowledge. The story also illustrates an important principle, namely, that audiences are comprised of other human beings and the speaker should speak to the audience without undue deference or unnecessary condescension.

There are a multitude of factors to be taken into account in deciding how to structure and present a speech to an audience. Such factors may be considered in terms of the audience and the purpose of the speech.

II THE AUDIENCE

1 The human element

It is most important for the lawyer to understand that those who listen to him speaking as a lawyer are like himself – fallible mortals who may be influenced for good or for bad by factors which may not have any direct bearing upon the case in hand.

As part of the preparation for a case counsel should bear in mind not only the nature of the tribunal before which the case is to be presented, but the personalities and backgrounds of those who comprise the tribunal. Discreet inquiries can usually be made which will assist in determining how a case should be prepared for and handled during presentation. A Judge, for instance, may be known to have or lack a special knowledge on some subjects (such as intellectual property, town planning, company takeovers, or whatever) which should be taken into account, or even a preference for a style of argument. It is no insult to an audience to adapt your approach to their knowledge and preferences, but rather a compliment. You (and your client) will often receive a better (and perhaps shorter and cheaper) hearing in consequence.

The following factors will be relevant to the lawyer's presentation (and should often be raised with witnesses as well):

- avoiding a personal appearance (in dress or mannerisms) which may be regarded by the tribunal as inappropriate or even offensive.
- avoiding the temptation to score a point when answering questions from the tribunal. A lay tribunal, for instance, may take offence if one of its members is treated by counsel as an adversary.
- being clear about the functions of counsel and the powers and legal limitations of the tribunal.
- avoiding irritating habits, such as the jingling of loose coins in pockets or clicking a ball-point pen.

2 Courts

Although our judicial system is based on a hierarchy of Courts from the Privy Council down to the District Court presided over by a Justice of the Peace it does not necessarily follow that greater formality is required in the higher Courts. For instance, the Privy Council is less formal in some ways because the Law Lords are not robed but, on the other hand, a higher degree of preparation will be required, because of the complex nature of the subject-matter and the intellects of the Judges, than is usually the case, for instance, when appearing before a Justice of the Peace.

Different styles of advocacy will be required from Court to Court, and even within the same judicial jurisdiction. By way of example, counsel are likely to conduct a criminal trial before a Judge and jury in a quite different manner from conducting a similar case before a Judge alone.

3 Tribunals

There are an increasing number of administrative tribunals all with different functions and powers conducting their hearings with differing degrees of formality. The lawyer needs a clear understanding of the functions and powers of the tribunal before which he appears as he will display his lack of preparation and fail to serve his client's interests if he asks a tribunal to do something which is not within its powers. Particular care is required when appearing before a tribunal with which the lawyer is not familiar or where the hearing style may be different from that with which he is familiar (eg some local authorities conduct town planning hearings very casually, while others are very formal). A polite inquiry in advance of the tribunal secretary or clerk will frequently pay dividends.

Particularly before lay tribunals it will often be unwise to cite numerous precedents which, at best, may be confusing the tribunal and, at worst, appear to indicate an unintentional arrogance on the part of the lawyer.

III PURPOSE OF THE SPEECH

1 Basic purpose

In most situations where the lawyer is communicating in the course of his profession he will be seeking to inform and to persuade. However, one should never underestimate the power of humour as an aid to persuasion. Whether seeking to inform or to persuade it is critical that information be given clearly and logically in a manner which can be readily understood by the listener.

Lord Chief Justice Parker once said "A Judge is not supposed to know anything about the facts of life until they have been presented in evidence and explained to him at least three times." No doubt that statement was not intended to be taken unduly literally, but it does emphasise that nothing should be taken for granted, and that information may need to be repeated more than once to convey the message (while avoiding tedious repetition).

In seeking to persuade a tribunal it is important to establish a realistic and attainable purpose as the object of one's persuasion. For instance, where a minimum penalty is prescribed by law it is pointless to seek to persuade a Court to impose a lesser penalty. A realistic and objective assessment of the situation is required otherwise the tribunal may well disregard the value of what is being said because the objective being sought is not realistically obtainable.

2 Jury trials

A jury is generally considered to be more susceptible to emotional appeals than a Judge sitting alone. By their very nature, juries are neither versed in the law nor in the language of the law. Thus counsel appearing before a jury needs to be aware that it is his function, in part, to ensure

that the jury is informed, but also that he should exercise powers of persuasion in a manner which might be inappropriate for a Judge sitting alone. Above all, counsel should seek to avoid the complex and technical words and phrases of the law which, at best, will probably not be understood by many jurors and, at worst, may positively prejudice a jury against the cause he represents.

The prosecutor in a criminal jury trial needs to take special care in approaching his task. While the defence can, if appropriate, make a strong appeal to the emotions the prosecution must bear in mind that it is to prosecute, not persecute, and that any undue appeal to the emotions may well result in the prosecution overstepping the borderline between proper presentation of the case and improperly pressing for a conviction.

Counsel need to learn the conventions and procedural rules relating to the conduct of cases before any tribunal, but before a jury there will be considerable scope for approaching the case at hand in a way best suited to persuade the jury. For instance, in the face of a strong closing address for the Crown defence counsel must consider how best to approach the presentation of the closing address, bearing in mind the fact that the Judge's summing up has still to come. Choices to be made might, for instance, include:

- whether a detailed examination of the facts is required, sometimes at the risk of drawing additional attention to the weaknesses of the defence case;
- whether attention should only be given to areas where the accused should be given the benefit of the reasonable doubt;
- whether it is appropriate to raise other theories as to the circumstances of the crime. For instance, in a case concerning the disappearance of a blood sample from a police station cell block medical room the writer recalls exploiting the failure of the prosecution to prove that the only access to the medical room was through the cell block corridor from which virtually only the accused would have had access;
- whether the task should be approached with logic or emotion or a combination of both. Where the Crown has closed in a strong manner it may be very effective to close with a contrasting and coldly logical analysis of the deficiencies of the Crown case.

Some counsel will ask leading questions and will raise matters which are not considered relevant to the case in hand. Ethical questions of some nicety may arise here as one may ask whether it is proper deliberately to ask a leading question or raise irrelevant matters knowing that the jury may well have been influenced before a ruling is given from the Bench.

Robert Frost suggested that "a jury consists of twelve persons chosen to decide who has the better lawyer". This cynical observation seems to be directed not so much to the legal knowledge of the advocate as to the advocate's ability to persuade.

3 Burden of proof

The advocate's style will be influenced by whether the standard of proof "is on the balance of probabilities" or proof "beyond all reasonable doubt". While the legal philosophers will argue whether the burden of proof "shifts" during the course of a trial counsel learn to sense how well their case is doing and how to react to the changing situation. In the advocate's role as a communicator he must take into account where the onus of proof lies, and fine tune his style to meet the shifting fortunes of his case as it proceeds.

IV CONCLUSION

To be an effective, skilled communicator the lawyer always has to be conscious of the need to tailor what he says and how he says it to the nature of his listeners. Current affairs commentator and high school principal, Mr Michael Deaker, recounted a pertinent story to New Zealand Toastmasters in Invercargill recently. Some years ago he had to discipline a fourth form girl. Having got himself into the right frame of mind and adopted a "posture for effective, if not oppressive communication", he remonstrated with the girl with "production, pausing, emphasis, phrasing and gesture" which he felt was particularly impressive. Having dismissed the girl, she went to his door, opened it and turned to him, saying "What'd all that mean what you said Mr Deaker?"

The moral of the story, according to Mr Deaker, is that it does not matter "how eloquent, or clever, or powerful, or moving, or persuasive, or clear you think you sound and look, successful communication depends utterly on the receipt, the processing of the message and then the reaction to that message". Accordingly, "the audience must determine the way the message is delivered".

Correspondence

Dear Sir

In his most interesting article "Trespassing and vagrant vehicles" (1983) NZLJ 17) John Bickley details two categories of abandoned vehicles catered for by s 356, Local Government Act 1974. The article cites these categories as being firstly, those vehicles which appear to be abandoned and are either unlicensed or unregistered; and secondly, those vehicles which appear to be abandoned and are "registered *or* licensed". It is also stated in the article that where a vehicle "is registered or licensed a District Court order is first required".

Whilst one would readily agree that the first category, via the clear wording of s 356(1), comprises abandoned vehicles which are unregistered or unlicensed, it is surely arguable that the second category comprises abandoned vehicles which are both licensed *AND* registered. This second category is derived from the not so clear s 356(4) which encompasses "any motor vehicle to which subsection (1) of this section does not apply". Interpreted in this fashion the categories are thus true mutually exclusive ones with the categorical distinction being important, bearing in mind that a District Court order is required where category two is involved.

Also, in addition to the statutory powers to remove motor vehicles quoted in Mr Bickley's article one could include s 239, Public Works Act 1981, which details the removal of motor vehicles from public works land.

Yours faithfully

M G Dollimore

Computer Crime

COMPUTER ABUSE AS A BASIS FOR CRIMINAL LIABILITY

FRANK X QUINN LLM an Auckland Solicitor who was for many years a Legal Advisor with the New Zealand Police.

Computers have been with us long enough now for their possible misuse to have become apparent. This article and the one following it by John N Lenart were submitted separately for publication within a few days of one another. In itself this indicates the growing importance of the topic. The two articles cover some of the same ground but in different ways, and are therefore suitably complementary.

1 Introduction

Computer abuse as the basis for criminal liability has yet to manifest itself in New Zealand to any extent. To the writer's knowledge there are no reported criminal cases featuring computer abuse. That state of affairs is unlikely to exist for a great deal longer, having regard to the increasing acceptance of computer systems for a whole range of commercial accounting, analytical and other data processing activities. The object of this note therefore is to examine briefly the bases upon which "computer abuse" could attract a liability under the existing criminal law. It will also be considered whether, and to what extent, the existing law needs to be supplemented to accommodate the particular phenomenon which is the computer.

2 Types of abuse

The writer claims no more than a layman's understanding of computers. It occurs to him however, that there are three broad areas of what may be described as computer abuse.

The first category may be described as the unauthorised recovery of data from the computer system. This could involve the retrieval of "software" such as formal programmes, commercial information of the type known colloquially as trade secrets, or other confidential information or records.

The second category of computer abuse may be described as the unauthorised manipulation of the computer system to produce some external consequence. The manipulation could be directed to the input data, alteration to an existing program, or to simply the unauthorised accessing or operating of the system. In each case the object of the exercise would be to produce some consequence extrinsic to the computer system itself, eg the unauthorised issuing by the computer system of cheques made payable to a bogus payee or to the manipulator himself.

The third area the writer has in mind is sabotage of a computer system. There are two areas of concern. First damage to computer "hardware", that is, the physical componentry of the computer system. Secondly, damage to the computer's "software", its intelligence, either by altering the content of the software or by its erasure.

3 Existing legislation

It is hardly surprising, having regard to the recent introduction of computer systems on any scale in this country, that with one exception there should be no specific computer legislation. That exception is the Wanganui Computer Centre Act 1978. As the title suggests, this Act is confined in its application to the state's law enforcement information storage system centred at Wanganui. The Act creates certain offences relating to the unauthorised accessing of and distribution of information from the Wanganui Computer, but does not purport to extend the Act's application beyond the Wanganui system itself. Thus whilst the particular offences created by the Act might provide a discussion base for the formulation of a general penal code relating to computers, the Act itself is of no relevance to the topic under discussion.

Existing legislation which conceivably could apply to the types of computer abuse referred to above are the Copyright Act 1962 and the Patents Act 1908. However, these Acts are primarily concerned to codify civil remedies for breach of copyright or infringement of patent rights. The criminal liability imposed in each case is limited and, as a practical matter, neither Act is likely to be invoked in the case of computer abuse.

One is left therefore to resort to the general criminal law, embodied largely in the Crimes Act 1961. As indicated above there is in this Act no express provisions relating to computer abuse. So far as offences relating to the interference with proprietary rights are concerned, the Act is primarily an expression of the codification of the criminal law undertaken in the United Kingdom in 1879. The purpose of that exercise was to relieve the criminal law relating to property of the myriad subtleties and distinctions which had been built up at common law. As will be seen however, some common law concepts were retained in the code and these have implications for the application of the Crimes Act to computer abuse. It is to that application, in relation to the areas of computer abuse identified above, that the writer now turns.

4 Recovery of data from computer system

The following fact situation will serve as a starting point. Smith is employed as a computer programmer and EDP operator by a large multi-national oil company which has been undertaking an exploration programme off-shore. He is aware that his employer has spent millions

of dollars in carrying out exploration, collating the data obtained and storing the results on the company's computer. Indeed Smith has worked on devising a program to allow the company to efficiently analyse information obtained and make reliable forecasts as to future action. Needless to say, the information is considered by the company to be highly confidential. Not only has it cost millions of dollars to assimilate, but it has an incalculable value in relation to the company's competition with other exploration companies.

Realising the potential of the information and of the programs, Smith accesses the computer one night and retrieves from it certain highly confidential items of information regarding off-shore exploration prospects. These he has printed out on the computer's printout machinery. He also commands the computer to make a duplicate of the analysis programme which is stored in the computer. This the computer does by reproducing the magnetic impulses on to a blank tape contained in the system for that purpose. Smith then takes the tape and the printout and later offers them for sale to one of his employer's competitors.

The first question which arises is whether Smith has committed theft in relation to the activities described above. So far as the tape and the printout paper are concerned, there is no real difficulty. He has on the face of it stolen these items. However, it is not difficult to conceive slightly changed circumstances which would preclude a prosecution based on this feature of the case. For instance, Smith could have thrown up the information on a VDU screen and taken photographs of it. There would be no printout which could then provide the basis for a prosecution for theft. Similarly, he could have obtained the program by a means other than transcribing onto a blank tape. If for instance the system had a remote "on line" facility to which Smith had exclusive resort, he could have transmitted the details of the program onto that facility and thereby avoided the need to take one of his employer's tapes.

What then of the "taking" of the *information* which after all is the real wrongdoing? Here the existing criminal law in New Zealand poses great difficulty. The principal obstacle is that the theft provisions of the Crimes Act are limited in their application to "things capable of being stolen" which things, by definition, must be susceptible to physical trespass: Crimes Act 1961, ss 217 and 220. That is to say, to be stolen a thing must be *tangible*. In this regard our Crimes Act retains one of the curiosities of the common law. The essence of theft at common law was a trespass to the thing stolen. If the thing is intangible, ex hypothesi, there can be no trespass.

The Crimes Act thus fails in this regard to recognise and protect the legitimate expectations of present-day property owners. The example given above illustrates that in today's age, property ownership may vest in intangibles, the value of which may grossly exceed the value of any tangible assets which the owner possesses.

It may be concluded that so far as the information retrieved by Smith is concerned, he does not commit theft. There is however a curious reflection in the Crimes Act of the common law concept of property as it extended to electricity. By s 218 of the Act, electricity is "declared" to be a thing capable of being stolen. The theft lies in the fraudulent abstraction, consumption or other use of electricity. Arguably, Smith has a liability for the unauthorised use of the electricity used in the example given above. However, such a suggested basis for criminal liability only needs to be made for its irrelevancy to Smith's real guilt to be exposed. In any event, even if it were possible to quantify the value of the electricity used in this escapade, the value would probably be such that its unlawful use would attract only the least of the penalties available for theft: s 227(1)(d) of the Crimes Act.

In the United Kingdom, the common law concept of property for the purpose of theft was abolished by the Theft Act 1968. Under that regime, property includes "money and all other property, real and personal, including things in action and other intangible property". Such a definition, if incorporated into New Zealand's criminal law, might arguably impose a liability for the taking of such incorporeal commodities as constitute "property". This paper is no place to enter into a discussion on what constitutes property in this wider sense. Suffice it to say, that if Smith's employer could enforce by way of injunction the exclusivity of the information stored in the computer, then there is a strong argument that the information is property. It would follow on the face of it that Smith's actions would constitute theft.

It has been argued however, that even assuming that the information, the "trade secrets", stored in the computer constitutes an item of intellectual property, merely to copy the information after retrieval from the system would not be theft. The argument is alluded to in Smith *The Law of Theft* (4 ed) paras 100-101. It is dealt with in more detail however, in Griew *The Theft Act* (3 ed) paras 2-12. Griew there argues that the unauthorised copying of a trade secret would not be theft of that secret under the English Theft Act. The Act requires the appropriation of property with the intent to deprive the owner permanently *of it*. Griew's argument is that the owner of the trade secret would not be deprived of the trade secret merely because it is copied without authority. The information which makes up the trade secret would be left intact. What its owner would be deprived of would be its exclusivity, its secretness.

Griew's argument assumes that exclusivity is not itself an item of property. In this writer's view, that argument is at least debatable. It is difficult to see why the information which makes up the trade secret should be considered property, but that the right of the "owner" to that information and the right to preserve the information to that owner, ie its secretness, is not itself an item of property.

In New Zealand by contrast, the law relating to theft does not require an intent to deprive *permanently*, if there is an intent to take property in circumstances such that the property cannot be restored to its owner in the condition in which it was taken: Crimes Act 1961, s 220(1)(d). Arguably the retrieval and copying of a trade secret, as in the example given above, would disclose this intent. In taking the information with the intention of selling it to his employer's competitor, Smith intends not to "return it" in the condition in which he took it. He has stripped the information of its secretness.

These comments are of course entirely academic unless and until the criminal law relating to theft in New Zealand is freed from its common law shackle as to tangibility. But it occurs to the writer that another existing provision of the Act may impose a criminal liability for Smith's actions. Reference is here made to s 266A of the Crimes Act. This offence was drafted by the Criminal Law Reform Committee in 1973 and was introduced into the Act by the Crimes Amendment Act of that year.

The section immediately follows the existing forgery provisions of the Act. It is designed to extend the criminal liability for forgery-related offences, and also to overcome difficulties with the forgery law exposed in cases decided before 1973. Specifically it had been held that the forgery provisions did not attach a liability for the alteration of a document in some circumstances, or in respect of a document which was a reproduction of another document. By s 266A(b) it is an offence, with intent to defraud, to make a document that is a reproduction of the whole or any part or parts of another document. The offence is committed if the reproduction is made "by any means". At the same time as this offence was created, the definition of "document" for the purposes of forgery was amended. New definitions were included. Significantly for present purposes, a document was defined to include "any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded. . .". The existing concept of "document", ie a paper or other document capable of being read, was preserved.

It is arguable therefore that Smith's actions described above disclose an

offence under s 266A in that he has made a document (the printout paper or the duplicate tape) which is a "reproduction" of the whole or any part of another document (the storage tapes within a computer system). It might seem strange that it is possible to describe a document which is typed paper as a reproduction of a document which is tape carrying magnetic impulses. In the writer's view however, the various definitions of "document" now contained in the Act and applicable to this section make it clear that such a consequence was indeed contemplated when the revised definition, and the new s 266A, were enacted.

Now if the legislature had retained the specific intent which is necessary for forgery when it enacted s 266A, the foregoing argument would be insupportable. The specific intent for forgery is, and has always been in this country, that the forged document should produce a mistaken belief in the mind of some person seeing the document. The intent is that the document be "automendacious", ie that it tell a lie about itself. If this intent was required under s 266A, clearly it would render the section inapplicable to Smith's escapade. There would be no intent on his part that the printout or the duplicate tape should appear to be something other than what it really is. Indeed, the whole object is to reproduce information from within the computer. However, it is to be noted that liability under s 266A requires only an "intent to defraud". Although this expression eludes precise definition, it is submitted that the intent which would be manifest in Smith's action would be an intent embraced by the expression "intent to defraud".

5 Manipulation of the computer system

The next broad category of computer abuse involves the manipulation in some way of a computer system to produce a result or a consequence external to the system. For example, the system may be accessed by the use of a false access code or the unauthorised use of a third party's code so as to instruct the computer to pay bogus cheques, arrange delivery of merchandise, etc.

The fact situation of an American case, *US v Jones* (1977) 553 F 2nd 351 is instructive in this regard. In that case Jones, an American resident, was the accomplice of an employee of a Canadian company. The company regularly made purchases from an American company in the State in which Jones was resident. The Canadian company used a computer as the basis for its accounting and bill-paying procedures and the Canadian accomplice was supervisor of his employer's accounts section. He fraudulently assigned to Jones the code number for a genuine customer of the Canadian company. In consequence when, periodically, the computer was instructed to process and issue cheques for all its suppliers, cheques made payable to Jones were issued by the computer and subsequently forwarded to her in the United States, when they should have been paid to the supply company. Jones was prosecuted under a Federal statute which made it an offence to traffic in inter-state commerce in stolen or fraudulently obtained property.

It will be seen that the essence of that fraud involved the manipulation of a computer by causing it to "believe" that actions which it had been instructed to take were "legitimate" actions – that is to say actions which, to the computer, were the result of legitimate instructions given by the company which operated it.

What would be Jones' criminal liability in New Zealand? The first offence which springs to mind, given these circumstances, is that of obtaining the cheque by means of a false pretence, contrary to s 264 of the Crimes Act. However the facts of this case disclose a difficulty. The offence of false pretences required that the false representation be directed to a "person" and that it produce a mistaken state of mind in that person. There will not be a false pretence if a person is not induced to part with property as a result of the false representation. Where a computer is utilised to perform a function which, at its end, produces the cheque or other valuable security, *and no human being is required to be misled*, on the face of it the offence of false pretences will not have been committed.

The facts of *US v Jones* are perhaps somewhat unusual in that the employee of the defrauded company was able to manipulate the company without the need to make false representations to other people. The cases will be rare in which those circumstances are repeated.

Further offences under the Crimes Act which may accommodate the *Jones* type of fraud are ss 252 and 253, both of which relate to "false accounting" by an officer, member, or employee of a body corporate. The latter section extends liability to an employee of any employer, corporate or otherwise. However whilst the employee in the *Jones* case would thus be liable, Jones herself could not have been prosecuted under these sections.

Depending upon the way in which the computer is manipulated, the offence of forgery may be disclosed. For instance, if a punch card is used to access the computer, and the card is fraudulently altered to accommodate the perpetrator's unauthorised instruction, on the face of it there is the offence of forgery. Again however, there is the difficulty that in some instances, the perpetrator will not bring about a mistaken state of mind on the part of another person.

A further question arises, again using the facts of *Jones*, as to a liability in connection with the cheques obtained from the computer. Clearly there is not theft by *taking* of the cheque. Is there a theft by *conversion*, ie where the possession of the cheque is not unlawfully obtained, but the cheque is then converted to the offender's use? By s 220(2) of the Crimes Act, a subsequent conversion of anything obtained with the consent of the owner, even though induced by a false pretence, may be theft. There are difficulties with the application of this provision to the *Jones* situation. As noted above, there has been no representation made to another person. Arguably the cheque has not been obtained with the *consent* of the owner, unless one ascribes to the "mind" of the computer, the consent of its owner. It is to be doubted whether the criminal law has yet advanced sufficiently to accommodate such a concept.

Section 270 of the Crimes Act makes it an offence to procure the execution of a document by fraud. The specific ingredients are that a document is executed by any person on the basis of a false and fraudulent representation that the contents of the document are different from what they really are. The section is aimed at situations where people are induced to sign documents without perusing the contents. In an appropriate case this section could be considered. Furthermore, it may be possible to invoke s 266A, examined in the previous section, where a cheque is produced from data stored in the computer. Arguably the cheque constitutes a document which is a reproduction of part of another document, namely the computer's storage tapes.

Finally, regard may be had to s 229A of the Crimes Act, introduced at the same time as s 266A, which makes it an offence to use fraudulently a document capable of being used to obtain a pecuniary advantage, or to obtain such a document fraudulently. It is to be noted that, unlike the offence of false pretences, there is no requirement that a false (or indeed, any) representation operate upon the mind of another *person*.

6 Computer sabotage

With damage or destruction to computer hardware, there is no problem with the

application of the existing criminal law. The wilful damage provisions of the Summary Offences Act 1981 or of the Crimes Act could be invoked. As a practical matter however, having regard to the likely cost of sabotage, it is probable that the latter provisions would be utilised.

In a case of erasure of software, or damage to software falling short of actual erasure, the question arises whether the wilful damage provisions of the criminal law could be invoked. Is the software "property" for the purposes of those provisions? The answer would appear to be in the affirmative. By s 298(4) of the Crimes Act, liability for wilful damage is extended to the destruction of "any property in any case not provided for elsewhere in this Act". Property is defined in s 2 of the Act to include "any debt, and anything in action, and any other right or interest". Thus on the face of it if the software in question constitutes property in this wider sense of the term (as distinct from being a thing capable of being stolen), its erasure from computer tapes would constitute wilful damage in terms of s 298(4).

7 Computer Abuse: A case for law reform?

As has been noticed, there is no special penal code in New Zealand for the types of computer abuse identified in this note. Moreover with the exception of actual destruction of or damage to computer componentry, the existing criminal law is at best haphazard and, at worst, inadequate in providing a penal sanction against such abuse.

The writer understands that the Criminal Law Reform Committee is presently examining the topic. Undoubtedly legislative intervention is warranted. However it is submitted that the law makers should resist the temptation to introduce specific computer-related penal legislation without adequate consideration being given to the proper place for such legislation in the wider context of a modern criminal law of property. As has been noticed briefly in the foregoing paragraphs, our present law on theft and fraud-related offences derives almost verbatim from codifications of the common law over a century ago. Although the code produced a number of far-sighted improvements to the common law (and thereby spared this country from the tortuous development in England which culminated in the Theft Act 1968), much of our present penal code in this area continues to reflect anachronistic concepts of property and value. Amendments to the code have by and large been spasmodic and reactionary.

Perhaps the single most anachronistic feature of our law of theft and of false pretences is that which most typifies its common law ancestry: in order that it may be stolen or obtained by a false pretence, a thing must be both tangible and moveable. Yet as the writer has hopefully illustrated, the most valuable part of any computer system is likely to be its "intelligence". A peculiar feature of the computer is that this intelligence may be abstracted without the taking of the owner's tangible property.

Thus any adequate penal code on computer abuse must abolish this restriction on the existing law. Having gathered the resolve to do so however, it is submitted that the Legislature must complete the task by extending our criminal law of property to all the myriad forms of property which our modern society recognises and values. For in the final analysis, any computer's software is at bottom the product of human input and it is surely the value of the latter which the law ought to protect.

Computer fraud: A legal challenge

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This article is complementary to the one preceding it by Francis X Quinn. The author of this article considers not only the issue of the criminal law in relation to computer abuse, but also the aspect of civil litigation arising from computer fraud.

Introduction

The resurgence of local interest in the fascinating topic of computer fraud comes as no great surprise to those who have been thinking, working and studying in the area for some seasons. And within the subject itself, there are various subheadings all containing problems. For the law and for the lawyers there are many such problems. The legal challenge lies in tackling these problems.

The amount of computer crime, actual or "guestimated" is beyond the ambit of this paper. But the continuing statistical debate (ie frequency of occurrence[1]) does provide an important key to the whole legal area. The fact that most writers agree that computer fraud is "victimless" crime and that some fraud is unreported or even undetected suggests that the eyes of society in general and the law in particular are elsewhere turned. This further suggests that it is often difficult to see, and sometimes timely not to notice the numerous legal problems that could and have occurred.

In this paper, the writer will briefly look at the legal problems arising out of computer fraud. It is hoped that the reader will see that these problems have ramifications far wider than the criminal law. The term "computer fraud" is preferable to "computer crime" because, if an action is fraudulent it may give rise not only to a criminal prosecution, but also to a civil action under any of several branches of law (eg contract, tort and copyright law). The fraud may also have further implications for individual liberties, especially in the area of privacy.

Any computer specialist is aware that there are various types of frauds that may be perpetrated ranging from the copying of software to the theft of millions of dollars.[2] But the nature of the fraud itself, as well as the actual stage at which it occurs during a computer operation, may result in widely differing rights and liabilities for those either involved in its commission or affected by its outcome. So it is from this perspective that we turn to the specific problems.

In Part I, the nature and types of fraud will be analysed, followed by a discussion of problems in the areas of criminal law

and evidence. In Part II, the area of civil litigation is examined.

PART I: Criminal fraud

In the first part of this paper the nature and typology of fraud will be discussed followed by an examination of problems in the area of criminal law and evidence.

Fraud: meaning and typology

(A) Meaning

Fraud as such has no legal definition. Rather it is an all-embracing term used to cover a wide range of activities. Under the Crimes Act 1961, there are certain offences under the heading "Fraud". But fraud also occurs in civil law, (eg fraudulent misrepresentation in contract, tort of deceit). Whether an activity is fraudulent will invariably depend on whether the actor intended to defraud. Mens rea, the necessary intention to commit a crime, is thus essential to be proven in a criminal prosecution for fraud.

Computer fraud can be described as fraudulent activity by the use or abuse of a computer. This includes all stages of any computer operation. Computer crime has been defined in the United States as:

> Any illegal act for which knowledge of computer technology is essential for its perpetration, investigation or prosecution.[3]

There are two main categories of computer crime. In the first category, the computer is the "tool" of a crime. It is the means by which a crime or fraud is committed. The computer is here used to plan, manage or actually commit the illegal act. Such acts include embezzlement, theft of property and fraud in its wider sense. In the second category, the computer and/or its operation is being abused. It thus becomes the object of a crime, such as vandalism or sabotage, theft or alteration of data, and even theft of the services of the computer.

From a legal standpoint, it must always be remembered that whether a computer be the tool or the object of a crime, it can never commit a crime. Only the manipulator can do that. So computer fraud is a human rather than a technological phenomenon.

(B) Types of computer fraud

The two categories outlined above can be further subdivided to ascertain the many and various types of fraud. There is fraud which is committed during any stage of a computer operation. Fraud may also occur by linking into and obtaining information or services from a computer from outside the operation. Furthermore, fraud may occur in the illegal copying of software programs, when they are not part of a working operation.

There are five stages in a computer operation and at each phase frauds can and do occur.

(i) *Input:*
Here data is translated into the language of the computer. Obviously false data may also be inserted, eg fictitious details of employees. In one United States case, a fictitious employee with a surname beginning with Z was put into a computer. The fraud was discovered by accident when the company, wishing to improve its image, hired public relations consultants who decided to profile two employees and chose the first and last names on the payroll.

(ii) *Programming:*
Here step-by-step instructions are given to the computer for its operation. Again, false instructions may be given to the computer, so that its actual functions are somewhat different from those that were planned. A programmer in England inserted a small but multiplying error into a program. As it multiplied, the error became larger. Eventually the accounts showed discrepancies of over £1 million. It is also common for programmers to leave "trap-doors" for later amendment to a program. These trap doors often provide unauthorised entry to the system. A disgruntled employee, whose employment had been terminated, used a "trap-door" into a program and inserted instructions so that the program would self-destruct on a certain date two years later. It duly erased all details of its operation. Programs have even been the subject of "kidnapping", though not necessarily in the legal sense.

(iii) *Central Processing Unit* (CPU):
Here the computer actually works through the instructions. At this stage, it is the operation of the brain that is taking place. Like the human being, a computer is vulnerable to neuroses or attacks on its processes and memory. Fraud can be committed by means of sabotage, wiretapping or electromagnetic interference. It is often at this stage that a skilled operator with knowledge of the process sends false messages to the computer. This is known as "data diddling", eg the exchange of false for valid information. This can also occur at the input stage.

(iv) *Output:*
Here the computer, having completed its operation, translates the functions back into communicable form. At this stage fraud may occur through the copying, alteration or theft of all or any of the information.

(v) *Communication:*
The final phase of operation consists of the transmission of data from the CPU to other (remote) terminals and other computers by linkage methods. Such communication is therefore open to interception, alteration or other interference, even before it reaches the legitimate user. This area causes concern from the viewpoint of detection and apprehension of the offender.[4]

Linking into a system from the outside via terminal or telephone, is another area where fraud occurs. This is sometimes called "electronic piggybacking" or "impersonation" and occurs where remote terminals or assumption of the identity of a legitimate user are the means to obtain access to the system. Here, the infiltrator can take any of the various actions described above, from merely viewing the information through alteration to complete destruction. His initial step into the system is unauthorised. As we shall see below the question still remains: is that step fraudulent?

The final type of fraud that remains relates to software. There are several "sub-types" of this category ranging from the bugging or obliteration of software to copying and selling the materials. See *Ward v Superior Court* 3 CLSR 206 (Memorandum opinion 51629, 1972) and *Hancock v State* 1 CLSR 562 (Tex Crim App 1966). The scope of fraudulent activity in this area grows apace with the proliferation of software materials. In many cases, such activity cannot be covered by criminal prosecution under out-dated laws, with resultant problems in civil litigation actions.

The security of all aspects of computers is thus of major importance. The New Zealand Computer Society has published guidelines.[5] This is merely a code of conduct: there are no enforcement procedures. In fact there is no requirement for computer personnel to even belong to

the Society. This is not however intended as a criticism of the Society, which is to be commended for answering a need unanswered by government. The security aspect, while again outside the ambit of this paper, is of vital importance in the area of fraud. The tighter the security, the less likely the crime and the higher the chances of detection.

Criminal law

Assuming that a fraud has taken place and that both the offence and the offender are isolated and detected, the major issue that arises is whether or not the existing criminal law sufficiently covers a specific activity. While the provisions of the Crimes Act 1961 (as amended) will be applicable to some frauds, for others the Act will not prove of great assistance.

If a magnetic tape or computer printout is stolen, if funds are illegally moved, a prosecution can be brought under the heading of theft or fraud or possibly even forgery. As long as what is taken comes within the category of "Things capable of being stolen" under s 217 a prosecution for theft may lie. Section 217 states:

> Things capable of being stolen — Every inanimate thing whatsoever . . . which is the property of any person, and either is or may be made movable, is capable of being stolen as soon as it becomes movable.

While electricity is expressly declared to be capable of being stolen, and this would presumably cover the theft of electrical impulses in the illegal use of a computer, (eg in a time-sharing situation), there is still a major problem for unauthorised copying of software. One of the essential ingredients of theft is the notion the property itself is either permanently removed or altered to the extent of a change in nature. Theft has an aura of permanency. Obviously, when a program is copied the owner still has the original. (In some if not many cases, he may not even be aware of the copier's activity.) So he cannot be said to have actually been permanently deprived. This argument is obviously related to the theory of patent and copyright laws, as discussed below in Part II.

Some help may be given by the addition of s 229A, which creates an offence of taking or dealing with documents with intent to defraud. However, on closer scrutiny the new section still provides problems for the theft of data. These are:

(i) There must be an intention to defraud. This was made clear in parliamentary debates.[6] But there is a difference between an intention to defraud and a mere intention to obtain an advantage. The section explicitly states that the activity must be committed with the intention to defraud. It is submitted that this intention, especially in the case of software, may be difficult to prove.

(ii) The section relates to the "taking" or "obtaining" of documents themselves or parts of documents. This is made clear in s 263. But, is obtaining information out of the program the same as obtaining the "document" or part of it. Current theory indicates that information is property if it is "commerciable" ie of commercial value.[7]

These problems are far from having been resolved. The limited Parliamentary debate and lack of decided cases suggest that clarification is required. Certainly a law enforcement agency would hesitate to use this section in relation to software.

An unscrupulous business competitor may, in copying software, be guilty of offences under the heading of false pretences. However, one problem still persists if the information is merely copied and used, rather than sold. For this type of offence to occur, "false representation" must be made. It is quite possible to conceive of situations where, either no such representation is made, or the representation is not (legally) false.

It is also highly unlikely that the competitor would be guilty of forgery under s 264 for reproducing software. For although the results of his efforts may come within the definition of "document", it is difficult to envisage a Court holding such a document to be false in that it "purports to be authorised by another party".

Interestingly, a prosecution could be brought under the offences provisions in the Companies Act 1955 against an employee or officer of a company who falsifies records. This is due to the updating of s 461 of the principal Act by the Companies Amendment Act 1980. While this was due in the main to the need for tightening the liabilities of company management in general, the new s 461C would appear to cover some types of computer fraud. Under this section, there is a requirment of intention to defraud *or* deceive. Whether deception must be "criminal" has not yet been tested.

In conclusion, it should be accepted that our criminal legislation is inadequate to deal with the increasing complexity of computer abuse. An American case, *Ward v Superior Court* 3 CLSR 206 (Cal Superior Ct 1972), is often cited as an example of how "pre-computer" criminal laws are inadequate.[8] Many States in the US have specifically updated their criminal codes to explicitly include computer related frauds and abuse. There is clearly an urgent need in New Zealand for similar legislative activity. In addition, on an international level, serious thought is often given to the standardisation of such legislation to combat the international flow of data (via telephone, satellite, etc). It would be wise, if somewhat belated, for New Zealand to do the same.

Specific provisions relating to computer crime, fraud or other related abuse including privacy, or indeed a separate statute could have some wide-ranging effects, viz:

(i) deterrence of abuse;

(ii) creation of a basis for enforceable ethical standards through the computer industry as a whole; and

(iii) obviate the need for rather out-dated criminal provisions to be "stretched" to cover increasingly complex situations.

PART II: Civil litigation

Introduction

It has earlier been suggested that the ramifications of fraudulent abuse of hardware and software are not solely related to problems in the areas of criminal law and evidence., Those areas cover the actor and his act. But the outcome or result of the activity is equally important. This becomes apparent from a mere glance at the growth of civil litigation. These results, like tremors, may be of varying force. Compare the results of activities in the Equity Funding Scandal with eg the result of copying a set of accounting procedures. Increasingly however, the victims are turning to the civil branches of the law, seeking remedies for such abuse.

In legal terms, remedies are usually claimed by way of *damages*, to gain compensation for financial loss, or *injunction*, to protect the publication and/or marketing of confidential information.

This part of the paper examines some of the problems that arise as the result of activities, which may or may not be classified as fraudulent under criminal laws, but nonetheless are the result of some form of abuse. Firstly the applicability of protection under patent, copyright and trade mark legislation will be examined, followed by a discussion of issues in contract, tort and privacy.

Patent, copyright, trademark and design

The first and most obvious choice to someone affected as a result of computer abuse is to seek redress under protective legislation. The critical question therefore becomes: is such legislation adequate to cope with computer-related problems?

It should be noted at the outset that there is no Trade Secrets legislation in New Zealand. This has remained in the province of the common law, discussed below. The Acts that could protect against abuse are the Patents Act 1953, the Copyright Act 1962, the Trade Marks Act 1953, and the Designs Act 1953. These Acts are all based on the philosophy of offering protection by means of an interest in or control over ideas, works and markings. The interest can thus be said to be proprietary.

Both the Designs Act 1953 and the Trade Marks Act 1953 would seem to be of little application to this area. With designs, features dictated by function are outside the definition. With regard to trade marks, whose definition relates to markings indicated for trade corrections, the Act set up a system for registration. Neither Act would appear to cover software programs. And it is difficult to envisage a situation in which they could be so used. Thus, no protection is offered.

Evidence

The law of evidence comprises a delicate and refined set of rules which outline what information may or may not be used in the prosecution of an offence. While this may not be strictly applicable to the area of computer fraud, (in the sense that the main issue relates to the admissibility of computerised information as evidence rather than to the fraudulent use of such information), there are nevertheless legal problems of much relevance. For in order to successfully sustain a prosecution for illegal activity, evidence relating to the information itself will be of major importance.

The problems of computerised information as evidence may be summarised as follows:

(i) Is such evidence "hearsay" and therefore inadmissible?

(ii) Is existing legislation and common law adequate to deal with problems raised by technology?

In attempting to answer these questions, certain deficiencies appear in the law. A leading case on admissibility is *R v Pettigrew*, the Times Law Reports 22/1/80 p 23, in which the United Kingdom Court of Criminal Appeal held that so long as the requirement of "personal knowledge" was required, computerised information would not be admissible if personal knowledge was not present. Obviously, stored information is often not within the area of personal knowledge; if not it would be hearsay and therefore inadmissible.

Suggestions have been made that the Evidence Amendment Act (No 2) 1980, which implemented the recommendations of a 1967 Committee may apply to computer output. However, while certain business records have become admissible, there are still problems due to:

(a) the limited definition of document; and

(b) the continued requirement of "personal knowledge".

In the case of *Holt v Auckland City Corporation* [1980] 2 NZLR 124 the Court of Appeal accepted a statutory South Australian test, in saying that expert testimony would be required to prove the reliability of the computer before the output would be admissible.

Thus the problems have not been resolved in New Zealand. The writer can do no more than to echo Richardson J's plea in *Holt* that there is a need for specific legislation on the point.

The Patents Act 1953 is largely a copy of its United Kingdom counterpart of 1949. However the British revised their Act in 1977 as a result of the findings of the Banks Committee.[9] Under s 1(2)(c) of the new Act computer programs are specifically excluded from the list of patentable inventions.

While the New Zealand law has not yet been updated, it seems unlikely that a program would receive a grant. There are several reasons for this, including the "state of the art" and "mathematical method" arguments. To the knowledge of the writer, there have been no such applications locally. And it is suggested that, given technological methodology, there would be few in the future. There is however an argument that would allow patentability for a new computer system which could only run on a unique and novel program.[10]

It is submitted that the patent system (not only in New Zealand) is too cumbersome, too costly in terms of time and resources, and too tied to the concepts of novelty and inventiveness to apply greatly to computer programs.

The essence of the Copyright Act 1962 is the protection of authorship or creative originality. The author or creator is granted rights of action against those who copy his work without consent, acknowledgment, or payment of a royalty fee.

At first glance, such protection would seem to be of important application to certain types of computer abuse, such as program piracy. As it currently stands however the Act presents some technical difficulties.

Under s 7, the most obvious category to classify a program would be as a "literary work".[11] However, for copyright to be breached, the program itself would have to be "written" (ie notes), for until that point there is no creation to protect. Next, the program would have to be reproduced either in "material form" or by publication. It could thus be argued that even though a program is copied, if the notation from the copy substantially differs from the original, there is no breach of copyright.

Once a work is reproduced there is still no breach until it is sold, hired (or exposed for sale or hire) or exposed to the public. Thus individual or private use of a program is per se not a breach. It must be used for the purposes of gain or publication.

It could be argued that a program, usually on tape or disk, would be covered under s 13 as a sound recording. Here, the major bar to any action is that no breach of copyright can occur until the recording is performed in public.

One important factor in the copyright equation, is that unlike a patent, the right of authorship is not a monopoly. In *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, Lord Pearce stated at p 291:

> . . . copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours.

Just as two artists may paint similar portraits of the same model, so two programmers may design similar systems. Protection is not given to he who first finishes and writes his design. Given the "state of the art" this could be an important factor in the question of proof and the defence of "fair dealing" may well apply.

The obvious relevance of copyright to software abuse is the subject of current legal review. In New Zealand, at the time of writing, the matter is being concurrently discussed within the Justice Department and by the New Zealand Copyright Council. No doubt the recommendations of the (UK) *Whitford Report*[12] are being carefully evaluated. This report emphasised the need for effective protection for computer programs, and argued that this was clearly within the scope of the (UK) Act. The

summary of recommendations includes the treatment of software as "works" and restrictions on mere storage of programs. It will be interesting to see if, along with other members of the Berne Copyright Union and Universal Copyright Convention, such recommendations are adopted in New Zealand.[13]

Contract

In relation to abuse of computerised information, or software programs, some remedies may lie under common law doctrines for breach of contract. However, for such relief to apply, there must be an agreement between the supplier and the user of such information. This contract would also be required to have a term, either express or implied, to the effect that misuse of materials would constitute breach of contract.

Most contracts for sale of equipment, program or other information do not provide for misuse. (It would be unusual eg to buy a program that started with the words: "This program is sold on condition that it shall not be . . .". This is common in literature to protect copyright.) The reasons for this may be either that in legal terms it could be regarded as a condition subsequent and therefore may be unenforceable, or it may infringe the buyers rights of quiet possession under s 14(b) of the Sale of Goods Act 1908.

More common in the computer industry are contracts of *licence*. Such licences can be differentiated from sale in that the owner or developer does not want to permanently part with the property in the materials. He thus allows them to be used under certain restrictions.

Software licences may be either exclusive or non-exclusive. Under an exclusive licence, only the licensee may use the materials. It is a usual condition where, for example, a program is developed for a specific operation on a particular computer. A non-exclusive licence gives the owner the right to dispose of his program to others. Both types of licence usually contain provisions and penalties for misuse of materials. They may also limit the actual use by restrictions on the number of copies which can be obtained. They are usually non-transferable.

International Computers Ltd (ICL) has an excellent example of a standard licensing agreement and it is used as a model for many similar agreements in the UK. The agreement includes restrictions on transferability and confidentiality. Indemnities for infringement of intellectual property as well as often overlooked provisions as to termination are contained.

The misuse of materials by a software employee may be covered under breach of contract of employment as well as under the tort of breach of confidence (discussed below). This is based on a condition implied in a contract of employment not to misuse materials confidential to the employer, as for example in *Seager v Copydex Ltd* [1967] 2 All ER 415.

In relation to fraud and other abuse, one problem remains that, in order to gain relief, the contract would have to be breached by one of the parties to it. While this would include the employee of either party, it would not affect those who obtain materials outside the contract. Furthermore, it would seem that under the new Contracts (Privity) Act 1982 s 4, a third party would only gain rights (and thus incur obligations) if it were specifically intended that the party receive a benefit under the contract.

Thus it would appear that in contract, provided the agreement is sufficiently clear, adequate remedies may be available for computer abuse.

Torts

As stated above, if there is no contract between the parties involved in a dispute concerning abuse of computer materials, no contractual remedy can be obtained. Such an abused party may well turn his attention to the area of tort to obtain a civil remedy.

In certain, but very limited cases, relief may lie in such torts as deceit or unfair competition. However, the emerging legal area in relation to computer applications is undoubtedly actions for *breach of confidence*.

The relevance of actions for breach of confidence to the computer applications is quickly apparent. Programs, processes and output, by their very nature, are often confidential. While they may not be covered under, for example a contract of employment (discussed above), a remedy may still be available for unauthorised disclosure of confidential information.

A classic test of the principles underlying what constitutes breach of confidence can be seen in the judgment of Megarry J (as he then was in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. The three requirements are:

(i) the information must be confidential,

(ii) the circumstances of communication must show an obligation to keep the information confidential, and

(iii) there must be unauthorised disclosure of information.

There would be little problem for computer materials to satisfy the first test. As suggested above, such material is usually regarded as confidential. This could include non-public technical knowledge but probably not "state of the art" disclosure.[14] In some circumstances, a defence of "common knowledge" would not be allowed, for example if disclosure had been made to certain outside persons or groups, but not to others.[15]

In order to set up the obligation to keep information confidential, the test of the "reasonable man" can be used. Thus the legal issue for the computer industry could be expressed: would the reasonable user of computer materials know, or should he be expected to know that those materials were given to him in confidence? Obviously the circumstances of the particular case would be of vital importance in what is at the moment a grey area of law. The problem for fraudulent activities may well be that the information has not been "communicated". It may merely have been available

The last test, that the disclosure must be unauthorised, covers a wide area. But in relation to computer abuse, if such information is disclosed, it would, in all likelihood also have been unauthorised.

In addition to the normal remedies of damages and injunction, an interesting area of relief has opened up. An *Anton Piller* order may be made. Under such an order, confidential material could be seized by its owner (or developer) prior to disclosure, to prevent serious abuse and to prevent destruction of incriminating evidence prior to litigation. Such an order is not lightly made however, and in an ex parte application, a strong prima facie case would have to be made out.

It is suggested that the emergence of this relatively new tort of breach of confidence could provide relief in respect of computer abusive activities, especially where no contract is involved. As the law develops, the computer industry itself could play a useful role in delineating areas where certain (as opposed to all) materials could be marked "Confidential — not to be disclosed without consent" thus creating an obligation of non-disclosure. Given the proliferation of materials however, the clearer the delineation, the more protection will be given by breach of confidence. There is an obvious danger that if too much information (eg including "state of the art") is labelled as confidential, it will become increasingly difficult for the Courts to adhere to the principles outlined.

Privacy

The results of computer abuse may be widespread. The issue arises again in the much debated area of privacy, from the viewpoint of the individual who may be the subject of abused computerised information.[16] Privacy itself is a vast topic, and involves political, sociological and philosophical, as well as legal considerations. However, some aspects of the relationship between the individual and computer abuse should be mentioned.

It should be at once noted that the right of an individual *about whom* information may be manipulated, sold or disclosed are severely restricted. True, some protection is afforded by the Wanganui Computer Centre Act 1976, but this only related to information on one computer installation (ie at Wanganui). Given the vast number of computerised systems in New Zealand, the question must again be asked: where is the protection for the individual against computer abuse?

The answer is that, apart from the above Act, there is no protection. Aside from the important issue of the right of an individual to know where and what information is being stored about him, there remains little relief for abuse of such information.

At common law or equity, there is no overall remedy. There is no tort for the invasion of privacy. In some cases perhaps, there could be a breach of confidence, but it may prove extremely difficult to satisfy the tests outlined above. In other cases, an action for defamation may be available, but questions of publication and defences such as justification (truth) or even fair comment may apply. Thus, any possible civil litigation is severely restricted.

While the New Zealand Parliament has continued to avoid the issue of privacy, apart from a brief flurry in the early 1970s,[17] it has nevertheless legislated for the obverse of the same principles in the Official Information Act 1982. With the growth of computerised systems, a "laissez-faire" approach to privacy is dangerous. Given the amount of information about individuals already stored on many systems throughout the country and the possible abuse or unauthorised disclosure of such information, surely some individual protection is required.

In other countries, much legislative activity has occurred. In the United States, Canada, Sweden and Australia, there are various enactments. These include protection of individual rights over wide areas, such as the declaration of a right to privacy, registration of databanks, and individual rights of access and challenge to stored information.

While a fuller discussion of this important issue is, once again, outside the ambit of this paper, it is nevertheless submitted that legislation protecting individual rights in relation to computer systems is urgently required. Due to expansion of such systems, it has been required for several years. Even if legislation were enacted promptly, it may take some years to catch up to the current developments within the computer industry.

In 1982 an ad hoc working party on computers and privacy was set up by the New Zealand Computer Society and the New Zealand Law Society. The findings of this committee will be viewed with interest by those who see an urgent necessity for protection of individual rights.

Conclusion

The tentacles of technology now surround society, from the programmed games common to children to the large databases of banking systems and government. This is by no means necessarily a bad thing, for technological advancement is a necessary adjunct to the human striving for the betterment of mankind.

The opportunities for computer frauds, crimes and other forms of abuse have increased alongside the technology. Thus the challenge to the parameters of law, the boundaries within which society operates.

Thus far, the awareness of the legal profession to the impact of technology has been apparent more in its application to their own industry than to its effect on the law.[18] Word processing and computerised trust accounting systems are making their mark in many once musty legal practices. But to date, too little attention has been given to the important legal implications of computers.

From the preceding sketches of the current state of the law in relation to computer fraud, it is submitted that current legal boundaries are already stretched to the limit. In some areas they are being hesitantly moved onward. In others, holes are becoming increasingly visible.

It is both expected and hoped that some of the individual problems raised in this paper can be resolved by finely tuned legal minds. But it is submitted that areas of change, both by legislation and within the common law, need urgent consideration. Given that law is always behind the times, it is suggested that, by now, law is sufficiently far enough behind the times to face that challenge.

1 See eg Parker Donn B; *Crime By Computer* (New York: Scribner & Sons 1976) (Reported cases represent only 15 percent of actual occurrence); cf Watkins, Peter; *Computer Crime: Separating the Myth From the Reality*, 1981 CA Magazine 44 (statistical projections inacurately reflect and grossly overstate actual amount of crime).

2 On 26 March 1979, Stanley Rifkin was convicted in Los Angeles County Court on two charges of computer fraud. He transferred US $10.2 million to an account in Switzerland.

3 US Department of Justice, 1979. (This definition has now been incorporated in several state Penal Codes eg California 1980.)

4 Purvis, Rodney; *Corporate Crime*. (Sydney, Butterworths, 1979) p 426.

5 Guidelines on Privacy – Security – Integrity; The NZ Computer Society 1981.

6 See *Hansard* (1973) 384 NZPD pp 2568, 2569.

7 Quaere "merchantability" under the Sale of Goods Act 1908.

8 See further Nycum, Susan; *Legal Problems of Computer Abuse* (1977) Washington University Law Quarterly, No 3 p 527.

9 Cmnd 4407, HMSO (July 1970).

10 See Niblett, Bryan; *The Legal Protection of Computer Programmes*, (London, Oyez, 1980) at p 33.

11 This is as opposed to categories of dramatic musical or artistic works, although programs may have some elements of these.

12 Cmnd 6732 HMSO (March 1977).

13 See also, *WIPO Model Provisions on the Protection of Computer Software* (International Bureau of the World International Property Organisation, Geneva, 1978).

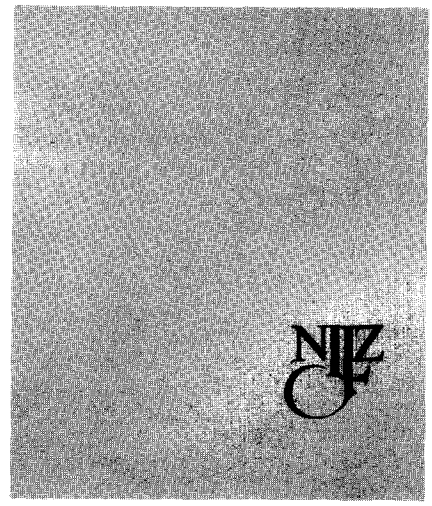
14 See Banks Committee (supra n 1), Chap 19.

15 See Niblett, op cit, p 65.

16 See eg Flannery, Michael; *Credit Information and Privacy*, [1983] NZLJ 42;

17 In August 1972, Dr Drayton MP for St Albans introduced a Private Members Bill the short title of which was "The Preservation of Privacy Act" (based on UK private members Bills).

18 In a letter to the author from the (UK) Society For Computers and the Law dated 4 November 1980, the Secretary stated this fact.



A New Zealand CLIRS

(Computerised Legal Information Retrieval System)

John Miller, Senior Lecturer in Law, Victoria University, Wellington. Director of Victoria University CLIRS project.

The computer world is now with us. The author of this article has spent some six months travelling and studying the implications of databases of legal material for use in legal practice. This article provides some useful background information and expresses his personal views and opinions. It is published with the intention of stimulating informed discussion on this topic among New Zealand lawyers.

Introduction

For the past five months I have been in the United Kingdom, Europe, and Canada, studying CLIRS operations, and I am now in Australia, through the courtesy of the Australian Government, studying the proposed CLIRS here.

Although my researches are not yet complete, I feel I have seen enough to enable me to comment on what is happening with CLIRS overseas and what we in New Zealand should be doing with regard to establishing our own CLIRS.

Brief Description of a CLIRS

A CLIRS is provided by a large mainframe computer on which are stored legal databases (eg the *New Zealand Law Reports* and the New Zealand statutes), and an information retrieval package (eg STAIRS, STATUS) which enables lawyers with very little computer expertise to search the databases.

In order to search a database, the only equipment a lawyer needs is a terminal, usually consisting of a screen, a keyboard, and a printer. Most word processors would suffice.

This terminal is connected to the CLIRS mainframe computer either through direct lines or via the telephone network by means of a modem or acoustic coupler. A lawyer can thus be at one end of the country and the CLIRS mainframe at the other. Indeed, the CLIRS mainframe can be overseas (eg Eurolex, in the UK), and yet still be accessed by lawyers as far away as New Zealand.

The cost to a New Zealand lawyer using a CLIRS would be the cost of obtaining the terminal and modem/coupler, the telephone connection charges, the computer charges which would cover computer time used, and a royalty charge for searching the database. I provide details of the charges being made by various CLIRS later in the text. It is not possible to say exactly what the cost would be for a New Zealand lawyer, but it should be within the means of even a sole practitioner. In addition to learning how to operate the terminal, a lawyer would need to familiarise him/herself with the search language particular to the information retrieval package.

The search languages of all information retrieval packages require the lawyer to search for cases by word matches (eg find all the cases in which the words "evidence with confession" occur) but variations occur in the formulations used when requesting information from the computer. With some packages the words sought from the database are the only words that need to be typed in, while in other packages the word must be preceded and joined by certain symbols. In different packages, different symbols mean different things.

In word matching, poor research techniques will mean that important cases are missed or details are provided of irrelevant cases, but this of course already applies to conventional legal research with printed materials.

Brief Comments on Overseas and New Zealand CLIRS

A Overseas CLIRS

(1) **United Kingdom CLIRS**

The overseas CLIRS we in New Zealand would be most interested in accessing are the two systems operating in the United Kingdom they are Lexis and Eurolex. Of these two systems only Eurolex is available to New Zealand lawyers at the moment. All that is required is a terminal and permission from Eurolex.

Lexis and Eurolex have not achieved the success originally envisaged, due to conservatism on the part of the UK legal profession, high costs, and a database which has not adequately catered for United Kingdom lawyers' needs. There are important lessons for New Zealand, in this, and these will be dealt with later.

(2) **Other CLIRS**

There are a number of these in countries which have databases of interest to New Zealand lawyers, including the United States of America, Canada, and Europe, and again, all that is required is a suitable terminal and the permission of the particular CLIRS operator.

(3) **Non-legal Databases**

In addition to legal databases, there are other overseas databases supplying for example, news and financial information. These could be useful to a New Zealand lawyer and they too could be accessed from New Zealand with a suitable terminal and the appropriate permissions from the databases operators.

B New Zealand CLIRS

(1) **New Zealand Market Size and Network**

The size of the New Zealand market is so small compared with other jurisdictions that it is unlikely that an overseas CLIRS operator would come to New Zealand to provide a New Zealand legal database. We therefore have to set up our own system in New Zealand.

What is required is a computer system operated by the Government, or preferably by a New Zealand company, which would provide the basis for a CLIRS operation.

(2) **Databases**
This CLIRS system should not be restricted to providing the databases of one publisher, but should contain any database a publisher is willing to provide and maintain. Nor should the database be confined to legal material. It should also for example, contain New Zealand news and financial information which would be of interest to lawyers.

(3) **Structure of Legal Databases**
The legal databases should not follow the format taken by the United States of America and United Kingdom databases, which contain mainly primary legal materials (cases and statutes). Instead, we should start by making available a current awareness service, and secondary materials such as digests articles and abstracts.

(4) **Information Retrieval Packages**
We should not follow the Australian example and commit ourselves too readily to one information retrieval package. There are a variety of packages available, such as STAIRS, STATUS, ASSASSIN, UNIDAS 1100, SIRS, and SIFT. Opinions vary on their suitability, but for New Zealand a decision will be based upon what hardware the package runs best on, and what support is available here. No matter which package is chosen a New Zealand CLIRS will still be able to communicate with a CLIRS using a different package, so there is no need for us to chose the same package as the Australians. Furthermore, new technological developments with information retrieval hardware may make information retrieval packages redundant.

(5) **Terminals**
The New Zealand CLIRS should be able to be accessed by a wide variety of terminals, including word processors.

(6) **Other Services**
As well as the provision of legal and non-legal databases, the New Zealand CLIRS could provide other services, such as word processing, accounting, electronic mail, reminder systems, and access to company, land, and Court records. Another important service which could be provided is an internal information retrieval system for lawyers' offices. This would enable the instant recovery of details of all the previous legal work carried out in an office, and would dispense with the constant "reinventing of the wheel" that goes on in so many offices when previous files, opinions and precedents cannot be traced. The system could also be used by barristers for litigation support in lengthy trials.

(7) **Victoria University CLIRS Involvment**
Assistance and advice is freely available from the Victoria University CLIRS to all those interested in a CLIRS operation.

At present the Victoria University CLIRS is engaged in a variety of projects which include testing various information retrieval packages, devising training programmes, and improving terminal operations for the legal profession. We also monitor the latest developments with overseas CLIRS and can access them on behalf of New Zealand lawyers if required.

Expansion of Comments

A **Overseas CLIRS**
The overseas CLIRS we in New Zealand would be most interested in are those in the United Kingdom, Canada, the United States of America, Australia, and Europe.

(1) **United Kingdom CLIRS**
The two main CLIRS in the United Kingdom are Lexis and Eurolex.

Lexis is provided by Butterworths (Telepublishing) Ltd in association with the United States of America supplier, Mead Data Central Inc, of Dayton, Ohio, where the database is stored.

Eurolex is supplied by the European Law Centre Ltd, a subsidiary of the International Thomson Organisation PLC.

Both systems are in competition with each other, although Lexis appears to be more interested in the larger city practices, while Eurolex serves the entire range of legal practices.

Set out below are the databases at present contained in the two systems, but it must be remembered that they are expanding all the time:

Lexis Databases in the United Kingdom
Statutes: By the end of 1983 all statutes and statutory instruments will be included.

Cases: All decisions since 1945 in the following reports:

All England Law Reports
Building Law Reports
Butterworths' Workmen's Compensation Cases
Criminal Appeal Reports
European Court Reports
Immigration Appeal Reports
Industrial Cases Reports
Industrial Relations Law Reports
Industrial Tribunal Reports
Justice of the Peace Reports
Knight's Industrial Reports
Law Journal Reports
Law Reports (Appeal Cases, Queens Bench, Chancery, Probate, and Family)
Law Reports Restrictive Practices Cases
Law Times Reports
Legal Decisions Affecting Bankers
Lloyd's Reports
Local Government Reports
Patent Cases
Property and Compensation Reports
Road Traffic Reports
Ryde's Rating Cases
Simon's Tax Cases
Tax Cases (from 1875)
Value Added Tax Tribunal Reports
Weekly Law Reports

plus unreported cases decided since 1979.

Special Topic Libraries:

These include all cases, statutes and statutory instruments on:

Tax
Intellectual Property
Double tax agreements and tax statements of practices, leaflets, etc.
Local Government

Lexis databases in the USA
Extensive Federal and State Case Law databases as offered by Lexis USA.

Lexis Databases in France
French case law from the Cour de Cassation, Conseil d'Etat and Conseil Constitutionnel, treaties and legislation.

Lexis Databases in the EEC
European Court Reports and European Commission Decisions.

Other
Nexis: a general and business news database from a variety of international sources.

Eurolex Databases in the United Kingdom
Statutes: All statutory instruments from 1981.

Finance, Sale of Goods Group, Local Government Acts.

Cases: Weekly Law Reports from 1954
Times Law Reports from 1976
Financial Times Commercial Law Reports from 1981
Criminal Appeal Reports (and sentencing) from 1970
Scots Law Times from 1970
Industrial Cases Reports from 1972
Fleet Street Reports from 1963
Reports of Patent Cases from 1945
Industrial Relations Law Reports from 1972
Road Traffic Reports from 1970

Other: Current law monthly issues
Current law year book from 1977

Eurolex Databases in the USA
The Westlaw service.

Eurolex Databases in Canada
The QL System service.

Eurolex Databases in the EEC
Common Market Law Reports from 1962
Official Journal of European Patent Office from 1978
European Human Rights Reports from 1979
European Commercial Cases from 1978
Council of Europe Treaty Series from 1948
Official Journal of European Communities (legislation) from 1980
European Law Digest from 1973

Lexis have far more statutory material than Eurolex because Lexis have had it all keyed into the computer as soon as printed copies have been available.

Eurolex on the other hand have been using the computerised printing tapes from HMSO to set up their databases. They have apparently found the conversion process difficult, and HMSO are rather slow in supplying the tapes.

The Eurolex database can be accessed from New Zealand now. One or two firms already do this and the CLIRS project at Victoria University has entered into a mid user agreement with Eurolex, whereby searches of the Eurolex databases can be carried out for interested parties. At the moment the service is only available from 7 am to 11 pm United Kingdom time, but these hours will be extended in accordance with demand. It is understood that a New Zealand agent for Eurolex will be announced shortly.

Lexis is not available to New Zealand lawyers. A key feature of the Lexis system is that it is accessed via a dedicated terminal, only available from Lexis. These terminals are not available in New Zealand, nor are they likely to be. Furthermore, the New Zealand market is too small for Lexis involvement and could only be covered as part of an Australian service. That is now unlikely as the Australian Government has effectively shut Lexis out of Australia.

Neither Lexis nor Eurolex have achieved the success originally predicted. The take up rate by users has been slow and this appears to be due to (a) the conservatism of many members of the United Kingdom legal profession, especially when it comes to embracing new technology, (b) the cost involved, and (c) databases which are not as yet adequately meeting users' needs.

Lexis charges, which include the supply of a Lexis terminal – a desk consisting of a screen, keyboard, and printer – are as follows:

(i) Subscription – £6,000 per annum.
(ii) Connect time – £30-£45 per hour depending upon amount of usage.
(iii) Installation – £200
(iv) Instruction – £35 per lawyer, up to a maximum of £1,500.
(v) Minor charges for printing the results of searches.

In addition, there are the following British Telecom charges:

(i) Installation – £200
(ii) Rental of line and modem – £264 per annum.

At the moment, Lexis is offering a 50 percent reduction of the subscription for the first 12 months, and there are special rates for Universities, which include a connect time of £30 per hour and free subscription.

Eurolex, on the other hand, is cheaper to use. Originally there was a subscription fee but this has been changed to a straight on-line charge of £60 per hour. There is also the cost of a telephone call to the Eurolex database in London.

The Eurolex user must obtain his or her own terminal, but Eurolex allows a wide variety of microcomputers to be connected to its database, and the cost here depends upon the complexity of the equipment desired; whether a simple terminal, or an intelligent microcomputer which can perform a variety of functions including word processing. Eurolex offers a terminal with some intelligence for £1,200.

There is also the cost of a modem rental at £360 per annum, and the British Telecom installation charge of £200. For Universities there's a special rate equivalent to a 50 percent reduction in the on-line charge to £30 per hour.

As can be seen, the cost of obtaining Lexis is greater because of the subscription fee for the supply of the dedicated terminal. Even so, the Eurolex charge is often too great for many lawyers, especially for a database which does not meet their needs.

The problem here appears to lie in the composition of the databases. They are composed mainly of primary legal materials (cases and statutes), and United Kingdom lawyers rarely use these in their legal research. They tend to use secondary legal materials such as current awareness services, textbooks, digests, and articles.

There are two other minor legal databases in the United Kingdom. These are Infolex and Lawtel, and they try to provide a current awareness service of recent cases and statutes, but they are not full text, only go back a few years, and are only available on the Prestel Videotex system.

The Prestel system has not been a success either, and as yet the number of subscribers to the services is low. It is uncertain therefore whether the services will survive. They would be available to a New Zealand lawyer when videotex is introduced here, but the response through the international telephone network would be rather slow. If there was sufficient demand however, a New Zealand videotex provider could no doubt transfer the entire database out here, and access would then be more efficient.

The cost to a United Kingdom practitioner using Infolex is £248 for the first year, and £300 per annum thereafter. There are other costs such as equipment charges, and Infolex estimates that the overall cost, including subscription, equipment rental, and typical usage is £400 per annum if Prestel is already installed, and £470 per annum if the subscriber only has a TV set.

Lawtel's charges are £600 per annum as they provide more information about the cases and statutes in their database.

Both systems provide a gateway to Eurolex through a mid-user group. Thus, if a lawyer discovers an interesting case on the Prestel database, the full text can be obtained from Eurolex.

(2) Canadian CLIRS

The only CLIRS operator here at present is QL Systems Ltd, situated in Kingston, Ontario. A large number of databases are provided, including news and technological as well as legal databases.

The legal databases cover the law reports and statutes of all the Canadian provinces except Quebec. In addition, there are the *Supreme Court of Canada Reports*, and the *Dominion Law Reports*. Only the headnotes of the Law Reports are available because there have never been sufficient funds to include the full texts. In addition to Canadian material, QL Systems Ltd provides the United States of America database, Westlaw, and the United Kingdom database, Eurolex.

The cost to a Canadian lawyer varies depending upon the type of equipment used, but basically it is $60 (Canadian) per hour.

QL Systems Ltd will connect up to a variety of terminals on the same basis as Eurolex in the United Kingdom. It is available to a New Zealand lawyer through the international telecommunication network.

(3) United States of America CLIRS

The two main CLIRS in the United States of America are Lexis and Westlaw. Lexis is provided by Mead Data Central Incorporated, in Dayton, Ohio, and Westlaw by West Publishing, the major American legal publisher situated in St Paul, Minnesota.

The databases on both systems are enormous and include state and federal cases, statutes, and some other materials such as the *Encyclopaedia Britannica* on Lexis.

Lexis started operating is 1973 and is reputed to handle over 20,000 searches per day.

Westlaw began later and at first only provided headnotes of cases, but when the preference in the United States of America appeared to be for the Lexis type full text database, it switched to this recently.

The position regarding the availability of the United States of America Lexis system in New Zealand is unclear. There is an agreement with Butterworths that Butterworths will provide the Lexis service in the Commonwealth. If Butterworths fail to provide a service it may be that Lexis will allow direct access to the United States of America from New Zealand. However, there would still be the problem of acquiring the dedicated terminal for access.

Westlaw however, has expressed interest in allowing access from Australia. It can be obtained indirectly through QL Systems Ltd, or through Eurolex who provide it in Canada and the United Kingdom respectively, so it should be available directly to a New Zealand lawyer through the international telecommunications network.

As well as the above full text retrieval systems, there are other legal reference systems available in the United States of America. Of particular interest to New Zealand lawyers is the Dialog Information Retrieval Service. It has many databases, including the Legal Resource Index, which abstracts articles from 660 legal journals and five law newspapers around the world, the Criminal Justice Periodicals Index, which indexes leading criminal justice journals, and Patlaw, which indexes United States Federal, State, and administrative agency rulings on intellectual property. Dialog databases are available now to New Zealand lawyers through the New Zealand Post Office Oasis system.

(4) Australian CLIRS

As yet there is no national CLIRS in Australia. There is a pilot CLIRS however. It is called Scale, and it is provided by the Attorney-General's office in Canberra, but for the moment it is only available to the Government Service.

The State Attorney-Generals have agreed that the information retrieval package to be used for a national CLIRS should be Status. There has been some criticism of this decision, and it has been said that a major influence was the fact that the Federal Attorney-General's project, Scale, invested considerable funds in developing Status and in capturing legal material in a Status format.

Only two states, Victoria and New South Wales, have taken any action so far in inviting tenders for the provision of a CLIRS. Computer Power of Melbourne, who are the suppliers of Status for certain types of mainframes in Australia, were the successful tenderers for the licence to set up a CLIRS in these states. They estimate that a system for the two states will be in operation by 1985, that it will cost $100 (Australian) per hour for on-line access, and that it will be available on a variety of terminals.

Computer Power have been granted a preliminary licence for now, but the indications are that a full licence, which will give them a monopoly in the two states for a number of years, will be granted. The states were able to ensure this monopoly because of their claim to Crown copyright in judgments and statutes, and this claim was used to prevent others, particularly Butterworths/Lexis, from setting up a rival CLIRS. An Australian CLIRS would certainly be available to New Zealand.

(5) European CLIRS

There are 45 CLIRS databases in Europe, but the one most likely to be of interest to New Zealand lawyers is Celex in Brussels.

Celex is provided by Euris, a division of Honeywell Bull in Belgium, and provides a comprehensive database in English on EEC law. It would be available to New Zealand lawyers through the international telecommunications link, but there is a registration charge of 10,000 Belgium francs, and an on-line fee of 500 Belgium francs per hour, which would probably deter most New Zealand lawyers from using it.

Non-Legal Databases

As well as the legal databases mentioned above, there are an even greater number of non-legal databases available in the United Kingdom, United States of America, and Australia, which could be available to New Zealand lawyers.

An interesting one in the United Kingdom is Polis. This is the United Kingdom Parliamentary on-line information system which will eventually have a database consisting of Parliamentary questions, Parliamentary proceedings, Parliamentary papers, progress of United Kingdom legislation, lists of United Kingdom, European, and international official publications, press comments on parliament, and miscellaneous library material. Polis is available through Scicon Computer Services Ltd, in the United Kingdom.

There are so many databases available worldwide that it is difficult to keep track of them, but one of the services that the Victoria University CLIRS project will provide is that of keeping notes on all the databases likely to be of interest to New Zealand lawyers.

B New Zealand CLIRS

(1) New Zealand Market Size and Network

By international standards, the New Zealand market for a CLIRS is rather small. This can be seen from an analysis by the Victoria University CLIRS of the 1982 NZ Law Register, which revealed that there were approximately 852 legal firms in New Zealand. This was further broken down into:

Partners	2,547
Staff solicitors	786
QC's and barristers	122
Gov't and company lawyers	291
	3,746

Allowing for changes since that date, and including the Judiciary and university law faculty staff, there cannot be more than 5,000 likely users spread throughout New Zealand. When one considers that there are more lawyers than this in many overseas cities, it can be seen why New Zealand is not a high priority market for overseas CLIRS operators. In any case, most overseas CLIRS operators have enough problems in attending to their own territory.

The most likely overseas candidate to consider supplying a New Zealand CLIRS would be the Australian company, Computer Power. They do not however envisage having a service for New South Wales and Victoria until 1985, and it would be some time after that before they would consider New Zealand as there would still be all the other Australian states to cover. There is also the problem with an overseas company of the site of the database.

In the United Kingdom, Butterworth's Lexis databases are stored in Ohio in the United States of America. This was a cause for concern amongst a number of United Kingdom lawyers, and it is also one of the reasons why Lexis has never secured a foothold in Canada. The Canadians are reluctant to allow their law to be stored in databases situated in the United States of America. Indeed, it goes even further than that in Canada, for the Quebec Government are against having their law stored in databases outside of Quebec.

I suspect that there would be similar opposition to having New Zealand law stored in databases in Australia. It would be preferable therefore for the Government, or a New Zealand company, to set up a CLIRS computer system of its own, thus providing an electronic highway on which our CLIRS databases could be made available locally.

It would also be preferable for us to have one, rather than competing systems, as duplication of computer systems and staff would result in wasted resources. There are a number of New Zealand companies in a position to set up a CLIRS computer system. Databank Systems Ltd, for example, already has a New Zealand-wide computer system for the New Zealand banking system in existence.

The provision of a New Zealand CLIRS computer system could be undertaken either as a result of tenders invited by the Goverment and the New Zealand Law Society, or as the result of market forces in which case the first company to provide an efficient system would take the field.

The latter approach could lead to a number of CLIRS competing with each other, resulting in the waste of resources already mentioned, but this situation is somewhat unlikely as given the size of the New Zealand market, it is doubtful whether too many companies would be interested.

(2) The Provision of Databases

The company providing a CLIRS in New Zealand should preferably be a company which is not a current legal publisher.

The problem with legal publishers setting up their own CLIRS, is that they provide only their own or complementary material, and not, obviously, that of their competitors. This could lead to pressure on other publishers to set up their own systems, and not only would this result in a waste of resources, but it would involve the New Zealand lawyer in having to switch from one CLIRS system to another. A company independent of legal publishing operating the CLIRS, would be in a position to allow any existing and all new legal publishers to place a variety of databases on the one system.

A CLIRS also offers an ideal opportunity for the provision of new databases which are not at present available in printed form. Databases such as: unreported judgments, administrative tribunal decisions, and land, company, and Court records. These could all be provided only a matter of days, even hours old in some cases. In addition, lawyers who have expertise in certain areas could set up their own databases on the CLIRS and gain royalties from accesses by other lawyers.

As I mentioned before, the CLIRS should also provide other databases, such as news and financial information databases. In many cases it is not the law that a lawyer finds difficult to ascertain, but the facts. A news database for example, could be searched to provide valuable information on such matters as the business activities of certain companies, or the frequency of accidents at a particular location.

(3) The Structure of Databases

Legal databases in the United States of America and the United Kingdom are basically composed of primary legal materials (cases and statutes). While there is no doubt that these are essential to a complete national CLIRS, there is also no doubt that many lawyers, particularly those outside the United States of America, do not commence their legal research by reading cases and statutes. A properly set up CLIRS must do more than simply provide the cases and statutes.

Lawyers familiar with an area of law already know the relevant cases and statutes and require only a knowledge of any recent changes. For those unfamiliar with a particular area, the first reference point will generally be a textbook, article, or digest. Both the expert and the non-expert lawyer may then read the cases or statutes, but these will not often have been their first step in legal research. Even those lawyers who do read the statutes or cases in the first instance will require a wider range of reference as they will want to test their understanding of them by referring to secondary sources such as articles or textbooks on the subject.

The CLIRS must therefore provide: a current awareness service at the first level, a digest/commentary service at the second level, and a full text of the statutes and cases at the third level. This is the way in which the Eurolex database will be structured in the future.

There are various reasons for the concentration on case and statute law in the United Kingdom and the United States of America CLIRS. In the first place, Lexis was the leader in this field in the United States of America, and as they were not legal publishers they did not have any prior material for the database. They therefore went back to the beginning and placed the full text of cases and statutes on their system since there is no copyright in judgments or statutes in the form in which they are issued from the Courts or legislature in the United States of America.

Because Lexis started with the full text of cases and statutes everyone else followed suit, particularly as there are fewer copyright problems in obtaining them. Another reason is the fact that United States lawyers, because of their legal training, tend to commence their research from primary sources.

Although it has been shown that lawyers in the United Kingdom tend to use secondary materials first, Computer Power in Australia still plans to set up a database in the format of primary materials. While this is useful in a country where there are a number of states with different primary materials, as also in the United States of America, we in New Zealand should approach a CLIRS from the opposite end and set up a current awareness service followed by a digest/article/abstract service. This will supply what New Zealand lawyers need and thus result in a financially viable CLIRS operation. Once a profitable base has been established the full texts of cases and statutes can be then included. If however we started by placing full text cases and statutes first, we would be

involved in a huge expenditure with little prospect of recovering it. Studies have indicated that in New South Wales it will be seven years before the Computer Power's CLIRS moves into profit.

The cost of converting all New Zealand primary legal materials into a computer readable form is estimated at $NZ1-$NZ1.5 million, although it could be done for around $NZ.5-1 million if the conversion was carried out in Asia. Even the lesser amount would take a long time to recover if the number of subscribers was limited, so it is most important to ensure a large number of subscribers first. Yet another reason for not starting with primary materials is the time involved in converting cases and statutes into a computer readable form, and the subsequent delay in the commencement of the CLIRS service.

(4) Information Retrieval Packages

There are a wide variety of information retrieval packages used in the various overseas CLIRS. The chart below gives details of the main packages available and of some of the CLIRS that use them:

The Lexis and Westlaw information retrieval packages are not for sale separately. The whole service must be taken. There is also a new legal information retrieval package which has been developed by the Norwegian Research Center for Computers and the Law. This is called Sift and it is based on Status. The Victoria University CLIRS project hopes to have a copy of this for testing shortly.

Although the Australians have decided to use the Status package there is no need for us to use the same one. New Zealand lawyers will still be able to access an Australian CLIRS even if a New Zealand CLIRS uses a different information retrieval package. This can be shown by the European situation where there are a variety of CLIRS using different packages all of which can be accessed by lawyers through the Euronet Diane on-line information network. The only problem the lawyers face is that of differing search languages, but this problem will soon be solved as the Europeans have devised a common search language for Euronet Diane users. It is called the Common Command Language (CCL) and it is slowly being implemented throughout the network. At a meeting in Luxembourg in February 1983, representatives of national and international standards organisations met to develop a world standard CCL which is likely to be based on the Euronet Diane CCL. Recommendations are now being drawn up for an International Standard Organization (ISO) norm.

An alternative for the lawyer who does not wish to master different search languages, or even the common command language when it arrives, is to use a mid-user service, whereby someone else carries out the search. These are popular in Europe and Canada and it is interesting to note the Eurolex have also commenced such a service.

Another development which will make switching between different databases easier is an enhancement which when fitted to a lawyer's terminal will reinterpret his requests into the format required by the CLIRS being searched.

Similarly, CLIRS operators using different information retrieval packages,

Package	*Supplier*	*Some CLIRS users*
STAIRS	IBM	Datev – Germany Cedij – France Lawyers Coop (NY, USA) – 10 USA State Legislatures
STATUS	Aere Harwell, UK	Scale – Australia Eurolex – UK Kluwer – Holland
QL SEARCH	QL Systems Ltd, Canada	QL Systems Ltd – Canada
SIRS	Data Retrieval Corp, Milwaukee	14 USA State Legislatures
ASPENSEARCH V	Aspen Systems Corp, Rockville, Maryland, USA	9 USA State Legislatures
UNIDAS 1100	Sperry Univac	Italgiure – Italy Unidata – Switzerland UK Houses of Parliament
ASSASSIN 005	ICI	ICI Internal Records
MISTRAL	Honeywell Bull Belgium	Celex – Belgium

will be able to exchange entire databases by means of a computer program written to transform the database of one CLIRS into a form acceptable to that of another.

There is therefore no need for us in New Zealand to feel compelled to select a particular information retrieval package just because it has been selected by Australia. We should carefully examine the advantages and disadvantages of each package and ascertain whether it is still being developed and supported by its creators and on which mainframes it can best operate. We should also keep in touch with developments in information retrieval hardware, which may take the place of information retrieval packages. The Victoria University CLIRS project is monitoring such developments as part of its research activities.

(5) **Terminals**

It is important that a New Zealand CLIRS be capable of being accessed by a wide variety of terminals, including microcomputers already available in legal offices for word processing. A CLIRS of this type would enable many small practices to justify the purchase of an intelligent microcomputer which could be used not only for legal information, but word processing, accounting, and general office management.

In large practices however, a single microcomputer would not be sufficient as it would be used almost continuously for word processing. Another microcomputer, set apart principally for legal research, although it could of course be used for other matters, would be necessary.

Setting aside a terminal comes close to the dedicated terminal approach adopted by Lexis, but it differs in that the Lexis terminal is set up only to access the Lexis database, while a microcomputer can access a variety of databases. One advantage of the Lexis terminal over the microcomputer is the fact that it is relatively simple for the infrequent user to operate. The keyboard is well set out and almost self explanatory. The infrequent user would find a general purpose microcomputer terminal rather more difficult to operate, although there is now available a simple solution in the form of a mask, which when placed over the keyboard, highlights the appropriate keys for a search.

Terminals will become more user friendly through time, but it is important for New Zealand lawyers to start using them now in order that they can contribute to new developments.

(6) **Other Services**

If an intelligent microcomputer is used as a CLIRS terminal, it can, with the appropriate software, also be used by a lawyer for the variety of functions mentioned previously: word processing, accounting, reminder systems, general office management, access to company, land and Court records.

There are limits however to what a microcomputer can do and since storage on a microcomputer is limited, many firms may prefer to use the power of the CLIRS mainframe for these functions.

A CLIRS mainframe would also be in an ideal position to offer an information retrieval system for the internal database of a lawyer's office. All internal office correspondence, opinions, precedents, and files, would be in a computer readable form if a word processing system was used to prepare them. This data could be placed on a part of the CLIRS mainframe yet be accessible only to the legal office in question. The information retrieval package on the CLIRS could then be used to search the lawyer's internal database, and it could all be done from the terminal in the lawyer's office.

A system such as this would solve one of the major problems facing lawyers; that of tracing work previously carried out. Every lawyer has had the experience of searching in vain for a precedent, a file, or an opinion, and then because it cannot be found, of having to duplicate the work.

An internal retrieval system could also be used during long trials. The Court documents, evidence, and details of the exhibits could be placed on the computer and instantly recalled at the touch of a button. The National Law Library Ltd, an off-shoot of the Society for Computers and Law in the United Kingdom, has developed an information retrieval package called Microbird, which will carry out information retrieval such as this, in house, on a microcomputer. There are limits on the amount of storage available on a microcomputer hence the need to use an outside mainframe.

The storing of material on an outside mainframe brings up the matter of confidentiality of material. Effective security arrangements can be built in to retrieval systems to preserve confidentiality, and the New Zealand trading banks are a good example here. They are all in competition with each other, yet they all share the same computer facilities supplied by Databank Systems Ltd. Similar arrangements could be built into a CLIRS in order to protect the confidentiality of a lawyer's internal database.

On the other hand, some lawyers may actually want to provide open access to parts of their database on the CLIRS. For example, a firm may have carried out extensive research in an area of law which would be of interest to other lawyers who would pay royalties for each access.

A CLIRS thus offers exciting new opportunities to legal firms, making them more efficient, and thereby increasing their profits.

(7) **Victoria University CLIRS Involvement**

The Victoria University project is willing to assist with information and advice on all aspects of setting up a CLIRS.

Other work being carried out includes the testing of the Stairs information retrieval package, with similar testing to begin shortly on Status and Sift.

Training programmes are also in the process of being developed and will commence later this year.

A variety of research projects are also both under way and planned for 1983 and 1984. These include:

(i) Researching new methods of converting historic legal data, eg scanners and optical character readers.

(ii) Researching the effectiveness of computerised legal research, compared with manual research.

(iii) Researching the implications computerisation will have on the work of lawyers.

In addition to all this, we will be keeping track of all the latest developments in this area, both in New Zealand and overseas. All the information obtained will be freely available to those interested. We will also access overseas databases for New Zealand lawyers until they become more familiar with computer research or until commercial mid-user groups become available.

Conclusion

New Zealand lawyers are already beginning to recognise that they must keep up to date with technological developments which will assist them in their legal practices.

A CLIRS is a new development which will be of great benefit to lawyers, not only in providing an additional and effective means of finding the law, but also in bringing a host of other services, as for example, that of internal database management.

Blood-alcohol offences — the judicial approach

J L CALDWELL

Much of the criticism by laymen of the application by the Courts of the blood-alcohol legislation overlooks the fact that Parliament in creating this particular offence has chosen to adopt an arbitrary quantitative test that is not necessarily related to driving. It is based on presumptions that may or may not apply to a particular individual at a particular time as being likely to endanger other road users (or himself). The tests to be applied are objectively "scientific" and consequently must be properly carried out if they are to be valid. It is not the rules of evidence, but the requirements of the certainty of scientific method that properly provide defences to charges brought under this legislation. In this article, Mr J L Caldwell, Lecturer in Law at the University of Canterbury discusses the judicial approach to this punitive legislation, illustrating the very serious problems of principle that it raises.

The Transport Amendment (No 4) Bill 1983, as reported back, with its provisions on "drinking and driving" has focussed public attention once again on what Jeffries J has characterised as "... an endemic social problem in western style affluent societies ... [and] ... a very particular socio-criminal problem which is bordering on the unique" *(Taupau v Ministry of Transport*, unreported, Wellington Registry M 527/81, 6 November 1981).

By s 14 of the Bill the legislature proposes to put beyond all argument the power of an enforcement officer to direct drivers of vehicles to stop and remain stopped in order for the officer to determine if an offence under the Transport Act (or the Road User Charges Act 1977) has been committed. This power will exist regardless of whether the officer has good cause to suspect any offence. There is however nothing radically new in this proposal (somewhat misleadingly described as the "random breath-testing" provision) — it seems the power was already available under the present provisions of s 66 of the Transport Act 1962 (see *Hohaia v Roper*, unreported, Wellington Registry, M 534/82, 23 February 1983 per Quilliam J).

By s 11 of the Bill it is proposed, in effect, to widen the ambit of s 58E of the Transport Act. Section 58E of the Act presently provides that "reasonable compliance" with certain sections of the Act will suffice for successful prosecution. Section 11 of the Bill provides that an error in an evidential breath test will not vitiate proceedings for an offence relating to blood alcohol concentration.

The rule against hearsay evidence is to be further undermined in this area of law by the provision in s 13 of the Bill which states that in certain circumstances an analyst's certificate relating to the analysis of a blood specimen will be conclusive evidence. In those circumstances the defendant will not be able to request the appearance of the analyst at the hearing.

Inevitably these new amendments will produce a further spate of legal challenges and judicial pronouncements. It is therefore timely to reflect on the current judicial approach to the existing blood-alcohol provisions.

Scheme of the Legislation

As Jeffries J noted in the *Taupau* case (supra) the offence of drinking-driving is manifestly a special category of criminal offending. This has led to a legislative scheme for enforcement rather different from the normal. As McMullin J recently observed in the Court of Appeal "[t]he legislature has substituted chemical tests for the officer's own personal observation" (*Parker v Ministry of Transport* [1982] 1 NZLR 209, 214); or as Chilwell J similarly declared in *Makheca v Auckland City* (unreported, Auckland Registry, M345/80, 1 September 1980) "... the law has surrendered itself in large measure to the scientists". The reason for this legislative approach seems to be the reason proffered by the Court of Appeal in *Kamana v Auckland City Council* [1978] 2 NZLR 435, 441 — the legislative hope that it would make proof of past offences easier.

The broad outline of the scheme is familiar. There is an initial breath-screening test followed by an evidential breath-test (which may be enough for conviction) and then followed in certain circumstances by a blood test.

Underpinning this broad scheme are to be found provisions wholly unlike

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A CLIRS, along with other new developments must be used by lawyers if they are to participate fully in a modern society. The day is fast approaching when clients will be astounded if their lawyers do not have computer terminals through which they can transfer information.

The day is also fast approaching when it will be considered professionally negligent for a solicitor to fail to use a computer terminal to search legal databases.

If lawyers begin to use computers now, they will grow accustomed to them, become more knowledgeable about them, be able to participate in their development, and be able to use them to their best advantage. They will also wonder how they ever managed to provide a profitable professional service without them!

those found in other penal statutes. For example s 58 (2) and (3) of the Act provide that a conclusive presumption operates to the effect that the proportion of alcohol found in either a suspect's breath or blood after testing is "conclusively presumed" to be the same as that at the time of driving. As North P baldly stated in *Simpson v Police* [1977] NZLR 393, 397 such a conclusive presumption is really a fiction. Indeed the Court of Appeal had earlier pointed out in *Stewart v Police* [1970] NZLR 560 that these provisions are not founded at all on the likelihood of the alcohol content being in truth the same at the two points of time; rather they are founded on the basis that there is unlikely to be a miscarriage of justice in most (although not all) cases. Apparently any hardship in a few individual cases was assumed to be warranted by the overriding public interest in convicting guilty persons.

However the mercy of the Courts has to some extent softened the harshness of the legislature. In *Transport Ministry v Sowman* [1978] 1 NZLR 218 and *Ministry of Transport v Bell* (unreported, Court of Appeal CA 241/82 15 February 1983) the Court of Appeal has indicated that in accordance with the ordinary principles of discretionary sentencing any evidence of a material difference between the tested level and actual driving level of alcohol may be taken into account when sentencing. Thus the concept of culpability has been injected into this area of law by the Courts rather than Parliament.

Another major legislative attack on technical legal defences is apparent in s 58E of the Act (and in its predecessor section, s 58(2)). The obvious object of this section on reasonable compliance is "... to negate possible defences devoid of merit" (*Police v Wilde* [1977] NZLR 876, 881); but the section does mean that deviations from a scheme imposing severe penal sanctions can in certain circumstances be overlooked.

Balanced against this general legislative emphasis on the public interest in the detection and conviction of drinking drivers there are of course many provisions designed to protect the suspect. For example s 58(4) and s 58A clearly show legislative recognition of the somewhat unusual consequence of an evidential breath-test being of itself sufficient to lead to conviction. Similarly there are carefully designed procedures in the Act and the Transport (Breath Tests) Notice 1978 to ensure there is no error in the working of the evidential breath-testing machine.

Technical Complexities of the Equipment

As recently as in 1980 the evidential breath-test machine was judicially described as "... a novel and, to the uninitiated, a complex device" (*Tirikatene v Ministry of Transport* [1980] 1 NZLR 658, 661. See also *Elliot v Ministry of Transport*, unreported, Christchurch Registry M21/81, 25 August 1981, per Hardie Boys J).

Not surprisingly many attacks were made by defence counsel on the efficiency and mode of working of the machine. Much argument centred on its complexity. Perhaps to lessen such argument members of the Court of Appeal in *Soutar v Ministry of Transport* [1981] 1 NZLR 593 declared that the characteristics of Alcosensor II should not be regarded as "arcane or mysterious". The Court of Appeal therefore felt confident in holding that the failure to press an already depressed "SET" button could not result in an incorrect result.

Similarly in *Morris v Ministry of Transport* [1980] 2 NZLR 326 the Court of Appeal dispelled the air of mystery surrounding the then current practice of warming up the Alcosenor II — a practice not provided for in the Breath Tests Notice. The Court of Appeal found there was no evidence to suggest that this practice of warming up would cause material error and therefore the Court stated that it would not invalidate the test subsequently administered.

In *Soutar's* case Somers J suggested that if a question arises as to any features of the device and if the parties have not called scientific evidence then the Judge should not be slow in calling for it himself. However it can be noted that evidence is really only relevant on the question of a malfunctioning of a particular device on a particular occasion. As the Court of Appeal stated in *Auckland City Council v Gray* [1982] 1 NZLR 200 the general efficiency of the Alcosensor II device is an unreviewable matter since the Breath Test Notice has the same effect as a regulation. (And although the Court of Appeal left open the issue of review for *ultra vires* this must be regarded as a ground unlikely to succeed in view of their earlier decision in *Mackenzie v Police* [1970] NZLR 814, 817.) *Gray's* case was recently applied by Barker J in *Lyons v Ministry of Transport* (unreported, Auckland Registry, M1245/81, 9 March 1983) and in that case His Honour was not prepared to hear argument to the effect that regular calibration was needed to preserve the machine's accuracy. His Honour said the device was impregnable.

However the special legislative protection and the mantle of infallibility accorded to the evidential breath-testing device is not extended to the computer used in the blood analysis procedure. The Court of Appeal in *Holt v Auckland City Council* [1980] 2 NZLR 120 stated that the prosecution is required to observe the ordinary rules of evidence in establishing the results of a test and the accuracy of the computer print-outs. Richardson J noted that computers do not yet have the degree of usage and acceptability in New Zealand to enable the Court to presume they were operating accurately.

Difficult Drafting

The wording of the legislation has often created problems for the Courts. Thus on various occasions Cooke J has been driven to criticise the drafting of sections. Various provisions have been described as "complicated" (*R v Mangos* [1981] 1 NZLR 86, 88), "inept and creating unnecessary pitfalls" (*Boyd v Auckland City* [1980] 1 NLR 337, 344) and as evincing "verbal difficulties" and "a degree of verbiage" (*Auckland City Council v Fulton* [1979] 1 NZLR 683, 686-7).

Inevitably the drafting difficulties and ambiguities have led defence counsel to launch essentially semantic arguments. In response the Court has been forced to take a somewhat broad and speculative view of Parliamentary intention.

Judicial Approach to Interpretation

There is a general presumption of statutory interpretation that when it is unclear whether the conduct of the accused comes within the scope of a criminal statute then the statute should be interpreted narrowly in favour of the accused so as to result in an acquittal (see Cross: *Statutory Interpretation* (6 ed) at pp 150-152). If adopted in this area of law the presumption would suggest the need for a narrow reading of ambiguous words and the need for strict adherence to statutory procedures. In fact this approach is rarely evidenced in this area of law although there are certainly some instances where it can be noted (see *Transport Ministry v Quirke* [1977] 2 NZLR 447, 506-507 and dicta of Woodhouse P in *Lawrence*

v Ministry of Transport [1982] 1 NZLR 219, 220). However the judicial fear has been expressed that if the Courts adopt an excessively technical approach to the legislation the legislature may respond with an "unacceptably severe" solution so that ultimately the Courts' surveillance is almost excluded (see *Taupau v Ministry of Transport* (supra) per Jeffries J).

Thus the Courts are more likely to have recourse to the approach enjoined by s 5(j) of the Acts Interpretation Act 1924 with a consequent decision unfavourable to the accused. Indeed s 5(j) has been expressly referred to (and not merely assumed) in such cases as *Boyd v Auckland City* (supra), *R v Mangos* (supra) and *Blucher v Police* [1971] NZLR 520.

As Cooke J said in *Auckland City Council v Fulton* (supra at p 686) "[i]n the face of verbal difficulties ... the general intent discoverable in the statute is particularly important." The same learned Judge similarly declared in *R v Mangos* (supra at p 88) that the preferred approach "... depends not on particular shades of wording in complicated statutory provisions but on their general pattern and purpose." And in interpreting the legislation the general pattern and intent of the statute has been variously described as deterrence *(Cooper v Ministry of Transport* [1980] 2 NZLR 498, 499), detection *(Fulton's* case supra at 687) and making the proof of past offences easier *(Kamana v Auckland City Council* (supra)).

It must be noted, however, that the Court of Appeal has frequently said that the natural and ordinary meaning of words is to be adhered to unless there is something in the context or the provision warranting another interpretation *(Coltman v Ministry of Transport* [1979] 1 NZLR 330, 337; *Soutar v Ministry of Transport* [1981] 1 NZLR 545, 548 and *Spencer v Ministry of Transport* [1982] 1 NZLR 222, 223). However a purposive construction is clearly apparent in many Court of Appeal judgments, and a casual reading of that Court's judgments shows the Court constantly interpreting statutory words in the light of the perceived intent of either the legislation as a whole or of a particular provision.

Thus in *Coltman's* case (supra) a calligraphic defect in the analyst's certificate relating to the defendant's correct address did not render the certificate inadmissible (in light of the "reasonable compliance section") This was because the Court inferred that the purpose of s 58B(9), which required the defendant's true address, was to enable identification of the specimen of blood with the donor and the Court felt that this purpose had been met.

In *Parker v Ministry of Transport* (supra) the Court of Appeal noted that when the statute provided the enforcement officer "may require" a suspect to submit to certain tests he need not exercise an independent discretionary decision. McMullin J opined that the purpose of the legislation was for evidence to be obtained by scientific objective testing rather than by subjective personal observations founded on a statutory discretion. In *Spencer v Ministry of Transport* (supra) the Court asserted that in the context of hospital blood tests there was no statutory purpose requiring the naming in the medical practitioner's certificate of the person who sent the parcel if it was other than the medical practitioner.

Sometimes of course the purposive construction could work in the accused's favour. Thus in *Scott v Ministry of Transport* (unreported, Court of Appeal CA 255/82, 10 March 1983) the meaning of s 58(A)(1) empowering an enforcement officer to require the defendant to undergo a breath-screening test "forthwith" was in question. Cooke J considered that "forthwith" should not be construed in an unduly literal or pedantic way. His Honour pointed to the purpose of the statutory provision which he said was the need for a speedy test and he therefore suggested that a willingness on the part of the defendant to undergo a test in the immediate vicinity and without delay would suffice. "Forthwith" did not therefore mean "instantly".

Furthermore defendants may derive some solace from the Court of Appeal's pronouncement that the breath-alcohol procedure is mandatory in the sense that if the procedure is not complied with the prosecution will fail unless saved by s 58E *(Soutar v Ministry of Transport* [1981] 1 NZLR 545, 547). But it must be remembered that the question of whether the procedure is complied with is determined in accordance with a broad purposive construction. Also it is apparent that at least some steps of the Breath-Tests Notice (eg step 4 which requires inflation of the bag "as far as possible") may be construed as directory *(Simpson v Police* (supra)). Moreover any solace may be illusory given that s 58E is, as discussed below, a substantial saving provision and that s 11 of the Transport Amendment (No 4) Bill 1983 will shortly be enacted into law.

Reasonable Compliance

A key provision of the legislative scheme is s 58E which provides it shall not be a defence to charges on breath-testing, blood testing, or charges relating to hospital testing that the provisions "... have not been strictly complied with or have not been complied with at all, provided there has been reasonable compliance with such of those sections as apply."

The leading Court of Appeal judgment on the predecessor section, s 58(2), was *Coltman v Ministry of Transport* (supra). The reasoning is still relevant today. In that case members of the Court adopted a liberal approach. Overruling earlier Supreme Court decisions, the Court held the section applied not only to the procedures used for the taking of breath and blood specimens but also to the standards of proof required in a prosecution. Thus dealing with a mistake in an analyst's certificate it was asserted that there could be reasonable compliance with statutory provisions if the mistake was explicable, if the person concerned had acted with reasonable care, if there had been no prejudice to the defendant and if the purpose of the section was met.

Soon after that judgment the provision then in question was replaced by the present s 58E. Although there has been some judicial uncertainty as to its meaning there is general acceptance that the section has greater curative effect than its predecessor *(Tirikatene v Ministry of Transport* [1980] 1 NZLR 660; *Parker v Ministry of Transport* (unreported, Auckland Registry, M 1746/80, 26 February 1981) and *Dodd v Ministry of Transport* (unreported, Wellington Registry, M 308/80, 16 September 1980).

The obvious differences between the two provisions are that the present s 58E applies to the "hospital section" (s 58D) and that s 58E also applies where some provision has "not been complied with at all".

The apparent difficulty in holding there to be "reasonable compliance" with a section where there has been no compliance at all has been neatly avoided by the Courts seeking to discover compliance with the section read as a whole. Thus even though some individual components of the section may have been entirely disregarded it is enough if there is reasonable compliance with the broad pattern

of the legislative scheme as revealed in the section. *(Tirikatene v Ministry of Transport* (supra); *Dodd v Ministry of Transport* (supra) and *Soutar v Ministry of Transport* (supra)).

While it has been stressed by the Court of Appeal that s 58E theoretically applies to *any* of the relevant provisions it has been suggested by Richardson J that some provisions may be so basic it would be difficult to conceive how non-compliance in strict terms could be justified *(Ministry of Transport v Murdoch* (unreported, Court of Appeal, CA 183/77, 9 March 1978)). In like manner Quilliam J has postulated that errors in the breath-screening procedures may be more readily excused under s 58E than errors in the more significant evidential breath-testing procedures *(Tirikatene v Ministry of Transport* (supra)).

Certainly it is clear that the Courts will not employ this section where there has been "... a major departure from the scheme of the Act *(Auckland City Council v Fulton* (supra) at 688 and *Ready v Ministry of Transport* (supra)). Thus in *Fulton's* case the Court of Appeal held that lack of approval for an evidential breath-testing device was so fundamental and central to the scheme of the legislation that usage of the old device could not be covered by s 58E. And on some occasions a defect may be so fundamental that it cannot be saved by s 58E even though there is no prejudice to the defendant *(Pickering v Police,* unreported, Blenheim Registry M 5/80, 23 December 1980 per Hardie Boys J).

However, minor defects have been held by the Court of Appeal to have been countenanced by s 58E. In *Transport Ministry v Morgan* [1977] 1 NZLR 238 a device unaltered from that approved by the Minister except for a different trade name was held to have reasonably complied with the Minister's approval. In *Auckland City v Gray* (supra) a new mouthpiece for Alcosensor II introduced subsequent to the Minister's approval was similarly accepted.

Naturally the application of this crucial section depends greatly on the facts of the particular case (see the *Fulton, Tirikatene* and *Coltman* cases). The *Coltman* factors described above are certainly the most important factors to be considered but ultimately it may all boil down to considering whether the purpose of the provision is met (*Soutar* v *Ministry of Transport* (supra)).

Of course the Court may well avoid the section altogether by according a liberal interpretation to the words of a particular provision so that the Court is able to hold that there has been "strict compliance" with the words in that extended sense (*Lawrence v Ministry of Transport* [1982] 1 NZLR 219). Indeed the very existence of the "reasonable compliance" clause may be an indication that a strict construction is inappropriate *(Thomas v Auckland City Council* [1975] 1 NZLR 751 per McCarthy P) and this is so even in the construction of provisions to which s 58E is not applicable *(Boyd v Auckland City Council* [1980] 1 NZLR 337).

Finally it is interesting to note that while the Court of Appeal has indicated that the procedures in the Breath-testing Notice are an exhaustive code, the addition by the traffic officer of an extra step not required by the notice has been held not to invalidate the test — that is unless the extra step would cause a material error in the functioning of the device or would conflict with the requirements of the notice *(Morris v Ministry of Transport* [1980] 2 NZLR 326). However any such extra step adopted by some traffic officers cannot be regarded as a mandatory step for other officers. In *Auckland City Council v Haresnape,* (unreported, Court of Appeal, CA 1/83, 30 March 1983) the Court of Appeal overruled a High Court decision which imposed a duty on a traffic officer not imposed by the Act.

The practical approach

The Courts have often expressed an understanding of the practical difficulties of this legislation and have attempted to interpret the Act in order to assist its practical working. Such an interpretation, of course, may not be available if the language of the Act does not support it *(Coltman v Ministry of Transport* (supra) at p 333). Nevertheless there is a real judicial reluctance to introduce "complications" into what is perceived as an "... overly technical area" *(Colbert v Ministry of Transport,* unreported, Gisborne Registry, M 57/82, 21 February 1983). And the practical aspects of the case have clearly influenced the Court of Appeal in many of its judgments in this area of law. Thus it was held that mere carelessness in not having an approved breath-testing device would not of itself deprive the prosecution of the right to say that no device was readily available *(R v Mangos* [1981] 1 NZLR 86, 88).

In another case it was stated that the prosecution need not strictly prove that "alcohol-vapour" introduced into the device was indeed as described if the container was correctly labelled *(Boyd v Auckland City Council* [1980] 1 NZLR 337). The notion of "forthwith" in a statutory provision was held to embody the concept of practicality *(Scott v Ministry of Transport* unreported, Court of Appeal, CA 255/82, 10 March 1983) and practical problems confirmed Richmond J's view that Step 4 of the Breath Test Notice was directory rather than mandatory in *Simpson v Police* [1971] NZLR 393.

Likewise in *Ministry of Transport v Bell,* (unreported, Court of Appeal CA 241/82, 4 February 1983) the Court of Appeal stressed that the sentencing flexibility created by *Sowman's* case had not created any difficulties in practice and this was a major reason why members of the Court felt disinclined to depart from it. In *Transport Ministry v Payn* [1977] 2 NZLR 50, 66 Woodhouse P observed in the Court of Appeal that the right of entry onto private property claimed for traffic officers would not have any effect upon their efforts to regulate drinking-driving and this was an important reason as to why His Honour felt the power could not be said to be impliedly authorised.

A traffic officer's experience and knowledge has been recognised by the Court of Appeal as enabling him to identify the device used as an approved device *(Transport Ministry v Markland* [1977] 1 NZLR 11, 14; *Auckland City Council v Gray* (supra) at 205-6). (The risk of abuse is seen as minimised with the traffic officer always open to cross-examination — see *Colbert v Ministry of Transport* (supra)).

As a final example McCarthy P when construing the former legislation felt that it neither expressly nor "by proper implication" required the second breath test and the blood test to be conducted in the same place. In his opinion that would have introduced "an unnecessary and an undesirable administrative burden" *(Thomas v Auckland City Council* [1975] 1 NZLR 751, 752).

Review of the Enforcement Officer

It has recently been stated by Woodhouse P in the Court of Appeal that "[t]he Court will always be concerned to ensure that an enforcement officer acts properly and fairly and for the purposes of the Act" *(Police v Wilson* [1982] 1 NZLR 216, 218). More qualified sentiments were expressed by

the same learned Judge in *Parker v Ministry of Transport* [1982] 1 NZLR 209, 210. Most recently in *Scott v Ministry of Transport* (supra) Cooke J indicated that the Court may also be concerned to ensure that an enforcement officer acts with tolerance and courtesy. This is on the basis that "[P]arliament cannot have intended citizens to be exposed unnecessarily to embarrassment, or even humilition." However such words of warning to the enforcement officers have been counterbalanced by the expressions of judicial faith in "... the ability and sense of fairness of law enforcement officers" *(Stewart v Police* [1976] NZLR 560, 566 per Wild CJ cited by Richmond P in *Transport Ministry v Sowman* [1978] 1 NZLR 218, 221). (Equal reliance has been expressed on "the good sense and judgment of the doctor", *MacKenzie v Police* [1970] NZLR 814, 819 per North P.)

Certainly the requirement of "good cause to suspect" must be objectively established for the initial breath-screening test *(Police v Anderson* (CA) [1972] NZLR 233) and if an issue of good faith is raised the onus of proving it falls on the prosecution *R v Mangos* (CA) [1981] 1 NZLR 86. But the requirement of "good cause" needs only be proven on the balance of probabilities and according to Haslam J, sitting in the Court of Appeal, respect is to be paid to a traffic officer's experience and judgment in observation *(Police v Anderson* supra at p 252; also *Police v Cooper* [1975] 2 NZLR 216). Moreover the Court of Appeal has recently expressed a reluctance to interfere with the enforcement officer's other decisions past the preliminary point of assessing "good cause", and it now seems clear that the powers of enforcement officers are not reviewable on the ordinary administrative law principles. *(Parker v Ministry of Transport* (supra)).

Conclusion

It need hardly be stated that the powers and procedures of the Transport Act 1962 which culminate in the taking of a person's blood are a significant intrusion on a person's civil liberties. However only occasionally have these considerations of civil liberties affected the judicial approach (but for an example see the judgment of Woodhouse J in *Transport Ministry v Payn* [1977] 2 NZLR 50). The more typical approach is that exemplified by the dissenting judgment of Richmond P in *Payn's* case (at p 55) when His Honour argued that the statutory object of lowering the road toll was "... so important that the Court should not allow it to be defeated except on weighty grounds".

The spirit of the legislation is thus perceived to be found in the broad provisions on "reasonable compliance" and in the "conclusive" presumptions rather than in the detailed provisions protecting suspects.

Thus, in brief, it would seem that if the legal issue is a little clouded an individual who is accused of one of the relevant offences should not be too optimistic of judicial indulgence favouring his cause.

APPOINTMENT OF HIGH COURT JUDGE — MR JUSTICE HILLYER

Mr Justice Hillyer was sworn in as a Judge of the High Court at Auckland on Wednesday, 7 September 1983.

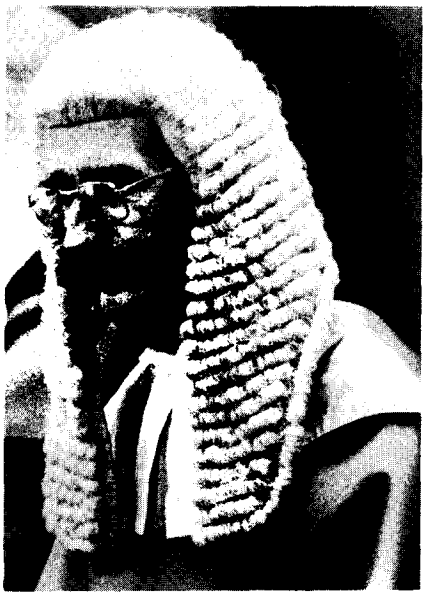
When the new Judge was appointed it was announced that he would be a temporary Judge in the first instance, as is also the case with Mr Justice Tompkins. Both Judges, however, are expected to be permanently appointed early in 1984.

Mr Justice Hillyer was a partner in an Auckland law firm in the 1950s and commenced practice as a Barrister in 1957. He was appointed a Queen's Counsel in 1967.

The new Judge has been active in a number of sporting activities and is a Trustee of the Youthline House Trust. Since 1978 he has been a Director of Petrocorp and of Maui Development Limited. In 1982 he was appointed a Judge of the Court's Martial Appeals Court. Recently he chaired the Commission of Inquiry into the administration of the District Court at Wellington.

Mr Justice Hillyer has been active in Law Society affairs. He was a member of the Council of the Auckland District Law Society and was its President in 1973-74. He was also a member of the Council of the New Zealand Law Society for the years 1970-74. Until his appointment he was a member of the New Zealand Law Society Disciplinary Committee, on which he had sat since 1973. In 1971-72 he was President of the Auckland Medico-Legal Society.

Mr Justice Hillyer was a part-time tutor in contract and torts law at the University of Auckland and has been moderator in the law of contract for the four universities since 1976. He has been a member of the Editorial Board of *Recent Law* since 1968, and from 1973-77 he was Chairman of the Legal Research Foundation. He was also a member of the Council of the University of Auckland from 1975-79.



Mr Hillyer, who is 61 years of age, is married with five children. He served in the Royal New Zealand Air Force from 1941-45 as a bomber pilot and on Special Air Service work. The new Judge will sit in Auckland.

Stick to a Stuff-Gown

Hubert Picarda, Barrister, England

The Forensic Fables have been a source of pleasure to many in New Zealand as elsewhere, since they first appeared. This note about the author is reprinted with permission from the New Law Journal *of 23 December 1982.*

ONE day perhaps, and may it be soon, while there are still enough eye-witnesses about, someone should write a history of the Bar between the Wars. In its coverage of the Junior Bar pride of place would go to the most popular junior of that period – Theobald Mathew, known to all in his day (and to posterity) as "Theo", whose wonderful *Forensic Fables* have just been republished.

What sort of a man was he? The bare outlines of his life have been drawn many times by obituarists. He was born on 6 December 1866 and died on 20 June 1939 in the city of his birth, London. His great uncle (the Apostle of Temperance in Ireland) was Father Theo Mathew, a name that sounds down through successive generations of the family. His father was Mathew LJ who was also "father" of the Commercial Court.

After education at the Oratory and Trinity College, Oxford, as befitted a son of admirers of Cardinal Newman, Theo was called to the Bar by Lincoln's Inn in 1890. In his early days he joined the South Eastern Circuit and also interested himself in the Commercial Court on whose practice he wrote a book. At one stage he sat in many commercial arbitrations as an arbitrator, and Lord Denning remembers well appearing before him in those days. But Theo really came into his own in the chambers of Lord Robert Cecil at 4 Paper Buildings, first as a frequently briefed counsel on Canadian appeals to the Privy Council with Sir Malcolm Macnaghten, and latterly more and more as a junior in prominent libel cases. He was much sought after as a pupil master, and in his time had as pupils reading with him: Mr Clement Attlee, Mr Stafford Cripps, Mr Quintin Hogg, Mr Kenneth Diplock and Mr Peter Thorneycroft.

His biographer in the *Dictionary of National Biography* conveys an impression of a junior – for so he remained all his life – who controlled his work flow and was never over burdened. The recollection of his clerk Sydney Aylett, in *Under the Wigs* (1978), was different and his pupils and contemporaries corroborate the clerk's eye view.

Lord Diplock, in a very recent interview with the writer, recalled his former pupil master with obvious affection more than 43 years after his death. "I was a pupil in 1931-1932 and stayed on to devil for him for about six months afterwards. He had a very large junior practice and was very much the old fashioned junior. By that time he had no commercial work at all and had a large number of pupils. These were lodged in the dog hole (as we called it) in 1 King's Bench Walk. He was a great specialist in libel. His main work was in interlocutory matters before the Masters and he was in the Bear Garden at least three times a week. He almost never went into Court without a silk and was led time and again by Pat Hastings and Norman Birkett."

"Master-pleader" was the description of another celebrated pupil, the present Lord Chancellor, in an evocative poem "Legal Ghosts" to be found in *Verses from Lincoln's Inn*. The description was one in which Lord Diplock fully concurred. Yet he remembered wrily that "Pat Hastings had at one consultation with Theo the impertinence to say 'This case has been ruined by the incompetence of the pleadings' ". The charge was absurd. Hastings won the case. But Theo always took the precaution thereafter when they were jointly instructed of seeing Hastings *before* drafting a pleading. For him it was a Forensic Fable with a Moral!

While he was no great advocate (albeit a superb after dinner speaker) he was a lawyer of great distinction in a distinguished generation of learned lawyers. There are many nuances in *Forensic Fables* which reflect this. And he was a notably cunning forensic technician. As an admirer of Gladstone (as well as of Dr Johnson and Dickens) he achieved a notable triumph in *Wright v Gladstone* (1927) *The Times*, 4 February, whose Captain Peter Wright had defamed Lord Gladstone's dead father, and was manoeuvred by Theo's stratagems into suing Lord Gladstone for libel, giving the latter the means of avenging his dead father. Mr Norman Birkett, as the biography by H M Montgomery Hyde shows, stole the thunder but the true coup was that of his junior.

Theo Mathew was, and remains still, the finest cartoonist the Bar has known. But his greatest claim to fame was and is his wit. It is the fate of most witty men that their wit dissolves in the ether. In this generation those who had the joy of hearing Mr Philip Hope Wallace in flood get scant comfort from reading reprints of his reviews. In the case of Theo Mathew posterity is luckier. For *Forensic Fables* (the pun Foibles would have sounded in his ear) and *For Lawyers and Others* give a fair measure of the style of a man who was giftedly *"spirituel"*. "He was a most entertaining man" Lord Denning remembers. To Sir Patrick Hastings "he was a man with a mind that saw humour in everything". Lord Diplock elaborates still further: "He was the wittiest man I have ever met: he bubbled over with it. And another characteristic, he did not save it for the occasion. I would call on him perhaps once a week and we would go to a tea shop in the vicinity which we called 'The Ladies' because it was run by two gentlefolk. He had no other audience than myself, but that made no difference. His wit was like champagne, nice at the time but evanescent."

There are, of course, many Theo stories. Lord Diplock recalls hearing a well-vouched-for story of a meeting of the

Newman Society where there was a discussion about the desirability of the Pope taking a more active line in social problems of the day. He poured an appropriate jug of cold water on the idea by his jesting observation "You know, if you are infallible you have to be awfully careful what you say".

Three other characteristics stand out from the memories, written and unwritten of his friends.

Firstly, he had a great love and mastery of language. His writing, as Richard Ludlow rightly observed in the *Law Journal* of 1 July 1939, "like his speech was pointed, and in style approached perfection: he never wasted or misused a word; and it was said of his writing that a phrase could not be altered without spoiling it". Nor was this love of precision confined to the English language. The writer's father, a French advocate and Middle Templer, remembers Theo cross-examining him on the different words in French, through the ages, for false teeth: he luxuriated in the nineteenth century "ratelier" and on being asked in later years how he was, he would assume a mock Racine tragedy style and say in his deep solemn voice: "L'ange de la Mort me frôle de son aile". Now a subsequent generation of readers can judge for itself his unerring aptness of phrase.

Next, he was obviously the kindest of men. A pious Catholic, his acts of charity and "comfortable words" were naturally private; but not unremarked. The man who could dissolve in merriment over "Frothy Bob" Fortune putting out a fire "with a few well chosen words" would link arms with high and humble alike. Lord Diplock, remembering Theo's Requiem Mass at Brompton Oratory, adds an illuminating gloss to the obiturary notice by Richard Ludlow. The turn out of senior members of the Judiciary and of the front row was remarkable for a Thursday in term time; in fact the sittings of the High Court were postponed until 11 am. But, he adds "there was also the largest assembly of bores ever seen, because Theo was so patient with them".

Thirdly, his love of his profession and his Inns of Court shines through his writings with a peculiar incandescence. Although he was a Bencher of Lincoln's Inn, of which he would have been Treasurer had he lived another year, he lunched often in the Middle Temple where he belonged *ad eundem*. There, in Hall, he would start at his table of old men (as they seemed to youngsters in the Thirties) and then at the end of his luncheon, munching a Cox's orange pippin, he would circulate from table to table. His conviviality spilled out of his Inns and into the Garrick Club of which he was, naturally, also a member.

Though some have wondered why a man with all his obvious qualities never became a Judge "one of those unsolved mysteries of the Law or the Lord Chancellor's office" as the *Law Journal* obituarist suggested, there is perhaps no mystery. He would, from time to time, ruefully declare that solicitors were chary of briefing him because of his books. But the facts belied this. And as a Recorder and arbitrator he avoided levity like the pestilence. His father was a junior, an Irishman and a Catholic. None of those factors was a bar to his preferment in his day. But by the 1920s, the period in Theo's life when he was most eligible, there had been one disastrous appointment from the Junior Bar to the High Court Bench and, Treasury devils apart, a convention was congealing. He was, in fact, in the words of our Senior Law Lord "a stuff-gownsman *par excellence*". And none the lesser for that. No junior has been remembered with such affection by such a roll call of legal talents. His two favourite pupils, and his two most frequent leaders, Sir Patrick Hastings and Lord Birkett have all recorded their pride in their association with him.

He was assuredly "The Established Junior who had nothing to complain of" *(Forensic Fables,* p 255). And for those who knew him personally, and for those who, like the writer, were too young to know him, his pleasant voices, his nightingales live on.

Dear Sir,

Re: Amnesty International Lawyers Group

A New Zealand Amnesty International Lawyers Group is being formed. Amnesty International is an international organisation which is independent of any government, political grouping, ideology, economic interest or religious creed and which supports prisoners of conscience.

The emphasis of the Lawyers Group will be on activities recommended by the AI International Secretariat for lawyers. Would persons interested in joining the group and/or responding to Amnesty International appeals concerning lawyers please write to The Co-ordinator, Amnesty International Lawyers Group, P.O. Box 1624, Auckland.

Yours faithfully,

Anthony G V Rogers

Books

The Principles and Practice of Rating and Rating Valuations in New Zealand

By J A B O'Keefe, NZ Institute of Valuers, Wellington 1982, 364 pp

Reviewed by D J M Mason, BA, LLB.

In his Preface Mr O'Keefe rightly says that this book is a "first generation" book, and he goes on to say that he hopes that it will give "some lineament to this branch of knowledge". The book will do much more than that.

Writing in a clear and easily readable style the author ranges over the nature and scope of local government rating, the legal concepts and principles of rating in New Zealand, rating systems, the principle of rateable property, the principle of rateable value based upon uniformity, the principle of rateable occupation, the principles, practices and procedures of rating and levying rates, the principle that rates are a legal charge on the land, the principle of the discretion to diminish the rating burden and there are extensive chapters on Maori Land rating and statutory procedures and legal procedures with a concluding chapter on suggested reforms. The author has quite a phenomenal range of knowledge and information which is neatly related to and dovetailed into the work which rings true as a craftsman's piece as well as an academic piece.

The work properly draws the necessary comparisons with the United Kingdom and other types of municipal legislation. A by-product of the study is the postulation of a special kind of rating law discretion which is set out in Chapter 12. Another by-product of the work is the conclusion in Chapter 6 that the Courts, particularly in the annual value context, have provided a lead in the direction of "investment approach" to rating valuation. Because of this, and because the writer speculates that some form of annual value rating may come into greater use in New Zealand, annual values and so forth are extensively treated in Chapter 5.

The work is a substantial variation and recasting of the author's *Law of Rating* published by Butterworths in 1975, but now out of print. To this reviewer, there is little doubt that O'Keefe on *The Principles and Practice of Rating and Rating Valuations in New Zealand* will become our *Ryde on Rating.*