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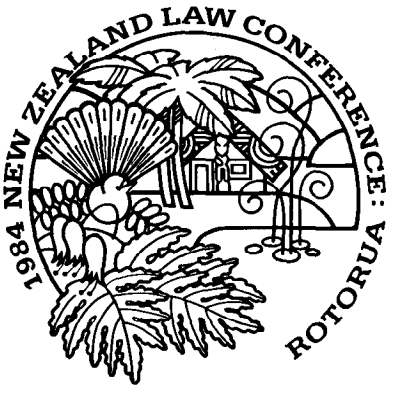

Being on a committee and going to a conference are sometimes derided as activities that are a waste of time. But what they do is often the opposite of the reasons given for attacking them. Committees do get things done, and conferences do educate those who attend them. Indeed conferences often educate people who do not even realise that their minds are being broadened a little and their knowledge deepened a little. The fact that conferences can be a pleasant way to acquire knowledge is surely a positive mark in their favour. It indicates a puritanical attitude to the virtue of hard work because it is hard work, to object to gaining a little information and some degree of understanding in an agreeable way. A little learning may be a dangerous thing as Alexander Pope tells us, but even a little is better than none. And anyway the danger that Pope warns can come from a little learning is intoxication of the brain; and the price of liquor being what it is these days some people might find this an added attraction for attending a conference!

The first Law Conference was held in Christchurch on 11, 12 and 13 April 1928. That conference was shortly thereafter described, in the *New Zealand Law Journal*, with a little surprise as "the outstanding event in the History of the Legal Profession in New Zealand . . .". The reason for the surprise was explained as being that when the proposal for a conference had been put forward at a meeting of the New Zealand Law Society in 1927, it had "received the tepid approval of that meeting chiefly because it did not arouse any dissent or opposition". Since Canterbury had suggested it, the first venue was fixed at Christchurch and the Canterbury Society was given the task of organising it. Now of course the regular holding of the Conference is an essential element of legal life, serving a multitude of purposes.

As everyone should now know the 1984 Law Conference is to be held at Rotorua and is being organised by the Hamilton District Law Society. The organising committee is being chaired by Mr Gerald Bailey and reports to date indicate that this should be an outstanding Law Conference. As usual the Conference will be held in the week after Easter. There is a complication in 1984 in that the first full day of the Conference, Wednesday 25 April falls on Anzac Day. The organisers, however, are making appropriate arrangements to ensure that the significance of that day is not overlooked.

It is in a way symbolic that it is expected that the keynote address on that day will be given by the Commonwealth Secretary-General, Sir Shridath Ramphal. With this year being the first year of CER it is also appropriate that a particularly large contingent is expected from Australia. Every Australian practitioner is receiving an invitation to the Conference so a real trans-Tasman influx can be expected. A substantial number are also expected from Asian countries through involvement with LAWASIA.

The Conference Centre will be at Tudor Towers, known in earlier days as the Old Bath House. The building has a traditional, not to say ancient architectural appearance which some would say is symptomatic of the law and its ways. But also like the law and its ways is the fact that the traditional style is now little more than a front for the modern building behind it and connected to it, and accurately described by its title, the Sportsdrome. It is about the size of an aircraft hanger, and as visually exciting; but it is practical and will serve admirably for many Conference activities.

Law Conferences now have a fairly recognisable shape with some major speeches, a variety of special interest papers for various groups and a concluding plenary session. This basic structure will apparently be followed at Rotorua. The three principal overseas guests are expected to be Lord Scarman, Mr Fali Nariman of India, and Sir Shridath Ramphal the Commonwealth Secretary General. A brief note about each of them is published in this issue of the *New Zealand Law Journal*.

The general theme of the Conference will deal with the response of the law, and therefore of lawyers, to the changing needs of society. This theme will involve consideration of such matters as the use of technology, the development of new skills and new understanding by lawyers, and the demands and expectations of the public. All professions are subject to continual challenge. Part of this, as far as lawyers are concerned, comes from a misunderstanding of their role and function, from the Prime Minister who mistakenly treats the New Zealand Law Society as a financial institution to some members of Citizens Advice Bureaux who, equally mistakenly, think that lawyers are, or should be part of the welfare service.

Television of course does its bit. Some series portray lawyers as crusading heroes with minds as scintillating as the shining armour they are imagined to be clothed in, and with hearts as lily-white as the horses they are imagined to be riding into their courtroom jousts. Other series, however, show lawyers as essentially dishonest, in their tricky financial dealings, their mental evasions and verbal tricks parading as intellectual argument, and their common identification with their criminal clients. Probably only the police have greater cause to complain, as they seem to be either thugs with a badge, bent, or imbeciles.

So perhaps at Conference '84 we can all take some encouragement from one another, recognise our common need to be better understood, (and therefore to make ourselves better understood), and learn something of what we need to know in this day and age.

P J Downey

Case and Comment

Contracts — Penalties

Two recent cases *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399, and *Marac Finance Limited v Turner* (unreported, High Court Auckland, A1225/80, Casey J) may be worthy of note in this area of contract law, although neither breaks new ground.

The most significant case is *Export Credits Guarantee Department v Universal Oil Products Co* (supra). For present purposes, the facts of the case can briefly be summarised. A construction project was financed primarily through promissory notes issued by a construction company in favour of a banking consortium. Payment of the promissory notes was guaranteed by the plaintiffs and was supported by consideration. The defendants contracted to indemnify the plaintiffs in respect of any sums which the plaintiffs were called upon to pay under the guarantee as a result of any promissory notes being dishonoured at a time when the defendants were in breach of, inter alia, their construction contracts. Many of the promissory notes were dishonoured and the plaintiffs were compelled to honour their guarantee to the tune of £39,000,00. The plaintiffs sued the defendants in respect of the indemnity. The defendants pleaded, inter alia, that the indemnity provisions constituted a penalty and were thus unenforceable.

Both the Judge at first instance and the Court of Appeal held that the clause was not a penalty and was therefore enforceable. The defendants appealed to the House of Lords which, in a judgment delivered by Lord Roskill, dismissed the appeal. Lord Roskill emphasised that the equitable jurisdiction to relieve against penalties only arises in cases where a payment is to be made or forfeited consequent upon a breach of contract. In the present case, the "clause was not a penalty clause because it provided for payment of money on the happening of a specified event other than a breach of contractual duty owed by the contemplated payer to the contemplated payee. . ." – ibid, p 223. Lord Roskill continued, "it is not and never has been for the Court to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain" – ibid, p 224.

At least in the United Kingdom, the case confirms that equity's jurisdiction to relieve against penalties is limited to payments to be made or forfeited on a breach of contract. (The question had been raised particularly at Court of Appeal level in *Campbell Discount Co Limited v Bridge* [1961] 1 QB 445, and by Lord Denning when the case went to the House of Lords: [1962] AC 600, 629-631.) However, although this reasoning may be sound jurisprudentially, some objection could perhaps be taken on the grounds of logic. As has been pointed out before, a party who has performed his contract (or at least, not committed a breach of it) is in a worse position than a party in default. That is to say, there is no jurisdiction to relieve a party in circumstances where, upon the rescission or cancellation of an agreement (other than as a result of breach of contract), that party is required to pay or forfeit a stipulated sum to the other party. If the case is followed in New Zealand, the New Zealand cases which extended the law of penalties to deposits (discussed in Hinde, McMorland & Sim, *Land Law*, Vol 2 para 10.080, p 1088-1093) would not be of any assistance in circumstances where the forfeiture is not consequent upon a breach of contract. Nor would the provisions of s 9 of the Contractual Remedies Act 1979 be of assistance. In these circumstances, in order to obtain relief, the "payer" would have to be able to enlist the jurisdiction of equity to relieve against unconscionable bargains or, in the case of a credit contract, the oppression provisions of the Credit Contracts Act 1981.

The second case is noted simply as a contrast to the first decision on the facts. In *Marac Finance Limited v Turner* (supra) Marac sued Turner, as receiver, for $11,767.55 which it claimed was due under an equipment lease. The lease provided that if the lessee failed to pay any instalment, the balance of the entire rental would become due and payable forthwith. In the view of the Judge, this stipulation was a penalty. The Judge said, "A stipulation for payment of the whole balance of rental, without any deduction regardless of when the default occurs, cannot be regarded as a genuine pre-estimate of loss". The case was therefore distinguishable from *IAC (Leasing) Limited v Humphrey* (1972) 46 ALJR 106 where a similar stipulation provided for a conventional rebate for future instalments. Accordingly, in the present case, the Judge allowed Marac to recover damages, at a lesser figure, together with interest thereon. (As an aside, the receiver's predicament was not too unfortunate because he was held to be entitled to enforce an indemnity which had been given by the shareholders of the company in receivership.)

S Dukeson
Whangarei

The effect of bills of exchange used as a means of providing credit

The decision of Casey J in *Broadbank Corporation Ltd v Mosgiel Ltd* (High Court, Dunedin, judgment 2 May 1983, (A No 56/82) is important for two reasons. The primary one lies in its analysis of the basis on which the rights and liabilities of the parties to a bill of exchange rests when the bill is being used as a means of providing credit, but the judgment also contains some useful guidelines on the way in which the Courts will interpret mercantile contracts generally.

The bills concerned were of two different kinds and had been drawn pursuant to two different credit facility agreements, both financing the operations of Mosgiel. Broadbank provided the finance under one of the facilities, by

means of bills drawn by Mosgiel, accepted by Broadbank and discounted by Mosgiel with a subsidiary of Broadbank. The agreement required Mosgiel to put Broadbank in funds on the maturity date of each bill. The other facility was funded by a consortium consisting of the Development Finance Corporation, Chase-NBA New Zealand Group Ltd, AMP Acceptances Ltd (who were also all plaintiffs in the action) and Broadbank, which managed the facility. The terms of this agreement were that a member of the consortium could either accept bills drawn by Mosgiel or draw bills itself for acceptance by the company, and again Mosgiel agreed to put any consortium member which had accepted bills drawn by it in funds on the maturity date of such a bill. Broadbank chose to follow the same procedure as it was using for the other facility, ie, it accepted bills drawn on it by Mosgiel, but the other consortium members elected to do the opposite, drawing bills on Mosgiel, which then accepted them, a difference which proved to be crucial. Both credit facilities were secured by second debenture stock.

When Mosgiel went into receivership, substantial sums were outstanding for bills of both kinds, but by the date of the hearing it had become clear that the receiver would be able to pay their face value on maturity as secured debts. The question which remained unsettled and which gave rise to the present action was whether interest was payable and, if so, whether it could also be regarded as a secured debt. The problem arose because neither agreement contained a term that interest was payable on overdue bills or payments. Such a term had been a standard one in all credit facilities entered into by Broadbank, but it had been abandoned because the decision of the High Court in *Re Securitibank Ltd* [1978] 1 NZLR 97 seemed to suggest that a provision for penalty interest could cause a transaction providing finance by means of bills of exchange to be regarded as a moneylending one, with all its inconvenient implications. The Court of Appeal in *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 made it clear that financing by bills of exchange was not moneylending, whether there was a provision for penalty interest or not, but at the time the arrangements with Mosgiel were entered into Broadbank had not yet reinstated the clause concerning interest in its credit facility agreements.

Section 57 of the Bills of Exchange Act 1908 enables a drawer who has been compelled to pay a bill dishonoured by the acceptor to recover, not only the face value of the bill, but also interest and expenses from the acceptor. The consortium members other than Broadbank were able to bring themselves within the ambit of this section, since they had all chosen to draw bills for acceptance by Mosgiel, instead of using the converse procedure adopted by Broadbank. However, whether s 57 applied in this case was the subject of some argument, giving rise to the most significant aspect of this decision. Counsel for Mosgiel claimed that the liability of the parties should be determined solely by reference to the terms of the agreement and that the Bills of Exchange Act did not apply. Casey J firmly rejected that argument on the basis that the rights and liabilities of the parties derived from the bills of exchange themselves and not from the agreement pursuant to which they were drawn. Since the statutory provision for interest was part of the inherent nature of liability on a bill, interest was payable in terms of s 57. His decision on this point affirmed that, in determining the rights and liabilities arising from a bill of exchange, the New Zealand Courts will look to the nature of the instrument itself and not to the terms of the agreement pursuant to which it was drawn.

This reinforces the effect of a statement by Richardson J in his judgment in the Court of Appeal in *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 at 173 in which he emphasised that the special characteristics of a bill of exchange will be given their full effect. This aspect of the judgment is also noteworthy because it departs from a recent decision of the Australian High Court. The facts in *K D Morris & Sons Pty Ltd v Bank of Queensland* (1980) 30 ALR 321 differed from those in this case, but the judgments of two of the majority of three were to the effect that, where there was an agreement to provide credit by means of a series of bills of exchange, the rights and liabilities of the parties arose from the agreement and not from the bills. It is suggested that Casey J's decision to the contrary is to be welcomed in that it protects the integrity of bills of exchange and allows their use in varying circumstances without any danger of distortion in the legal relationships they create, relationships which have been worked out by the Courts over a long period of time and in response to different commercial needs and which should, therefore, not be tampered with unnecessarily. It would seem that the burgeoning New Zealand bill market has, by virtue of this decision, been placed on a firmer legal foundation than its Australian counterpart.

The other point which fell to be decided was whether the debenture trust deed and stock certificates securing the credit facilities contained an express or implied term providing for the payment of interest. This was important to the outcome of the action for two reasons. One was the right of Broadbank to any interest at all, and the other was whether the interest to which the other consortium members were entitled by virtue of s 57 was a secured debt. The conclusion was that the trust deed and stock certificates did not create any liability for interest, a decision which necessarily turned on the construction of these particular documents. However, it is suggested that this part of the decision also has a wider application, since Casey J specifically adopted a set of principles to be used in construing mercantile contracts generally from the headnote to the decision of the Supreme Court of New South Wales in *Tricontinental Corp Ltd v Associated Securities Ltd* (1982) 6 ACLR 122. These are as follows:

(a) The contract should not be construed narrowly but liberally to ensure the intention of the parties is achieved.
(b) If the words used in the contract are unambiguous the Court will give them their clear effect notwithstanding that the result may appear capricious or unreasonable because the Court has no power to remake or amend the contract to avoid a result which may be considered to be inconvenient or unjust.
(c) Where the language is, however, ambiguous, the Court will prefer an interpretation which will avoid consequences that appear to be capricious, unreasonable, inconvenient and unjust.
(d) In construing the express terms of the written contract it is legitimate to examine surrounding circumstances.

It is suggested that those principles form useful guidelines in deciding questions of interpretation of commercial contracts generally.

Johanna Vroegop
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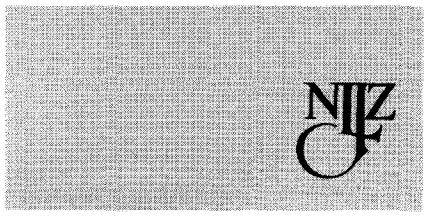


Law Conference Guests

There will be three principal overseas guests at the Law Society Conference in Rotorua. Lord Scarman will be present representing the English Judiciary, and because of his wide spread of interests and the responsibilities he has had, no doubt representing others as well. An appreciation of Lord Scarman and his work by Mr J Hodder is published in this issue of the *New Zealand Law Journal.*

Another principal overseas guest is Mr Fali S Nariman of New Delhi, India. Mr Nariman, who is a Parsee, was born in Rangoon, Burma; but he grew up and was educated in Bombay, India.

Mr Nariman has a BA degree with honours in Economics and History and a first class LLB degree. He was first enrolled as an Advocate of the Bombay High Court, and then subsequently became an Advocate of the Supreme Court of India where he is now a Senior Advocate. In the period of 1972-75 he held public office as an Additional Solicitor-General of India.

Mr Nariman is a member of the Delhi Legal Aid and Advice Board and he is also a member of the Press Commission of India. In 1977 he was a member of the Committee of Experts on Company Law and Monopolies and Restrictive Trade Practices.

Mr Nariman has been a Vice-President of the Bar Association of India since 1975. He is the General Editor of the *Indian Advocate* which is the quarterly organ of the Bar Association of India. He has had this position since 1972. He has published Commentaries on Law of Property in the Indian Constitution and on Indian Constitutional Law. He has written a treatise on the Supreme Court and Centre-State Relations. He has written articles in professional and other journals on such matters as the Law of Preventive Detention, and judicial power in the Indian Constitution.

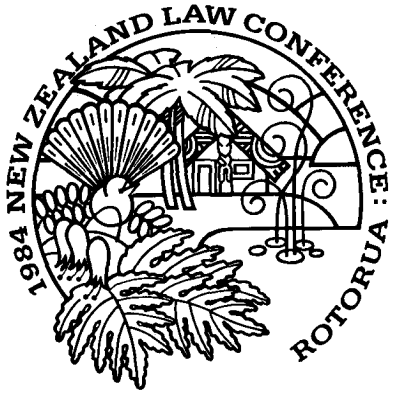
Mr Nariman has been active in international legal organisations. He is on the Council of LAWASIA and has been a Vice-President since 1981. In 1982 he became a Council member of the International Commission of Jurists. He has been the leader of the Indian delegation of lawyers to such meetings as that of the International Law Association and the International Bar Association. He was chairman of the first working session at the Sixth International Arbitration Congress that was held in Mexico in 1978.

When the Standing Committee on Human Rights was established by LAWASIA in 1979 he was appointed one of the two co-Chairmen and he still holds that office. He has attended an Australian Legal Convention, but this will be his first visit to New Zealand. Mr Nariman will be accompanied by his wife Bapsi who amongst her other accomplishments is the author of two books on cooking. Those who are fortunate enough to know Mr Nariman as a friend recognise in him a warm and generous personality, a man of clear and firm principle and one who is an outstanding lawyer.

The Commonwealth Secretary-General Sir Shridath Ramphal will also be a guest at the Conference. Sir Shridath, has been described as being a man for all continents. He is Asian by descent, Caribbean by birth and culture, and European by education and legal training.

He was at the time Minister of Foreign Affairs and Minister of Justice of Guyana. In this capacity he was involved in the work of many international organisations and forums including the United Nations and the Non-Aligned Movement. Since 1975 he has been Commonwealth Secretary-General.

It is in that role that he will be best known to New Zealanders. His work over the Rhodesia crisis, and his involvement in the apartheid controversy (including the issue of rugby!) are only the more obvious activities in which he has come to public notice. Sir Shridath Ramphal is a lawyer by education. This issue of the *New Zealand Law Journal* publishes an address given by him to the Canadian Institute of Advanced Legal Studies in July of this year.



From status to contract world wide

By Shridath S Ramphal, Commonwealth Secretary-General.

The Commonwealth Secretary-General, will be one of the principle guests at the New Zealand Law Society Conference to be held in Rorotua in April 1984. This article is a slightly edited version of his address to the closing session of the Conference of the Canadian Institute of Advanced Legal Studies given at Cambridge University in July of this year.

It is always intimidating to speak at the end of a Conference when circumstances have dictated your absence from the proceedings. In the result, I might open myself to the charge I once heard Lord Shawcross (then Sir Hartley) level against opposing counsel. It was one of his rare appearances at the Privy Council Bar and he began his address to the Board in answer to the arguments of counsel for the petitioners: "My lords, the observations of my learned friend have as much to do with these proceedings as the flowers that bloom in spring". I hope you don't think so of my reflections; but since I have the last word – or nearly so – I shall persist.

It is interesting to reflect that although yours is a Canadian Institute for Advanced Legal Studies, your first act in 1979 was, in a sense, to regress – to return to origins and to gather in these distant precincts, hallowed by time and by academic excellence; in a sense, retreating from a racier North American scene and pausing here to find both calm and inspiration in this, the loveliest of all university towns. It is interesting; but altogether intelligible. All too many of us in our professional lives find the constant demands of the common tasks in our habitual environment crowding out opportunities for intellectual refurbishment. Some may mistake your sojourn in Cambridge as self-indulgence; but anyone fortunate enough to participate in such occasions has a keen awareness of their practical value in broadening perspectives and in sharpening the mind.

You have gathered, therefore, to good effect, on this side of the Atlantic to refresh yourselves at the fountainhead of the common law and to reflect that so many of our shared ideals of freedom and justice derive from the events not so very far away at Runnymede. But you are not receivers merely; you bring with you your own perceptions and your own experience and these, in turn, inform the understandings of your counterparts in Britain. Indeed, from your very first meeting here, as on other occasions, distinguished British academics have not been reticent in acknowledging Canadian leadership. Professor Glanville Williams, for instance, asserted that you had little to gain from English law in the field of trespass – a sentiment with which Buckingham Palace would certainly agree; and Justice Kerr saluted Canada's role in pioneering the institution of the Law Commission, a body now to be found in the great majority of Commonwealth jurisdictions.

Cambridge, too, has a special place in Commonwealth scholarship, and as one of the Trustees of the Cambridge Commonwealth Trust I should like to record our special thanks to those present (and not present) who have assisted in establishing this Trust to help meet the problems posed to students from Commonwealth countries overseas by the imposition of higher levels of fees. The collective Commonwealth is much in your debt; but I like to think that Cambridge, too, will benefit from the assured attendance here of some of the Commonwealth's most able scholars.

This movement of young people through the universities of the Commonwealth has an importance that transcends scholarship and professionalism. It has been a vital element of the links forged between this country in particular and other member countries in the Commonwealth. It is a priceless heritage for Britain and for the Commonwealth collectively and one that we must nurture and preserve. The Commonwealth is above all a special relationship between people; the friendships, the understandings, the windows that open in your minds through the interchange of students who, because they are today's graduates, will be among tomorrow's informed and influential Commonwealth citizens, are of immeasurable value. They make for the intimacy out of which comes frankness in disagreement, but they forge also bonds of shared experience and identity that

make for solidarity when it is needed most.

Developments in the area of overseas students' fees have threatened this heritage, not only in Britain but in Canada as well. The common lawyers of Canada know more than most how precious is the inheritance that university links sustain. The Commonwealth needs your active support in preserving them and in working for policies which will continue to permit young people, particularly those in search of the highest standards of professional excellence, to continue to have access to the great centres of learning in the Commonwealth. If the Commonwealth connection means as much to all our countries as I believe it does we surely must not hesitate over making special arrangements for Commonwealth students in Commonwealth universities. I am glad to say that we have begun to move in this direction here in Britain. We need to go further; and you need to go further also in Canada if we are to recover ground already lost. And we must recover that ground quickly or it could be lost forever.

A gathering of this nature allows naturally for reflection on similarities and differences between the Canadian and English legal systems and, of course, strengthens recognition of the shared experience of freedom under law. I know you have used these opportunities well, and as you come to the end of this Conference will be pleased with your consultations. I suspect that you will have identified areas for reform at home but that, on the whole, your conclusions will be one of pride with the state of the law in Britain and in Canada. That is a worthy response in terms of orthodox jurisprudence and it is, of course, a valid one in a comparative sense. But I wonder if it is all that you should make by way of response to the needs of our times?

By training, but perhaps by disposition also, we tend as lawyers to see ourselves more as custodians than as activists, more as keepers than as developers. And there are times in human affairs when that instinct for consolidation gives such a role a special value. But is it a role of questionable value in changing times, in times which call for new ideas, new approaches, new measures; times which demand new perspectives of human relationships; times which represent a moment of transition between eras? In such times, were lawyers to be merely custodians we would find ourselves in the rearguard of our generation, clinging out of habit to concepts and systems that may have served their time with excellence but which have lost some of their relevance and utility. Or, more simply, have become inadequate as a response to the new needs that emerge from new realities. I believe that we are in such a time, and that it is calling for a role from lawyers that is more creative than that of keeper of the seals.

As you leave Cambridge, I wonder whether you do so with confidence that our profession everywhere in the Commonwealth or, more specifically, in Canada, is playing that creative role or at least stands ready and willing to do so? I must tell you in all conscience that I doubt whether we are responding with adequacy to the challenges that are at hand.

They arise, of course, in a variety of forms. Some of them will be more obvious to you as common lawyers in a domestic jurisdiction than others which impinge on those of us whose work straddles jurisdictions. In the former category are the challenges presented particularly to industrialised societies – but, of course, ultimately to all of us – by the new world of science and technology. In a book just published in Australia by Professor C G Weeramantry of Monash University these particular challenges have been brought together in a timely way, raising disturbing questions about law and human rights in the wake of technology. The book is called *The Slumbering Sentinels*, and I should like to read a short passage to you from the Professor's preface. I wish, however, that I could show you its cover (if I could do so without being in contempt) for it depicts Bench and Bar alike in varying postures of slumber against a backdrop of a computer read-out. This is the passage that I believe has relevance for all of us:

> Science and technology have burgeoned in the postwar years into instruments of power, control and manipulation. But the legal means of controlling them have not kept pace. Outmoded and outmanoeuvred by the headlong progress of technology, the legal principles that should control it are unresponsive and irrelevant. Legal structures and concepts and people who work the system are proving unequal to the task of protection, in the midst of a set of problems without precedent in the law. Assumptions long regarded as fundamental no longer hold true. Values once held unquestionable no longer command acceptance. Procedures once adequate no longer yield results. Lawyers are out of their depths, their concepts out of touch, their techniques ineffectual. Sociologists, philosophers, economists, environmentalists, ecologists and politicians have sensed some of these dangers and prepared for them. Lawyers have been slow to do so, hampered by outdated concepts and methods.

In his foreword to the book, that most assiduous Chairman of the Australian Law Reform Commission, the Hon Mr Justice M D Kirby, reminds us of Bronowski's warning:

> The world today is made, it is powered, by science; and for any man to abdicate an interest in science is to walk with open eyes towards slavery.

"This book", writes Justice Kirby, "seeks to open the eyes of a generation so dazzled by technological innovations, that it is often blinded to the social and human dangers that need to be seen."

Are we not as lawyers among those that are blinded? Is Weeramantry not right when he says that while other professionals have sensed the dangers and prepared for them "lawyers have been slow to do so, hampered by outdated concepts and methods"? How many lawyers, for example, see a role for themselves in shaping the response of our societies to the complex and somewhat threatening challenges posed by science's probings in the area of genetic engineering? And yet legal considerations, not just legalities and illegalities but fundamental legal concepts, need to be blended with the medical, religious and ethical considerations that are all involved in society's response. I know, of course, that individual members of the Bench and Bar in many countries acknowledge the need for lawyers to be more involved and active in these areas, but it is far from the case that our profession as a whole acknowledges such a role or even senses a danger in terms fundamental to the common law. If we believe we are irrelevant in shaping social responses to such basic issues we may find ourselves irrelevant over a much wider area. We cannot be sentinels and allow ourselves the luxury of slumbering on the watch.

And there are challenges too that arise from other aspects of technological advance, particularly in the area of communications. Ease of transport, and the proliferation of company structures that they facilitate, have combined to produce a dramatic increase in international white-collar crime – fraud on a scale which could quite literally imperil the economic base of many a small country. Yet few legal systems have even begun to confront this development of crime involving multiple jurisdictions; and in the absence of a creative response

a pristine sovereignty actually facilitates crime.

A major problem is inadequate measures for judicial assistance in criminal matters between jurisdictions. In fact, there is a disturbing trend for domestic law enforcement agencies, for a variety of reasons, not all of them rooted in good internationalism, to adopt a "hands-off" posture when it becomes apparent that a substantial foreign element is involved. The Commonwealth, I am glad to say, through last February's Law Ministers Meeting in Colombo, is now exploring a fully-fledged Commonwealth scheme for mutual judicial assistance modelled on the highly successful Commonwealth Extradition Scheme.

But even this will to act may be thwarted unless we come to grips with fundamental concepts that are in fact a part of the problem. The limits on extra-territorial legislative, judicial and executive competence impose severe restrictions on effective co-operation between countries. The twin concepts of jurisdiction and sovereignty sometimes rise up like medieval buttresses in the path of legal progress, all too often with lawyers themselves acting out the role of ancient keepers.

Such attitudes are first moulded in our universities and law schools and it is to them essentially that we must look for a new generation of lawyers who will fashion a jurisprudence relevant to the end years of the century.

The President of Harvard University, Derek Bok, himself former Professor of the Law School, has recently challenged American law schools to get rid of the blinkers that have prevented them noticing the injustices inherent in "a grossly inequitable and inefficient" legal system that they uncritically uphold and sustain. He went on to charge that most professional schools, despite abundant resources at their disposal to generate new knowledge and develop skills in problem-solving have instead "concentrated on training practitioners for successful careers while failing to acquaint them with the larger problems that have aroused such concern within the society". The implications of such "a flawed system" (to use his own words) are multiplied many times over by the sobering statistics he gave, namely, that "in Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*. . . . As the Japanese put it, engineers make the pie grow larger; lawyers only decide how to carve it up".

Canada, too, has had its share of criticism of the profession's performance. The recent report on "Law and Learning" prepared by a Consultative Group on Research and Education in Law under the chairmanship of Professor Harry Arthurs points to an acute need for empirical legal research. [Briefly reviewed in [1983] NZLJ 227.] It argues not only "that law in Canada is made, administered and evaluated in what often amounts to a scientific vacuum" but "that Judges, lawyers and law teachers fail to exhibit the collective intellectual capacity to comprehend, evaluate or change today's complex legal system". That is strong stuff and I do not imply by referring to it a judgment on its validity; but even if its findings were only partly valid they would still shock the legal community around the Commonwealth which looks to Canada as one of the best models available for a progressive, well-prepared profession and an enlightened approach to law reform. If you are in such trouble in Canada, most of the rest of us are in crisis. Could it be that in many common law jurisdictions there is a crisis made the more acute by our failure to perceive it as such?

And that really is the heart of the matter. We too often dwell smugly in our legal cocoons, convinced of our supreme importance to a society which we forget is noticing us less and less. We need to get out of that shell and remind ourselves of what others besides lawyers assuredly know: that there are more things 'twixt heaven and earth than our legal world dreams of — realities that often bear upon an ultimate judgment of our legal order.

A timely reminiscence helps to make my point. In two days' time, 29 July, it will be 150 years since the House of Commons at Westminster passed the second reading of the Abolition of Slavery Bill. The monumental legal change thus wrought was the result of the conjuncture of new economic interests with the passionate crusade of the Anti-Slavery Movement in this country: the conjuncture of material interest and humanitarian impulse.

We take pride even now in that great reform; but how often do we remember that it was, at least in part legal reform? For 100 years before it, slavery had subsisted, sanctified under British Law, Magna Carta notwithstanding. Lord Mansfield could assert, as he did in *Somerset's* case in 1772, that "the black must be discharged"; but, as we know, that was more a commentary on life in England than on life which English law ordained elsewhere. Mansfield's judgment "looked no further", Lord Stowell could assert in the High Court of Admiralty half a century later in the case of the slave, *Grace*, "than to the peculiar nature, as it were, of our own soil; the air of our island is too pure for slavery to breathe in".

The judgment was not without significance. Certainly it was of great moment for Somerset, freed on the return to a writ of habeas corpus. But Lord Mansfield's judgment was in another sense confirming (as one commentator put it) that "English law was wonderfully flexible in accepting systems that were fundamentally different inside and outside the metropolis"; and it explained the complacency of English common lawyers with the moral obfuscation inherent in such dualism. In the end, the Anti-Slavery Movement recognised that it was the legal framework, both metropolitan and colonial, which sustained slavery. What the Abolition of Slavery Bill did 150 years ago this week was to change the law of England. It gave Magna Carta a reach beyond the banks of Runnymede — a reach that common lawyers for the greater part had hitherto not missed.

And that, in essence, is my point: a plea for lawyers throughout the Commonwealth — but, of course, throughout the world, to eschew the smug complacency that a view of the legal order within narrow domestic walls all too readily encourages in us; a plea that we look to a broader jurisprudence. Were we to do so we would find that the field for reform is a vastly greater one than our lawyer's eye ordinarily surveys, and that the perspective of change cannot be confined within normal jurisdictional limits. I am making a plea more particularly for common lawyers not to be among the last to recognise that the duty of care we owe to our neighbour now imposes new imperatives as the concept of neighbour is itself being transformed in our interdependent world. That closely-knit, interlinked, interdependent world is a reality, however much the instincts of yesterday recall us to old nationalisms and summon up the adversary habits of crude sovereignty.

Interdependence in a narrow sense has, of course, always been a manifestation of national legal systems as the very existence and operation of a law presupposes a legal system of mutually supportive norms within which it functions. With the interdependence of nations in trade and finance, in security and in development the national legal systems must become as entities interdependent. An insular and selfish attitude by those responsible for the domestic legal order will serve neither

the interdependent world nor in the longer term the national society.

What interdependence means in the wider context is that we need each other in some measure; for prosperity, for subsistence, for survival even. The rich may be able to prosper in a world from which the poor had vanished; the poor may be less poor in a world without the very rich; the West may be able to dwell in harmony (though history denies it) if from the East there came neither torment nor threat; the East, the centrally-planned economies, may be able to enjoy even a Procrustean bed (though reality refutes it) if capitalism was not there to provoke envy. But the simple truth is that these are wholly irrelevant scenarios, for neither rich nor poor, East nor West, has the option to go it alone. For better or worse all must share this planet, acknowledging our mutual needs and that in their fulfilment lies a mutual interest.

Our shrinking world boasts now no human sanctuaries. There are no shelters that fully insulate anyone, anywhere, from disease, from poverty, from nuclear holocaust, from environmental collapse. The concept of jurisdiction increasingly has meaning mainly for lawyers. Planet Earth has become a global village, a human neighbourhood. The duty of care we owe is to all mankind who is our neighbour now. The nature of that duty, the notion of what is reasonable conduct in relation to others is known intuitively not only in Clapham, but by ordinary people the world over. We must in a new and broader jurisprudence provide conceptual space for these realities; we need to develop new precepts of rights and duties as relevant to our times as any that Lord Atkin formulated in an earlier era.

These are challenging acknowledgments for common lawyers, and they are uncomfortable ones; for they proclaim, as Mansfield's judgment had done over 200 years ago, not the perfection of the legal order but the unfinished business of its evolution responsive to a deepening perception of human needs.

If to all this you protest that I am urging you to wander into pastures beyond a lawyer's domain, I ask in return, by what superior law are its gates locked against you? And I remind you that common lawyers are heirs to a noble tradition of intellectual inventiveness responsive to changing needs. I am not talking, of course, about world government; the world is not ready for that, and perhaps it never will be; but that we have to acknowledge our inseparable humanity and the integrated global community we have become there can be not the least doubt. And that with such acknowledgment must come the means by which we manage an interdependent world, if only in the interest of mutual survival, is a proposition we surely know in our hearts to be true. We must now find in our minds the way to respond to it.

Great intellectual challenges are at hand. For common lawyers perhaps the greatest of all is that we do not allow the springs of legal improvisation to dry up; springs that served earlier generations bountifully in times of great transition. The extent to which the international system will be made more equitable and our world more safe and habitable are essentially matters for political decision. But there is a role for lawyers both in helping our political leaders to such decisions and in their implementation. When the Brandt Commission put forward its initial "Programme for Survival" in 1981, it summed up its perspectives for the future in this way:

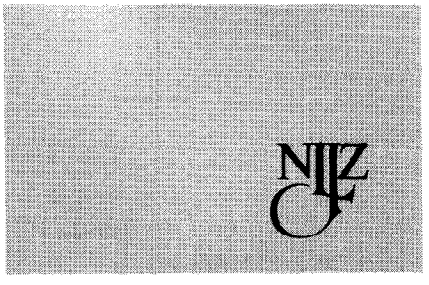
> We are looking for a world based less on power and status, more on justice and contract; less discretionary, more governed by fair and open rules.

What is that if not a continuum within the society of nations of the struggle in which common lawyers were once successfully engaged within their own societies? We grew up on a jurisprudence which taught us, in terms of Sir Henry Maine's famous epigram, that "the movement of the progressive societies has hitherto been from status to contract". Maine's proposition was challenged as not necessarily being a universal law of legal history. But how true it is that most, not yet all, national societies have indeed made that progression through eras of slavery, of feudalism, of the beginnings of social and economic reform, to the full flowering of just consensual societies. Common law societies, in particular, did move from status to contract – the sophistry that feudalism was founded in agreement notwithstanding. And the law itself helped the progression. Equity mellowed the harshness and softened the rigidities of a common law that was in danger of being out of tune with its times. Even today it is accepted by common lawyers that adherence to the contractual theme in the common law can be a snare and delusion if equality and fairness are not evident in the bargain. It is when these facts are ignored that one enters the sophistry of the "social contract", and the trap of feudalism. But, of course, what we face today is no longer so many separate feudal societies but a human society that bears all the attributes of a feudal state: not one state and two people but one earth and two worlds.

That is not, I know, how it looks from the city centres of the industrialised world, but I ask you to believe that that is how it looks to several billion people in the paddyfields of Asia, in the scorched grasslands of Africa, in the urban slums of Latin America. And it seems that way to them not on the basis of ideology or bias or even envy – but out of a living experience of degradation and hopelessness in the midst of plenty. Common lawyers cannot excuse themselves from concern with these contradictions. Worse still, we must not contribute to the pretence that the reality is somehow different, and sustain that pretence by complacency with the status quo.

Lawyers, common lawyers in particular, have a great contribution to make out of their own experience of the law, encouraging their fellows to accept that power and status are the old enemies of freedom and that from justice and contract they have nothing to fear and much to gain. And these possibilities are open to each of us whatever our roles in the law and in our societies. Corporation lawyers, trial lawyers, members of the Judiciary and law officers, general practitioners and specialists, all can help our generation to reach to higher levels of perception and attainment within the wider framework of the one world that we must share.

Lawyers cannot afford not to be involved, and be seen to be involved, in these contemporary concerns of national and international society. We have no alternative but to join in a fundamental reassessment of the law and of our own role in it. Perhaps it is by so doing that we can begin to effectively rebut some of the damning criticisms made of us; or render ourselves worthy of the high esteem in which the profession of the law continues to be held by those who do not yet feel constrained to criticise. If coming to Cambridge helps even a little in thus reinforcing you in the true and active service of the common law it will have been the best of all sentimental journeys – one that leads to renewal of commitment and resolve.



Lord Scarman

By J Hodder, Barrister of Wellington.

The principal judicial guest at the New Zealand Law Conference in 1984 will be Lord Scarman. In this article Mr J Hodder describes his career and looks at the contributions he has made to the law as a Judge and to the wider polity in the areas of law reform, constitutional reform, and conducting public inquiries.

The Right Honourable the Baron Scarman of Quatt has described the English Judge as the man for all seasons. There will be dissenters from that generalisation but not from the fairness of that phrase as a description of Lord Scarman himself, the most prominent member of the present English Judiciary.

His prominence is due in large part to his engagement in and pronouncements on matters outside the normal run of judicial work. Such matters include law reform, constitutional reform, and inquiries into matters of public controversy, most recently the Brixton riots of 1981.

Lord Scarman has described himself as "an empirical Englishman". His intellectual concerns (and his mastery of language) are exemplified in his declining to add to the debate on law and morality:

> The problem for practical people concerned to preserve the social relevance of law is complex and challenging enough without joining the philosophers as they dance – no doubt in the company of a goodly number of angels – on the glittering pinhead of their fascinating subtleties.

Preservation of the social relevance of law is no less a challenge in New Zealand than it is in England and the works of Lord Scarman on this broad theme contain much that is directly relevant in this country and at this time.

Leslie George Scarman was born in 1911 and educated at a public school, Radley College, and later at Brasenose College, Oxford. He achieved academic distinctions at both institutions. In 1936 he was Harmsworth Law Scholar at Middle Temple and was called to the Bar. This vocational choice was not due to conformity with a family tradition (his father was engaged in the insurance industry in London) but was inspired in part at least by the great politician and advocate, Lloyd George.

The early years at the Bar, described by Lord Scarman quite recently as "briefless", were interrupted by the Second World War. His contribution to that "vindication of the rule of law by force of arms" was channelled through the Royal Air Force. In 1946 he returned to his chambers and achieved considerable success in that "most competitive of all professions". A feature of his practice was an emphasis on the new growth area of public and administrative law. He took silk in 1957.

In January 1961 he became Sir Leslie Scarman, a Judge of the High Court, sitting in the Probate, Divorce, and Admiralty Division. Four years later he was appointed as the first Chairman of the Law Commission, a full-time position which he held until 1973 in which year he was appointed a Lord Justice of Appeal. The ultimate judicial elevation, to the ranks of the Lords of Appeal in Ordinary as Baron Scarman of Quatt in the County of Salop, came in 1977.

That brief recital conveys little of the contribution already made by Lord Scarman to the development of and attitudes toward the law and thereby to civilised living (a recurring phrase in his writings). Some appreciation of that contribution may be gained from a necessarily selective survey of his works on law reform, on constitutional reform, in public inquiries, and as a Law Lord.

As mentioned above, Sir Leslie Scarman (as he then was) was seconded from the High Court to be the first chairman of the Law Commission for England and Wales. This body and the Scottish Law Commission were established by the Law Commissions Act 1965, a measure closely associated with the reform-minded Lord Chancellor, Lord Gardiner. The function of each Commission was to take and keep under review all the law with a view to its systematic development and reform. Very high hopes were held out for the new bodies. Lord Devlin, for example, prescribed that

> ultimately the Law Commissioners will be more important than the House of Lords. Membership in the Commission will then become the "prizes of the judicial world". In this way the art of judicial law-making will not perish but will be transferred.

Mr Justice Scarman was not quite so bold. He analysed the establishment of permanent statutory law reform mechanisms in terms of pressures on the machinery of government created by social change. His starting point:

> Law reform is not exclusively a legal topic: it is also a social and moral problem. It is no longer possible to think of the law as an esoteric and technical discipline, whose values are

> safe in the hands of the Judges and the profession. Contemporary society requires that it be given the opportunity to test its laws by its own criteria; it insists that laws are either to serve the needs of society or to be rejected.

These requirements meant that the legal profession would have to yield up the secrets of the law. The traditional attitudes of the profession – emphasising individual rights such as property, preferring certainty over change, and fostering "legalism" – did not reflect those of contemporary society. Even token relics were to be denied:

> There is no cosy little world of lawyers' law in which learned men may frolic without raising socially controversial issues.

But demystifying the law for the population at large did not solve the machinery of government problem:

> none of our existing institutions possesses, in itself, the blend of technical learning, social awareness, and power to get things done.

Although the Courts might have the technical learning, they might not have the social awareness (being lawyers), and they certainly did not have the power to undertake systematic reform. Even the most activist of Judges

> have to wait for a good-hearted litigant to be prepared to spend his money on reforming the law, and this is a fairly rare bird even in a litigious country like my own.

Equally difficult for the judicial law reformer were fundamental constitutional proprieties:

> a Judge can, if he acts circumspectly, if not overthrow the chains of precedent at any rate wriggle out of them. He cannot, if he be a conscientious man – and Judges are by and large conscientious men – treat the plain language of enacted law in the same way.

By such reasoning Mr Justice Scarman's analysis reached the conclusion that planned and systematic law reform could only be effected through legislation. But that took one to an imperfect institution:

> Parliament has the social awareness but, if one has to face realities, neither the learning nor the opportunity – though in theory sovereign, it is controlled not by itself, but by the government. And the government is, more often than not, overwhelmed by the tide of its own business.

Nor could it be overlooked that the Parliament lacked legal skills or that the legislation passed was normally the work of the relevant government department and had been prepared in secret.

In this context the establishment of a permanent law reform body with its own statutory assurance of independence and initiative was a major constitutional development. It would compensate for the deficiencies of Parliament by providing a consultative process, skilled research and drafting.

Such a development was not of course without cost to the existing order. The Law Commissions Act was a "take-over bid" by Parliament for the area of law reform, property long vested in the legal profession and the Judges. It also required that the legal systems of other jurisdictions be considered. And it accelerated further the pre-eminence of statute law.

With a greater concentration on enacted law there was exposed a need for reform of traditional approaches to statutory interpretation. In particular there was a need for explanatory material to accompany the statutory language. But one source of guidance could continue to be put aside:

> I do not convict myself of unruly cynicism, I hope, if I suggest that Parliamentary debates and all the clutter of *Hansard* are an unsure guide to the purpose of a statute.

To those who might query the ultimate end of such changes and disruptions, the answer from the Mr Justice Scarman was that if law reform – both of content and presentation –

> be carried through with determination, the state of the law will assuredly become more accessible, more intelligible, and the responsibility of us all.

By 1974 the promulgator of those views on law reform had moved on from the Law Commission and become Lord Justice Scarman. But his concerns about the deficiencies in the common law and in the institution of Parliament had not faded. Instead they were crystallised in the Hamlyn lectures delivered by him in December 1974 under the title *English Law — The New Dimension.*

The Hamlyn lectures are the product of a legacy from the will of Emma Warburton Hamlyn of Devon who died in 1941. The terms of the Hamlyn trust, finally settled in the High Court in 1948, provide for lectures

> to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European peoples.

The first series of Hamlyn lectures was given in 1949 by Mr Justice Denning and entitled *Freedom under the Law.* The 26th series was that delivered by Lord Justice Scarman. It left little scope for complacency in its audience.

To begin at the end, the lectures concluded with some radical "tentative proposals":

> (1) A new constitutional settlement replacing that of 1689 to be worked out by Parliament, the Judges, the Law Commissions, and the government through a phased programme of study, research, and extensive consultation.
>
> (2) The basis of the new settlement should be entrenched provisions (including a Bill of Rights), and restraints upon administrative and legislative power, protecting it from attack by a bare majority in Parliament.
>
> (3) A Supreme Court of the United Kingdom charged with the duty of protecting the Constitution: if regional devolution comes, the problems of competing legislatures could be handled by this Court, which would be at the pinnacle of the ordinary Courts of the land.
>
> (4) An immediate study should be begun of the problems of codification coupled with the associated problems of statutory drafting and interpretation in the new context of entrenched provisions and codified law.
>
> (5) Machinery should be established (its embryo exists in the Council on Tribunals and the Law Commissions) for handling the on-going problems of the law's development and reform, with especial reference to the problems of administrative law.

To return to the beginning, the question that Lord Justice Scarman set for himself to answer in his lectures was:

> Is English law capable of further growth within the limits of the common law system?

He then proceeded to consider a number of contemporary challenges to that system. The most significant of these were the challenges from overseas and from the growth of the welfare state.

The challenge from overseas was analysed as twofold: the international human rights movement; and the European Economic Community. The latter, with British membership and the European Communities Act, 1972, involved the yielding of both legislative and judicial supremacy and rising tide of quite differently drafted EEC legislation.

Another rising tide identified by Lord Justice Scarman was that of international

opinion on fundamental human rights, evidenced by the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The deficiency of the common law in this area was explained as follows:

> When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament.

Further:

> It is no longer enough to say, with Magna Carta, "no free man shall be taken or imprisoned ... or any otherwise destroyed, nor will we pass upon him nor deal with him but by lawful judgment of his peers, or by the law of the land". The legal system must now ensure that the law of the land will itself meet the exacting standards of human rights declared by international instruments.... This calls for entrenched or fundamental laws protected by a Bill of Rights.

Great though such changes might seem to 20th century English lawyers, Lord Justice Scarman observed, they would not harm the common law. In the 17th century the common law had rejected the doctrine of constitutional sovereignty and that rejection was enshrined in the constitution of the United States and has continued there since — as has the common law. The social challenge to the common law identified in the lectures was the burgeoning of the welfare system. Traditional common law rights for individuals did not suffice when

> the state has become a welcome intruder into the social life of the community with its money and its administration;

and

> the welfare state is challenging the relevance, or at least the adequacy, of the common law's concepts and classifications.

Civil disturbance and violence in London contributed to the establishment, but was not the direct subject of the third major inquiry undertaken by Lord Scarman. In June 1977 he was appointed chairman of a Court of Inquiry into an industrial dispute between Grunwick Processing Laboratories Ltd and members of the Association of Professional, Executive, Clerical and Computer Staff.

The dispute, centred on Grunwick's film processing plant, had actually commenced in August 1976 with the walk-out and subsequent dismissal of a significant proportion of the predominantly Asian female workforce. Those dismissed had not belonged to any trade union while working at Grunwick but joined APEX after the walk-out and before their dismissal. The dispute dragged on but the commencement of mass picketing and unruly scenes created the political pressure which led to establishment of the court of inquiry. On 24 June 1977 there were some 2,200 pickets and over 1,500 police officers outside the Grunwick factory. On 30 June the Employment Secretary announced the inquiry in the House of Commons.

The inquiry was directed to the causes of the dispute and not to the consequences; the latter included "blacking" of mail to Grunwick as well as mass picketing. The inquiry report was published on 25 August 1977. It set out the background and development of the dispute, refrained from suggestions for law reform, but did assess responsibility:

> ... discontent and grievances arose from the company's lack of a properly developed industrial relations policy including effective machinery for the examination and redress of grievances.
>
> The company by dismissing all the strikers, refusing to consider the reinstatement of any of them, refusing to seek a negotiated settlement to the strike and rejecting ACAS offers of conciliation, has acted within the letter but outside the spirit of the law.

The report was not unanimously welcomed. Nor did it result in an early end to the dispute. But the conduct of the inquiry added further to the mana of the chairman. The legal correspondent of *The Times* wrote of the three inquiries then completed by Lord Scarman:

> Each time the issue has been redolent with bitterness, mutual suspicion and uncompromising attitudes by the various interests represented. Each time his lack of pomposity and his ability to gain the respect of witnesses whatever their status or class and to make them feel relaxed has defused the tension.

The response of the common law by way of judicial review was of course not overlooked by Lord Justice Scarman, but was assessed as too cautious. He was concered with procedure and avoided addressing the merits of administrative decisions:

> it is as if lawyers are to be banned from refereeing the match, though Judges are to act as linesmen and practitioners may advise and cheer on the players.

These matters also pointed to a new constitutional settlement:

> Our legal structure lacks a sure foundation upon which to build a legal control of the beneficent state activities that have developed in this country.

More recently, addressing an Australian audience, Lord Scarman not only reiterated those ideas, while admitting that the loss of devolution proposals within the United Kingdom had slowed constitutional change there, but firmly rejected the suggestion that Judges must be kept out of the political arena:

> They are already there — as umpires, not gladiators or competitors. They have always been there: and there they will remain. There is ... no reason for Judges not to be trusted to act judicially and according to law, though the case raises political as well as legal questions.

With the benefit of a decade of hindsight there can be little doubt that his 1974 Hamlyn Lectures secured a significant place in English legal history for Lord Scarman. But his high public profile was ensured by an unprecedented series of public inquiries in which he was required to investigate into and report on incidents of or associated with civil disorder.

In the first of these, Mr Justice Scarman was chairman of a Tribunal appointed by the Governor of Northern Ireland in August 1969 to inquire into numerous acts of violence and civil disturbance which occurred between March and August of that year in various parts of that unhappy country. The Tribunal produced one major report which was presented in April 1972. That report is long, detailed, and, indeed, relentless, in its chronicling of the misunderstandings, errors, and excesses which contributed to what have become known locally as "the troubles". It makes depressing reading even now, 14 years and 13,000 miles away.

Two features of the situation in Northern Ireland in 1969 were noted at the outset in the report: the sectarian division; and the arrival of the Age of Protest. As to the first, the report recorded:

> We have not been able to avoid describing groups as Catholic or Protestant. These terms are used only as labels indicating well understood community identifications.

(In this connection, Lord Scarman has recalled that upon his arrival in Northern Ireland to commence this inquiry a waiting reporter initiated the following exchange:

"Are you a Catholic or a Protestant?"

"Neither. I'm an agnostic."

"That's not good enough. Are you a Protestant agnostic or a Catholic agnostic?")

As to the second feature, the report recounts the major civil rights demonstrations in Northern Ireland in 1968 and observed:

> Events elsewhere in the world, particularly perhaps the student riots in France in the early summer of that year, encouraged the belief that a policy of street demonstrations at critical places and times could achieve results, if only because they would attract the attention of the mass media.

The report contained no recommendations and only made findings where satisfied by the evidence. One finding summarised the conflict in the country:

> The classic communal pattern emerges starkly from the evidence: the two communities exhibiting the same fears, the same sort of self-help, the same distrust of lawful authority. Catholics and Protestants were haunted by the same ghosts and retreated in fear to their respective ghettoes while attributing to each other the responsibility and the blame.

The second major inquiry involved a geographical area less than a mile from the Royal Courts of Justice in London. On 15 June 1974 the National Front, a right wing political group, held a march which terminated at a hall booked for the purpose in Red Lion Square, Holborn. A counter-demonstration, organised by a left wing group which had booked another room in the same hall at the same time, also ended in Red Lion Square on that day. The result was a temporary breakdown in public order with one student suffering fatal injuries and numerous injuries suffered by members of the police and by demonstrators.

Lord Justice Scarman was appointed by the Home Secretary, Mr Roy Jenkins, to review the events of 15 June 1974 and

> to consider whether any lessons may be learned for the better maintenance of public order when demonstrations take place.

The report attributed direct responsibility for the violence to members of the International Marxist Group, an extreme left wing group, who were part of the counter-demonstration but did not execute a turn when confronted by a line of police, instead launching an "unexpected, unprovoked, and viciously violent" attack on the police line. The report is notable still as an essay on police procedures and on the rights and responsibilities of protestors. In this country, where the 1981 Springbok Tour is unforgotten, those subjects have not been written of more eloquently:

> The public relations aspect of dealing with public disorder requires that after order has been restored the police should always review their own conduct: public confidence demands what may seem to some officers to be two incompatibles — quick suppression of disorder and a meticulous investigation of allegations of excessive force displayed by police in the operation.

The latter demand highlighted police complaints procedures:

> My experience in this Inquiry convinces me of the need for an effective complaints procedure enjoying public confidence. I strongly recommend the early introduction of an effective independent element into the procedure for the investigation of complaints.

As for those who choose to exercise their right to protest, Lord Justice Scarman advised:

> The law assumes the existence of a tolerant and self-disciplined society. The law requires of the citizen as the necessary condition for the exercise of his rights that he respects the rights of others, even though he may fundamentally disagree with them and totally disapprove of their policies.

It is of some interest that in the report (published two months after the 1974 Hamlyn Lectures were delivered) proposals for judicial review of decisions to ban or impose conditions on demonstrations were rejected because of the undesirability of engaging the Courts in politically controversial matters.

Some four years later came the most recent and perhaps most significant of Lord Scarman's public inquiries:

> During the weekend of 10-12 April (Friday, Saturday and Sunday) the British people watched with horror and incredulity an instant audio-visual presentation on their television sets of violence and disorder in their capital city, the like of which had not previously been seen in this century in Britain. In the centre of Brixton, a few hundred young people — most, but not all of them, black — attacked the police on the streets with stones, bricks, iron bars and petrol bombs, demonstrating to millions of their fellow citizens the fragile basis of the Queen's peace.

On 14 April 1981, Lord Scarman was appointed by the Home Secretary, Mr Whitelaw, to inquire urgently into those disorders, and to report, with power to make recommendations. Lord Scarman reported that the social problems and policing problems of inner city areas were inextricable linked:

> We require of the police that they maintain and enforce the rule of law in our ethnically diverse society. Without an appreciation of the needs and aspirations of the many elements which constitute that society it is impossible to set the standards for successful policing.

He then analysed the social problems of such inner-city areas as Brixton, noting the economic decline, the uncertainties over physical redevelopment, the poor quality housing, the absence of employment (perhaps 55 percent unemployment amongst young black males), the lack of constructive recreational facilities, the relatively high proportion of single parent families, and the transient nature of a significant part of the population. These factors contributed to the plight of, in particular, young black males:

> Many of the young people of Brixton are therefore born and raised in insecure social and economic conditions and in an impoverished physical environment. They share the desires and expectations which our materialist society encourages. At the same time, many of them fail to achieve educational success and on leaving school face the stark prospect of unemployment. . . . In addition, young black people face the burden of discrimination, much of it hidden and some of it unconscious and unintended. Without close parental support, with no job to go to, and with few recreational facilities available, the young black person makes his life on the streets and in the seedy commercially run clubs of Brixton. There he meets criminals, who appear to have no difficulty in obtaining the benefits of a materialist society . . . living much of their lives on the streets, they (ie, young black people) are brought into contact with the police who appear to them as the visible symbols of the authority of a society which has failed to bring them its benefits or do them justice.

From that analysis followed the most significant paragraph of the report:

> It is clear from the evidence of ethnic minority deprivation that I have received that, if the balance of racial disadvantage is to be redressed, as it must be, positive action is

> required. . . . Given the special problems of the ethnic minorities, exposed in evidence, justice requires that special programmes should be adopted in areas of acute deprivation. In this respect, the ethnic minorities can be compared with any other group with special needs, such as the elderly, or one-parent families.

The point was restated in the conclusion of the report:

> A policy of direct co-ordinated attack on racial disadvantage inevitably means that the ethnic minorities will enjoy for a time a positive discrimination in their favour. But it is a price worth paying if it accelerates the elimination of the unsettling factor of racial disadvantage from the social fabric.

The implication of that finding, with its echoes of the United States debate over affirmative action for ethnic minorities, is still being debated. Nor is it without relevance or impact in this country with its own rising tide of consciousness of ethnic minorities.

With respect to policing, Lord Scarman recommended in favour of greater efforts to recruit members of ethnic minorities into the police force (rejecting any quota system, but approving of special training), in favour of community involvement in policing, and (again) in favour of an independent complaints procedure.

As a Law Lord, Lord Scarman has contributed directly to the shared jurisprudence of the common law. His speeches have been notable for the quality of the prose, the citation of material from outside England, and a hint of some of the themes touched on in his extra-judicial dicta. A member of a collegiate body is most visible as chairman or in dissent. Lord Scarman has rarely presided in the House of Lords, but dissenting speeches have not been so rare. In two cases involving discovery, for example, he has shared a bolder, but minority, position. In an important Privy Council case on capital punishment, he was again in eloquent dissent. And in a recent matrimonial case, he was moved to speak of the "pedantry of literalism"; his noble and learned friends favoured literalism in that instance.

But that is not to suggest that Lord Scarman has not been conscious of the orthodox limits to judicial law-making. In *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 1 All ER 65, the recent decision on the accrual of a cause of action for latent building defects, for example, he found the existing law "no matter for pride":

> But the reform needed is not the substitution of a new principle or rule of law for an existing one but a detailed set of provisions to replace existing statute law. The true way forward is not by departure from precedent but by amending legislation.

The arguments for judicial restraint are set out at some length in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529:

> Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the Judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.
>
> . . . the Constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the Judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the Judges. Their power to do justice will become more restricted by law than it need be, or is today.

Recent admissions

BARRISTERS AND SOLICITORS

AGAR, J M	Auckland	28 October 1983
ALLAN, T J G	Christchurch	27 October 1983
BENN-HOYLE, C R	Christchurch	25 August 1983
BREED, S B	Auckland	28 October 1983
BROWN, G M	Auckland	28 October 1983
BYCROFT, R A	Auckland	28 October 1983
CADENHEAD, A J	Christchurch	5 October 1983
CARSON, M L	Auckland	28 October 1983
CHENERY, G S	Auckland	28 October 1983
CLARK, D J	Blenheim	20 July 1983
DUNNING, M N	Auckland	28 October 1983
FAIRALL, P A	Christchurch	5 August 1983
FARKAS, A A	Auckland	28 October 1983
GEORGE, R A	Christchurch	23 September 1983
GOODEY, M R J	Auckland	29 July 1983
GREENWOOD, K G	Auckland	28 October 1983
HALL, E F	Auckland	28 October 1983
HASTIE, K B F	Auckland	28 October 1983
HEGARTY, E C	Auckland	28 October 1983
HEY, C M	Christchurch	7 June 1983
HOBBS, M J	Christchurch	15 June 1983
JENSEN, S R	Auckland	28 October 1983
JEW, P A	Auckland	29 September 1983
KIRKWOOD, J S	Auckland	28 October 1983
LATIMAR, P J	Auckland	28 October 1983
LAWRY, H D M	Auckland	1 June 1983
LAWTON, L E	Auckland	28 October 1983
LEE, W H	Wellington	2 June 1983
McGREGOR, R V	Auckland	28 October 1983
MARCH, J	Auckland	28 October 1983
MATHIESON, F J	Auckland	28 October 1983
MUIR, P M	Auckland	28 October 1983
NAIDU, D	Christchurch	15 September 1983
NEAVE, R H D	Christchurch	26 October 1983
SMALL, D J M	Christchurch	26 October 1983
SMALLFIELD, J M	Auckland	28 October 1983
STEPHENSON, R P	Auckland	28 October 1983
SWIFT, P R	Auckland	28 October 1983
SUTTON, A B	Auckland	28 October 1983
TETZLAFF, N K	Auckland	28 October 1983
THOMSEN, V M	Auckland	28 October 1983
TILL, N A	Christchurch	5 August 1983
TOHILL, D A S	Auckland	28 October 1983
VAN CAMP (nee Moleta) M	Auckland	4 March 1983
VARNEY, J T	Auckland	28 October 1983
WILKIN, C B	Auckland	28 October 1983
WONG, W S V	Auckland	28 October 1983

Ten days in Hong Kong

By Richard Baker, a law student of Wellington.

New Zealand was represented at the Commonwealth Mooting Competition that was held in Hong Kong as part of the Commonwealth Law Conference in September. The representatives from New Zealand were Mr Richard Baker and Ms Mary Peters of Victoria University of Wellington. The New Zealand team reached the finals and failed only on a split decision. This brief article gives Mr Baker's reactions to the experience that they had at the Mooting Competition.

Ms Mary Peters and myself arrived in Hong Kong to participate in the inaugural Commonwealth Mooting Competition. This was held in conjunction with the 7th Commonwealth Law Conference and had resulted from a suggestion of Hong Kong's Law School which received the support of the Legal Division of the Commonwealth Secretariat. We were told that a resident of the colony, once travelling between Montreal and Toronto, had been invited to leave the car and appreciate a clear night of the sort now rare in the Northern Hemisphere. She had demurred, the evening's stillness and solitude being too much for her Hong Kong sensibilities. On our introduction to the colony we well understood her confusion. It was evening and both mainland Kowloon and Hong Kong island were ablaze with neon, their streets crowded with people. The bustle and aroma (wok fried rice and diesel) of a 24-hour city surrounded us as did a cloying, humid heat. It was a far cry from the cold and damp of Wellington we had left some 15 hours earlier.

Nine teams attended the Competition, all composed of university students who had been selected by domestic competition to represent their countries. Victoria University of Wellington represented New Zealand. Hong Kong's Supreme Court, an imposing stone edifice with an austere and worn interior (one Canadian commented that he saw a cockroach so big it sent him out for a beer), provided the venue for the preliminaries and semi-finals. Adjudicators were drawn from the ranks of Commonwealth Judges and lawyers attending the Law Conference and an involved problem of international law was posed. It involved the jurisdiction of the International Court of Justice and the rights of States under Law of the Sea and Diplomatic Immunity convention and custom.

The moots by no means monopolised the attention of the mooters, such were the colony's attractions. At a time of anxiety over China's intentions in 1997, the Hong Kong dollar tumbled and the tourist found that his money appreciated daily. Profitable trips were made to the imitation

Judges and finalists after Commonwealth Moot Final.

Top Row (left to right) The Hon Sir Graham Speight (Chief Justice, Cook Islands) The Hon Sir Alan Huggins (Vice-President Court of Appeal, Hong Kong) The Hon Tan Boon Teik (Attorney-General, Singapore)
Bottom Row (left to right) Phillip Mills (Aus) James Forrest (Aus) Richard Baker (NZ), Ms Mary Peters (NZ)

Gucci markets of Temple Street and Port Stanley. For those so inclined the Playboy Club, and the bars of Wanchai offered relief from the preparation of submissions. Formal affairs included the velveted splendour of the Hong Kong Law Association's annual ball, a ten-course meal on board a floating restaurant at Aberdeen, and cocktails with fellow mooters in the leather bound sanctum of the University Common room. Walks in the downtown area revealed the colourful and congested lifestyle of a population some of whom inhabited unimpressive tenements and yet sported the latest trappings of western society, Mercedes included. Our stay coincided with the Chinese mid-autumn festival which is a time, like Christmas, to be shared with loved ones. Thousands of children, each carrying a lighted candle and accompanied by their parents, trekked to the top of Victoria Peak overlooking the harbour. In the evening's twilight the Peak offered a glittering picture as they watched a full moon rise over the waters.

In the moot, the New Zealand team was unseeded and our first round saw us against the top-seeded Singaporeans. To universal surprise we eliminated them. Our next encounter was against the second-seeded United Kingdom team and in another close decision we received the Judges' nod. The final was against Australia and was held in the University's amphitheatre. The sides were changed and 24 hours of feverish preparation were enjoyed by all. We lost by split decision after a 90-minute deliberation.

An interesting feature of the Competition was the subterfuge that occurred as teams in pre-moot meetings manoeuvred for whatever advantage was going. The exchange of briefs (carefully designed to misinform) was accompanied by a cryptic question and answer session that would have done credit to Inspector Clousseau. In an imaginative non-suit attempt, one team objected that the Bench of visiting lawyers, not having in reality been appointed pursuant to the Statute of the International Court, was without jurisdiction to listen to the moot. It was all highly enjoyable and at times required a willing suspension of disbelief.

It is planned that the event will take place again at the 8th Commonwealth Law Conference in Jamaica, 1987. One hopes so, as there is much to be gained from talking with fellow students and hearing how a common law heritage has been applied in a diverse Commonwealth. For the individual mooters the competition provided useful if somewhat pressurised instruction in the finer points of advocacy.

Accident Compensation for New South Wales

By A M Angelo of Victoria University of Wellington

The release by the New South Wales Law Reform Commission of *Working Paper 1, A Transport Accidents Scheme for New South Wales* (May 1983) was recently the occasion for a seminar on the scheme proposed in that working paper. Some 300 people, mainly members of the New South Wales legal profession, attended the conference in Sydney on 4 August.

For the non Sydney-sider the scene was set early on the day of the conference by an article in the morning newspaper, *The Australian* headlined –

> *Lawyers want right to sue with no-fault compensation.* Lawyers in NSW meet today as doubts increase over the State's no-fault accident insurance proposals. Tim Dare outlines the opposition to a scheme that could be seen as threatening a traditionally lucrative legal field.

The article itself described the debate over no-fault compensation as "heating up" and described the most controversial aspect of the scheme as its proposal to abolish the common law right to sue for damages. "This worries lawyers who see it as striking at a fundamental and long-established principle of justice."

Though the reaction to the scheme was perhaps to be expected, for a person with the knowledge of the New Zealand experience of accident compensation the intensity of feeling that the working paper (not a final proposal) aroused was surprising. The result was that while the panel of speakers – by and large supportive of the proposed scheme – presented careful and coherent and, might one say, compelling papers relating to the operation of the proposed scheme, most other comment was addressed to the common law right to sue for damages and did not speak to the viability or detail of the proposal as such. Professor Sackville, Chairman of the Law Reform Commission, attributed this to the fact that people were still "in the shock stage". Final submissions on the proposal are due with the Commission on 1 October 1983 and there is every indication that the proposal will be very vigorously attacked – it is arbitrary, impersonal, bureaucratic, subject to government manipulation, and provides reprehensively low awards for pain and suffering – and defended before its fate is decided.

In terms of the *Outline of Working Paper 1* published contemporaneously by the Law Reform Commission the proposed scheme is one "which provides no-fault compensation for people injured, or the families of people killed, in transport accidents. When we speak of a 'no-fault compensation' scheme we mean a scheme which provides compensation for accident victims or their families, without the need for the claimant to prove that the accident was caused by another person's fault. The scheme would provide compensation for injuries and death arising out of motor vehicle accidents. It would also provide compensation for injuries and death in accidents arising out of the use of public transport services, including those not involving motor vehicles."

The proposed scheme according to Professor Luntz, a speaker at the seminar, is the first in a four step approach to the introduction of full accident compensation for New South Wales. The scheme relates to transport accidents initially because that is where the need is most urgently felt and because the operation of the scheme in that area would give the most useful experience from which to extend accident compensation into other areas. The proposal of the Law Reform Commission is very similar at base to the Woodhouse proposal with which New Zealanders are familiar. The pressure from the legal profession however is for a system on the model of Victoria where the common law claim is retained along with the existence

of a no-fault compensation scheme. The Commission's attitude to the Victoria model is that not only would the operation of such a system in New South Wales perpetuate most of the problems that would be sought to be avoided by an accident compensation scheme but also that the cost of operating such a system is considerably more expensive than that for operating a New Zealand type scheme.

Under the proposal compensation would be for lost earning capacity and set at 80 percent of pre-accident gross earnings paid periodically. There would be no compensation paid for the first week of incapacity and there would be strictly limited rights to lump sum payments for those partially incapacitated. No specific proposal for compensation for non-earners was recommended by the Commission but four ways of dealing with this matter were set out and costings for the scheme as a whole were done on the basis of the option that provided for flat rate periodic payments to injured non-earners at the level of invalid benefits under social security. The scheme would provide for compensation to surviving spouses and children of deceased accident victims. There would also be lump sum payment for non-economic loss for those with permanent disabilities subject to a 5 percent threshhold and a maximum sum of $51,000 (current). Additionally there would be modest awards available for grief and bereavement for families of deceased accident victims.

The impetus for these reform proposals has come primarily from the pressure on the current third party motor vehicle insurance scheme. Current New South Wales premiums are set at A$154 per annum (with which should be compared the maximum motor vehicle premium under the New Zealand accident compensation system of NZ$14.20) but "as at 30 June 1982, there was a shortfall in [the] insurance fund available to meet outstanding third party claims of about $188 million". The actual cost therefore of motor vehicle third party insurance in New South Wales at present is, on actuarial calculations, something like A$200 per annum. By comparison, the estimates for the proposed scheme are given as – on a fully funded basis, A$112 per vehicle per annum, or on a pay as you go basis, a plateau cost of A$121 per vehicle per annum. The estimated cost of a combined common law/no-fault scheme on a Victorian model is A$181 per annum.

The Commission's proposal does not particularise the funding of the scheme but lists a number of sources, among which the most obvious are the motor vehicle owner's levy and public service transport operator's charge.

Many valuable papers were prepared for the conference. Most of those related to the Commission's proposals but there was also one prepared by the Law Institute of Victoria on the Motor Accident Compensation Scheme operating in Victoria. Of most interest perhaps to a New Zealand reader are the discussions in the papers of recent common law developments as regards damages for personal injury, the difficulties of determining benefits that should be payable to non-earners, and perhaps, more critically, the problems of costing and controlling a statutory scheme of compensation.

The conference opened with an address by the New South Wales Attorney-General Mr Paul Landa who said that the government had made no commitment to the scheme proposed by the Law Reform Commission but did have a commitment to an improvement in the present system and a commitment also to the "best affordable scheme". He set four imperatives for such a scheme: it should be fair and adequate in its compensation, it should provide security for the future, it should provide maximum rehabilitation and rehabilitation opportunities, and it should be affordable by the community. Later speakers stated that there would under any future system be no-fault compensation – the outstanding question was whether a no-fault scheme would complement or substitute the common law.

Debate at the conference made it clear that the major problems in New South Wales today are rehabilitation and rehabilitation assistance and further that an accident compensation scheme would provide better in these areas than does the common law. Perhaps inevitably however, the working paper and the discussion on it concentrated, as did the New Zealand accident compensation system in its early years, on matters of compensation. A better perspective could probably have been achieved if rehabilitation had been given pride of place in the Law Reform Commission's proposals rather than as Chapter 11 in a 14 chapter proposal.

The consulting actuary, Richard Cumpston, who spoke on the proposal said that the long-term success of any such scheme depended on cost stability. In that context he emphasised many positive aspects of the New Zealand scheme such as its concern for early rehabilitation contacts, its rapid granting of aid, and its administrative efficiency. He was also critical of a number of aspects of the New Zealand scheme as inimical to cost stability. He spoke strongly against lump sum payments, and further spoke to the particular vulnerability of a statutory scheme to rapid escalation of medical costs:

> There is now a considerable body of evidence that over-supply of doctors leads to over-provision of services. Statutory schemes, where the bill normally goes direct from the doctor to the scheme, are particularly vulnerable to over-provision of services. Reasonable control of medical costs will need a good central monitoring system, together with the co-operation of professional bodies such as the Australian Medical Association.

Matters relating to the co-operation of the accident compensation administrators and the medical profession are matters that deserve the attention of the legislators in New South Wales. Given the pivotal position of the medical profession in the operation of the New Zealand accident compensation system the small degree of formal linking, liaison, or control between the two bodies in New Zealand is a matter which causes some amazement among outside observers. Not surprisingly the area is now a cause for considerable concern in New Zealand with statistics which suggest a large increase in a number of services being provided and an increase in the cost of each service of approximately 30 percent over the last 12 months. In the absence of well-established and well-tried procedures issues such as these are very sensitive ones to deal with promptly and adequately.

The further suggestion by Cumpston was that there might be some control (perhaps a "delicensing" or restricted listing) on practitioners who were for good reason found unacceptable as such for the purposes of the scheme. The result of such an approach could be that practitioners who abused the system could lose their capacity to participate in it. The actuarial viewpoint was also that weekly compensation should be substantially below pre-accident earnings – ideally perhaps in the vicinity of 60 percent of pre-accident earnings. Cumpston further advocated that, in order to prevent the scheme becoming an expensive unemployment system, only partial benefits should be paid to those with partial incapacities. Finally it was suggested that the most secure scheme was a fully funded one – though this is the pattern from which New Zealand has probably recently departed.

Disputes of Interest and of Rights: Definitions and Procedures

By A J Geare

Mr Geare of the University of Otago is the author of the recently published book The System of Industrial Relations in New Zealand *(Butterworths 1983). An earlier article by him on non-industrial matters in industrial relations was published in [1983] NZLJ 219. In this article he looks at the distinction between "interest" and "rights" in disputes.*

Introduction

A recent article[1] pointed out that although the Industrial Relations Act 1973 (IR Act) is intended to assist in the settlement of union-management conflicts, its effectiveness in that area is limited. The concern of that article was that the IR Act only operates if the conflict is over a matter coming under the statutory definition of an "industrial matter". The conflict is then deemed to be a "dispute". The IR Act is impotent if the conflict is over a matter adjudged to be non-industrial. There are, however, additional aspects of the IR Act which further limit its effectiveness in the area of conflict resolution, and these aspects are the concern of this paper.

The IR Act classifies disputes as being either "disputes of interest" or "disputes of rights" and provides procedures for their settlement and in certain cases penalties for the non-observance of the procedures. This paper argues first that the concept of separating disputes into "interest" and "rights" disputes is not particulary suited for New Zealand's industrial relations system. Secondly, the actual statutory definition of the two classes of disputes and the judicial interpretations of the definitions have created further problems and illogicalities. Some "interest" (by normal understanding) disputes are classified as disputes of rights and some disputes of rights are not covered by the procedure for settling such disputes – and are thus left in limbo. Hence, of course, penalties for the non-observance of procedures cannot have universal application.

Disputes of Interest and of Rights

New Zealand is by no means unique in attempting to distinguish between disputes of interest and of rights. Kahn-Freund points out that such a distinction is "elementary and basic in the labour law systems of many comparable countries",[2] and Young[3] claims the distinction was first made in Denmark about a hundred years ago. In its basic form, the normal classification is that a dispute of interest is a dispute arising either out of the negotiation of a new collective arrangement setting terms and conditions, or out of the renewal of an existing arrangement, while a dispute of rights is a dispute arising out of the interpretation or application of an existing collective arrangement.[4] The word "rights" reflects the fact that the dispute is over an agreed and settled document and the parties have the right to expect the substantive and procedural rules in the document to be followed.

The basic rationale for distinguishing between these two types of dispute is that it is assumed the parties to the disputes would accept different processes to arrive at a settlement. With disputes of interest there is generally greater reluctance to accept outside involvement in the settlement, and direct negotiation (possibly with limited assistance) is the generally preferred method. With disputes of rights, there is increased likelihood that a judicial or arbitral role from an outsider will be accepted, since the dispute should be over what the words of an agreement actually mean. Hence "interest arbitration" is rare (and even though it is a fundamental part of New Zealand's industrial relations system it is practiced in under 5 percent of potential situations in the private sector)[5] while "rights arbitration" is fairly well accepted. As a consequence, strike action is usually considered to be more acceptable (or less unacceptable) in interest disputes than in rights disputes.

Although, as stated above, it is quite usual for the distinction to be made, it is by no means universally appropriate. The concept of having an arbitrator interpreting an agreement and making a judicial decision, as in a dispute of rights, is appropriate only if the agreement really reflected that mythical "meeting of minds" and was in effect cut and dried. However, if as often occurs in reality, there are issues in the agreement which are only partially settled then it is far less appropriate to settle the dispute by judicial interpretation. Likewise, the distinction is appropriate if collective arrangements give *actual* terms and conditions, as happens with most plant agreements, or what in New Zealand may be best described as "collective agreements (principal)".[6] It is inappropriate in industrial relations systems where the collective arrangements set minimum standards on an industry-wide or district basis and where unions then negotiate better conditions with individual employers. Thus a Royal Commission in Britain observed in what is known as the Donovan Report that:

> The distinction is not at present important in Britain because most collective agreements lay down minimum standards which are

> improved and elaborated on by further negotiation at subsidiary levels. Moreover shop floor agreements are closely linked with customs and practices which are not set down in any agreement, so that at this level no clear distinction exists between disputes of right and disputes of interest.[7]

The situation in Britain has changed since the Donovan Report appeared and there has been a marked trend towards single employer agreements,[8] and hence the above quotation is not particularly apposite to Britain today. Ironically, however, the quotation is particularly apt for the New Zealand situation, as most workers in New Zealand are covered by awards which set minimum standards in the industry for the district or districts concerned. Admittedly single employer agreements are increasing in number, but a large proportion are *supplementary* agreements which are concerned with only a small proportion of the rules, the remaining rules being taken as those in the award.[9]

Thus, purely on theoretical considerations, the practice of distinguishing disputes of interest from those of rights is not particularly sound in the New Zealand situation. Even if the statutory definitions had been framed perfectly, difficulties would have arisen in applying the distinction in practice. Unfortunately the statutory definitions themselves create further difficulties.

New Zealand statutory definitions

The Industrial Relations Act defines disputes in s 2 as being either one of interest, meaning a dispute:

> created with intent to procure a collective agreement or award settling terms and conditions of employment of workers in any industry, whether or not the agreement or award is to be in substitution for an existing agreement or award;

or of rights, meaning:

(a) A dispute concerning the interpretation, application, or operation of a collective agreement or award; or
(b) A dispute concerning a matter of the interpretation, application, or operation of an enactment or contract of employment, being a matter related to a collective agreement or award; or
(c) Any dispute that is not a dispute of interest, including any dispute that arises during the currency of a collective agreement or award; or
(d) A personal grievance.

Superficially the New Zealand definitions appear to conform to normal practice – disputes of interest referring to the setting of conditions and disputes of rights referring to interpretation or the operation of agreements. However there is a very significant aspect of each definition which means that in the New Zealand setting both types of dispute have a fundamentally different meaning to that normally accepted.

In the first instance, a dispute of interest is not *any* dispute over the setting of terms and conditions. The statutory definition narrows the coverage to those instances where the terms will be embodied in two specified types of collective arrangements, namely a "collective agreement" or an "award". Both are defined in the statute under s 2. A "collective agreement" must both be in writing and registered by the Arbitration Court. An "award" is an award of the Arbitration Court and can only be reached after either conciliation, following the procedure in the IR Act, or arbitration by the Court.

This narrow definition creates a major difficulty in determining the status of disputes concerning "above-award" provisions. As noted earlier, the most common occurrence is for people to operate under awards which set minimum standards and for better than awards provisions to be negotiated far later in some cases. If these provisions are incorporated into a collective agreement – then the dispute is definitely a dispute of interest. However, it is common for the conditions, either company-wide or applying only to certain areas to result in a less formal or even unwritten agreement. The dispute is clearly over the settings of terms and conditions, but because of the narrow statutory definition there are conflicting views as to the status of above-award disputes.

Above-award disputes

One viewpoint is that an above-award dispute results in the situation in which the award is in effect amended for a particular employer. Thus the dispute was to procure a new award (for one employer) and hence should be considered a dispute of interest. This view was taken by Tyndall J in the case *N I D Builders' Labourers, etc, Decision* (1961) 61 Bk Aw 1341. There the union was covered by an award under which the employer was obliged by cl 13(f) to:

> provide the worker while on counting work with suitable board and lodging. . . . Suitable board and lodging shall include the providing of mattresses, pillows and stretchers. In the event of a dispute arising as to whether board and lodging are suitable, the matter shall be referred to a disputes committee under cl 26 of the award.

The union claimed that "suitable lodging" included the providing of blankets, sheets and pillow-cases, in addition to the mattresses, pillows and stretchers listed in the award. Tyndall J found at 1343, 1344 that:

> any differences arising as to whether board and lodging are suitable is properly referable to a disputes committee, but not so if the dispute involves a claim for an extension of the items listed. . . . We would add that if we held that the dispute should be settled by ordering the provision of blankets, sheets and pillow-cases, it would be tantamount to amending the award during its currency in so far as one employer is concerned. . . . If the union desires to press for the supply of additional bedding materials then it should take the normal steps when the replacement of the current award is under consideration by a council of conciliation.

Although this decision was made before the passing of the IR Act, it is submitted that there is nothing in the IR Act which of itself would affect the reasoning. Interestingly the Donovan Commission in the United Kingdom also consider that "claims for improvements in terms and conditions of employment within the factory" over industry-wide substantive agreements should be classified as disputes of interest.[10]

In more recent decisions the Court of Appeal and later the Industrial Court (now Arbitration Court) have taken the definition of a dispute of interest very narrowly. Thus the Court of Appeal in *AHI NZ Glass Manufacturing Co Ltd v North Island Electrical IUW* (1977) Ind Ct 243 at 248, observed that:

> the dispute in the present case, although a dispute as to terms and conditions of employment, was not a "dispute of interest". That is because it was not a dispute "created with intent to procure a collective agreement or award".

The dispute in the above case was over the provision of extra leave entitlement to "on-call" workers. The collective agreement provided for an allowance to be paid to on-call workers but did not specify extra leave. The employer claimed the dispute was one of interest and, hence, as discussed later, should not be permitted within a specified time scale. There was

no discussion of Tyndall J's earlier decision reported in the Court of Appeal's judgment. It thus must be assumed that the Court of Appeal either rejected or was unaware of his reasoning that substantive additions to an award "amended" it in so far as one employer is concerned, making the dispute one of interest.

The Industrial Court in the case of *Westfield Freezing Co v Auckland Freezing Works, etc, IUW* (1978) Arb Ct 7, found similarly that a dispute over the rates in an incentive bonus scheme related to, but left separate from the collective agreement was not one of interest – because it was not explicitly to procure a collective agreement or award.

Thus the situation in New Zealand is currently that a dispute will be classified as one of interest *only* if it is expressly for the purpose of procuring a collective agreement or award, as defined by the IR Act. No consideration is given as to whether in effect the dispute is to create a new award for a collective agreement for a new employer. Any other dispute will be one of rights.

The significance of this resulting definition on industrial relations is quite considerable. Not only does it affect the procedures to be used, but it has considerable impact on the "twelve-month rule" discussed below. In brief, this rule was designed to ensure that, with some exceptions, terms and conditions remain unchanged for twelve months. However it applies only to disputes of interest – while disputes of rights may be settled at any time. Thus unions wishing to improve terms and conditions more frequently than with twelve-month delays may do so by simply making sure the dispute is classified as one of rights.

Procedures for settling disputes of interest

Disputes of interest may be settled in three ways. The first is by voluntary settlement, outlined in s 65, which leads to a collective agreement. The second method is for the parties to utilise conciliation, as outlined in s 82. The end product is a collective agreement which however, under s 82(9), is deemed to be, and is known as an award. The third method, which can only be utilised after conciliation has failed, is arbitration by the Arbitration Court leading to an award.

The end products of these three methods of settlement are respectively: collective agreement, collective agreement known as an award, and award. This ludicrous use of technology has been criticised elsewhere[11] and an alternative classification proposed. This is that the three products should be referred to as collective agreement (voluntary), award (conciliated) and award (arbitrated). This terminology will be employed where necessary in this paper to lessen confusion.

Twelve-month rule

This is the common terminology for the provisions in the Act which in general prevent disputes of interest occurring more frequently than twelve months. Under s 92(1) of the Act:

> every award or collective agreement shall continue in force for a period specified in it, being not less than 1 year. . . .

although s 92(2) allows for a shorter period but only with the consent of the Arbitration Court. However the shorter period has to be specified at the time the award or collective agreement is made – not later on. A general exception to the twelve-month rule is provided by s 65(7) which specifies that:

> the application of the provisions of section 92 of this Act to any award or to any collective agreement registered under section 82 of this Act shall not prevent the registration of a collective agreement under this section.

The effect of that section is that a voluntary settlement leading to a collective agreement (voluntary) which replaces an award (arbitrated) or award (conciliated) may take place within twelve months. However the *next* voluntary settlement leading to another collective agreement (voluntary) cannot take place within the twelve-month period.

The rationale behind the twelve-month rule is clearly to limit the frequency of changes in terms and conditions of work except in the one case when an employer and union choose to change from the industry-wide award coverage to independent collective agreement coverage. The peculiar definitions in the statute; and the subsequent interpretations by the Courts, mean that so long as unions are happy not to have a collective agreement or award as a final product, they can attempt to change terms and conditions (subject only to external constraints such as wage freezes) as often as they wish.

This is not to say that the twelve-month rule is totally useless. Its major impact is to prevent awards, covering numerous employers, from being renegotiated within twelve months. The effect of this is very significant. However the judicial interpretation of the meaning of a dispute of interest means that individual employers can face demands for improved terms and conditions virtually at any time.

Procedures for settling disputes of rights

There are two general procedures provided by the IR Act for settling disputes of rights. One is designed for personal grievances only, the other for most of the remaining types of disputes of rights.

Section 117 of the IR Act outlines a standard procedure for the settlement of personal grievances which in the absence of any acceptable alternative, is to be in or is deemed to be in every award and collective agreement. The procedure works through stages: worker and supervisor, union representative and employer, (grievance) committee, Arbitration Court. There are provisions banning strike action or further action by the employer.

The procedure may be altered allowing a worker to apply directly to the Arbitration Court if the grievance was not dealt with or dealt with promptly because of the union or the employer.

Section 116 outlines the procedure for settling disputes of rights other than personal grievances. This procedure is to be in, or is deemed to be in every award and collective agreement. The procedure is that the matter goes to a (disputes) committee then to the Arbitration Court. A peculiar provision in s 115(4) is that if either party fails to observe the procedure then either party (that is, both the "offending" and the "injured" party) may refer it directly to the Arbitration Court. That is, a party can force the dispute to go directly to the Arbitration Court without the matter going to a disputes committee. As with the grievance procedure, strikes are banned.

For some reason there are certain differences in the procedures. The reasons for this defy logic. For example, a grievance committee need not have a chairman (although in practice it would have one) while a disputes committee must have one, and if other parties do not agree, then the chairman will be a conciliator or a mediator or their appointee. If a grievance committee comes to a decision, there is no appeal, and the matter goes to the Arbitration Court only if the grievance committee fails to reach a decision. However there can be an appeal to the Arbitration Court over the decision of a disputes committee.

The primary concern of this paper is not on the procedures, as such, but on their applicability. The personal grievance procedure is restricted by s 117(1) to

grievances over actions by the employer which are not applicable generally to workers of the same class employed by the employer. Thus grievances over wide-scale unjustifiable dismissals would appear *not* to be covered by the procedure. Judicial decisions have also established that the grievance procedure can only be employed on behalf of a worker who is a member of a registered union and is also covered by an award or collective agreement.[12]

The disputes procedure also has limited applicability. Under s 116 the IR Act specifies that the procedure:

> shall apply to a dispute of right between the parties including a dispute on
>
> (a) The interpretation of this instrument; or
> (b) Any matter (not being a personal grievance . . .) related to matters dealt with in this instrument and not specifically and clearly disposed of by the terms of this instrument.

In the *AHI* case cited earlier, the Court of Appeal at 244, interpreted the above wording in a restrictive manner, and determined that the language of s 116 should be given effect:

> according to its ordinary and natural meaning . . . [and] that the word "including" was to be treated as being used in a restrictive or exhaustive sense so that a particular dispute will not be of a kind falling within the disputes clause unless –
>
> (1) It falls within the definition of a "dispute of rights" in s 2(1), and
> (2) Is not a personal grievance, and
> (3) Is a dispute either –
>
> (a) on the interpretation of the Award or Collective Agreement, or
> (b) on any matter related to matters dealt with in the Award or Collective Agreement and not specifically and clearly disposed of by the terms thereof.

It is by no means certain that this interpretation correctly reflects the views of the legislators at the time the statute was passed. Of course, with the constant amendments to and changes in direction of policy of industrial relations legislation it is debatable whether the legislators were certain of their views. However given that the 1970 Amendment to the Industrial Conciliation and Arbitration Act 1954 contained a disputes procedure which applied "only" to such disputes, and this was altered to the current situation in which it is to be applied to disputes of right "including" such disputes – it is certainly not clear cut that the legislators intended "including" to be interpreted as "including only". Unambiguous draughtsmanship would have prevented the need for interpretation and thus the possibility of misinterpretation.

One result of the Court of Appeal's ruling is that it is now clear that there is no procedure outlined in the IR Act for settling certain disputes of rights. These include those disputes which are *not* intended to result in a collective agreement or award (and hence are not disputes of interest and thus must be disputes of rights) but which are intended to improve upon provisions which are specifically and clearly disposed of by the award.

A further effect of this situation, which will not be explored in detail here, is that penalties imposed by the IR Act for the non-observance of the procedures – for example for strike action over a dispute of rights – cannot be universally applicable. Section 124A of the IR Act states it is an offence to strike over "a matter that is within the disputes procedure". This specific penalty cannot be applicable to strikes over disputes of rights *not* within the procedure.

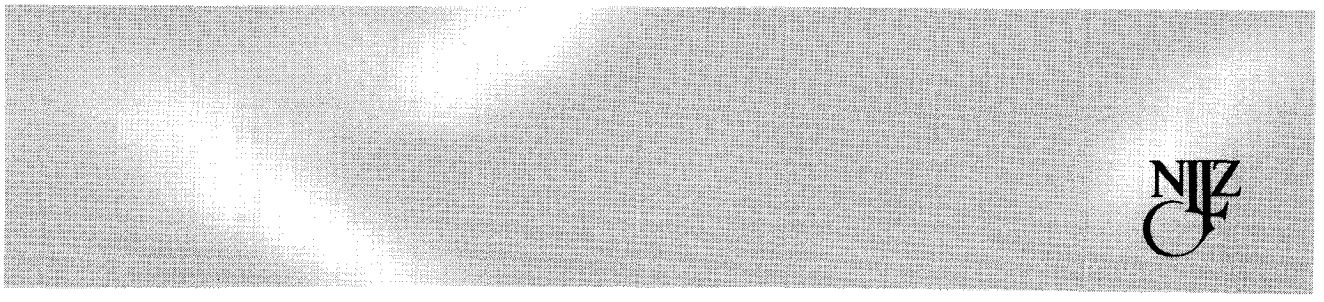
Conclusion

The IR Act is based on the philosophy that procedures with committees and arbitration, or conciliation and arbitration, is preferable to the use of normal collective bargaining action such as strikes and lockouts if "peaceful" negotiation fails to reach agreement. The legislators have also included a plethora of penalties for strikes during the process of working through the procedures.

This paper has sought to demonstrate that the theoretical basis for much of the legislation concerning the division of disputes into those of interest and those of rights is inappropriate to the New Zealand industrial relations system. Further it has submitted that the actual wording of the legislation creates further problems and illogicalities. These include the fact that disputes over terms and conditions can be classified as *both* disputes of interest and of rights – depending on the type of agreement the dispute is intended to procure. Further, some disputes of rights are covered by statutory procedures for their settlement, while others are not.

Given that legislators wish to oblige unions and employers to operate their industrial relations with government intervention and statutory procedures, it is surely incumbent on the legislators to provide rational procedures based on logical theory. Considerable improvement to the legislation is necessary before it could be considered the legislators had achieved that.

1 A J Geare "Non-industrial matters in industrial relations", [1983] NZLJ 219.
2 Otto Kahn-Freund, *Labour and the Law*, London, Stevens & Sons, 1977, p 54.
3 John Young "Getting it all Together", *Industrial Relations Review*, Vol 1(4), 1979, pp 46-50
4 *Report of the Royal Commission on Trade Unions and Employers Associations*, London, HMSO, 1968, para 464.
5 A J Geare "Formal Collective Arrangements in New Zealand Private Sector Industrial Relations" *New Zealand Journal of Industrial Relations*, (in press).
6 Ibid.
7 *Report of the Royal Commission*, op cit.
8 W Brown (ed) *The Changing Contours of British Industrial Relations*, Oxford, Basil Blackwell, 1981.
9 A J Geare "Formal Collective Arrangements", op cit.
10 *Report of the Royal Commission*, op cit para 60.
11 A J Geare "Formal Collective Arrangements", op cit.
12 *Auckland Freezing Works, etc, IUW v Te Kuiti Borough* [1977] NZLR 211.



Woolmington in retreat:

Mackenzie v Civil Aviation Department

By C B Cato, Senior Lecturer in Law, University of Auckland

In a previous comment, in this Journal, following the favourable response of Cooke J in *Ministry of Transport v Burnett's Motors Ltd* [1980] 1 NZLR 51 to the decision of the Supreme Court of Canada in *R v City of Sault Ste Marie*, [1978] 85 DLR (3d) 161, it was mooted that if the occasion arose, our Court of Appeal might adopt what was described as "the true half-way house position", [1981] NZLJ 294. It was argued that the true half-way house involved judicial recognition of a defence of absence of fault to an offence of strict liability. The onus of establishing absence of fault rested on the defendant and had to be discharged on the balance of probabilities. The writer, however, added the caution that "if the approach in *City of Sault Ste Marie* is adopted in New Zealand, our Courts must resist the temptation not to apply the presumption in *Sweet v Parsley* because a "no-fault" defence is available to a strict liability offence."

The term "*true* half-way house" was used to distinguish this concept from the half-way house that North P said existed in *R v Strawbridge* [1970] NZLR 909. In regard to *Strawbridge* it was submitted that North P was incorrect when he considered that the case before him was illustrative of what Lord Pearce in the leading case of *Sweet v Parsley* [1970] AC 132 at 157-158 had described as a "sensible half-way house". North P in *Strawbridge* had rightly rejected any suggestion that proof of innocence had to be discharged by the defendant on the balance of probabilities. In his opinion, this would have been inconsistent with *Woolmington*. Lord Pearce, however, and, possibly Lord Reid also at pp 149-150, envisaged that in some offences of a "quasi-criminal" kind, a shift in the onus of proof was appealing.

Although tempted with the possibility of creating an intermediate category of offence between offences truly criminal and those that could be traditionally considered to be absolute offences, neither of these eminent Judges, nor any of the other Law Lords was prepared to countenance a departure from *Woolmington*, in that case. Lord Diplock indeed was emphatic at p 164 that where mens rea was an essential ingredient of an offence the onus of proof of innocence did not rest upon the defendant. He said:

> Unlike the position where a statute expressly places the onus of proving lack of guilty knowledge on the accused, the accused does not have to prove the existence of a mistaken belief on the balance of probabilities, he has to raise a reasonable doubt as to its non-existence.

Strawbridge, like *Sweet v Parsley*, was a case of an offence involving drugs in which the defendant on conviction was at least in jeopardy of substantial penalty. In a case of this kind, the concept of a half-way house was inappropriate.

Given however, the Judiciary's apparent reluctance to discard the doctrine of strict or absolute liability, *Sault Ste Marie* was welcomed because prima facie it appeared to offer a satisfactory solution to the problem of what in *Lim Chin Aik v The Queen* [1963] AC 160, Lord Evershed had described as "the luckless victim". However a reassessment of *Sault Ste Marie* in the light of the most recent pronouncement of our Court of Appeal in *McKenzie v Department of Civil Aviation* (unreported, 28 June 1983), suggests regrettably that the writer's earlier enthusiasm for the decision was in part unjustified. Although the Supreme Court achieved a *via media*, it would not appear in retrospect to be the half-way house the writer had considered it to be.

The concept of a *via media* between mens rea and strict responsibility was first mooted by Professor Williams in 1953.[1] This was in reponse to the criticism of the concept of strict responsibility which he himself advanced, and further, in particular, to the problem of the "luckless victim".[2] It was not immediately clear, however, whether Professor Williams originally intended his *via media*, or responsibility for negligence, to be legislatively[3] or judicially fostered. Nor was it clear, when he said, "There is a half-way house between mens rea and strict liability responsibility which has not been properly utilised, and that is responsibility for negligence", whether he envisaged his *via media* to exist as a true alternative preserving the concept of strict responsibility, or whether in effect he envisaged that it would apply only in those cases characterised as offences of strict responsibility.[4]

The Williams thesis, however, was further developed by Professor Colin Howard in a seminal article, "Strict Responsibility in the High Court of Australia", (1960) 76 LQR 547. This article was subsequently referred to by Lord Pearce in *Sweet v Parsley* and further, by Dickson J in *R v City of Sault Ste Marie*. Professor Howard considered that strict responsibility was an "erratic" concept and was "distinguished only by its irrationality". In his opinion, the plight of "the luckless victim" could be solved by recognising judicially a defence of absence of fault in the strict responsibility category of case, the onus of proof, however, of establishing absence of fault resting on the defendant.

Although subsequently, in the aftermath of *Sweet v Parsley*, Professor Howard's thesis was criticised by an English academic, Professor Brett,[5] for his suggestion that the decision of the High Court of Australia in *Proudman v Dayman* [1941] 67 CLR 536 justified a shift in the onus of proof of honest and reasonable mistake to the defendant, the Howard thesis was nevertheless attractive because it offered a solution to the doctrine of strict responsibility to which the judiciary had unfortunately become wedded.

In principle, also there could be no objection to the Courts developing the law so as to incorporate the concept that

Professor Howard envisaged, since the doctrine of strict reponsibility was, to adopt Lord Reid's phrase in *Pettit v Pettit* [1970] AC 777 at 795, one of "lawyers' law". Nor, on this analysis, would the concept violate *Woolmington* because it stood independently of it.

Certainly, in *R v Sault Ste Marie*, Dickson J appeared to appreciate that accepting a defence of absence of fault in an offence of strict liability would not violate *Woolmington*. There, in defence of the notion of absence of fault, Dickson J observed:[6]

> It is somewhat ironic that *Woolmington's* case, which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in *Woolmington's* case, as I comprehend it which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with the burden of proof resting on the accused to establish the defence on the balance of probabilities.

It was this passage, together with the characterisation of the offence in question, water pollution contrary to the Ontario River Water Resources Act, 1970, which caused the writer to suggest, that the Supreme Court had arrived at the "true half-way house position". Had the Supreme Court paused there, it might have been possible to defend the decision as one embodying the "true half-way house" since the offence of water pollution arguably came within the category of a "nuisance" offence; a category which the Courts had traditionally considered to have the qualities of an offence of strict responsibility.[7]

However, although referring to the *via media* of Glanville Williams and the Howard criticism of strict responsibility, it is apparent that in adopting the classification it did, the Court went further than at least Professor Howard, and probably Glanville Williams also, would have envisaged. In the lower Courts, there had been judicial disagreement over the issue whether the offence in question should be characterised as one of mens rea or strict liability. The penalty in question for a first offence was $5,000. For a second the maximum financial penalty was $10,000 but a term of imprisonment of one year was also available. This disagreement caused Dickson J in *R v City of Sault Ste Marie* to say p 167:

> The divers and diverse judicial opinion to date on the points under consideration reflect the dubiety in those branches of the law.

Dickson J, in delivering the unanimous judgment of the Court, considered that the offence being what he described as a "public welfare" regulatory offence was prima facie one of strict liability. It could not be regarded as a "true crime", so that *Woolmington* did not apply. However, nor was it an absolute liability offence, which was described, in terms which would have been appropriate in traditional terminology, as existing only where, "the Legislature had made it clear that guilt would follow proof merely of the proscribed act".

One irony is that whereas the decision superficially appeared to solve the problem of the "luckless victim", it is doubtful whether this was achieved at all. The concept of strict responsibility for which the nomenclature "absolute" had been reserved, would in fact appear to have been preserved.[8] Only by limiting the scope of the *Woolmington* presumption to "true crimes" was the *via media* achieved. This was not, it is submitted, consistent with the Howard thesis.

The concept, however, of a third category of offence was not entirely novel. The virtues of a "quasi criminal offence", or *malum prohibitum*, rather than a true crime, *malum in se*, were tentatively explored by Lord Reid and Lord Pearce in *Sweet v Parsley*. Neither Judge, however, fully developed the argument and both appreciated the significance of *Woolmington*. A precedent for such an approach already, however, existed in New Zealand in *R v Ewart*.[9]

In *R v Ewart*, the Court was concerned with whether a charge of selling material contrary to the Offensive Publications Act, 1892, was an offence of strict liability or not. The penalty was a maximum fine of £5, or imprisonment for a term not exceeding three months with or without hard labour. The appellant contended that he did not know that the magazines he had sold contained such material.

Of the five members of the Court, two Stout CJ and Cooper J decided that the offence was absolute. Three considered otherwise Williams, Chapman and Edwards JJ would appear to have envisaged that absence of knowledge was a defence but the onus of establishing this lay upon the appellant.

Of the cases, cited in the judgment of the majority, the most important were *R v Prince* LR 2 CCR 154; *R v Tolson* (1896) 23 QBD 168 and *Sherras v De Rutzen* [1895] 1 QB 918. It is submitted however, that only the opinion of Day J in *Sherras v De Rutzen* could be properly described as clear authority for a shift in the onus of proof. *R v Prince* was so unsatisfactory a decision that it was subsequently described by Wright J in *Sherras v De Rutzen* [10] as an "isolated and extreme kind of case". *R v Tolson*, which was followed by the High Court of Australia in *Proudman v Dayman* [1941] 67 CLR 536, stood for the presumption of innocence and the availability of honest and reasonable mistake. Like *Tolson*, it is submitted contrary to the apparent opinion of Professor Howard[11] and subsequently Lord Pearce in *Sweet v Parsley, Proudman v Dayman* was not authoritative of a shift in the onus of proof. This point was emphasised by Lord Diplock in *Sweet v Parsley*, who after citing *Proudman v Dayman*, made the important observation, at p 114 that:

> Unlike the position where a statute expressly places the onus of proving lack of guilty knowledge on the accused, the accused does not have to prove the existence of mistaken belief on the balance of probabilities; he has to raise a reasonable doubt as to its non existence.

Despite, however, North P in *R v Strawbridge* recognising that the "intermediate" category fell foul of *Woolmington*, and the Court of Appeal in *Police v Creedon* subsequently deciding, albeit with some reservation, not to depart from *Strawbridge*, three of the four members of the Court in *McKenzie v Department of Civil Aviation* opted to adopt the classification in *Sault Ste Marie*, and in effect returned to *Ewart*. The adoption of the *Sault Ste Marie* classification moved McMullin J to say that his dissent was "emphatic".

McKenzie was charged with operating an aircraft in such a manner as to be the cause of unnecessary danger to persons and property contrary to s 24(1) of the Civil Aviation Act 1964. Low flying which caused a collision with overhead wires was the gravamen of the charge. The issue reserved by Casey J for the consideration of the Court of Appeal was whether the onus of establishing absence of fault as a defence to a charge in respect of public welfare regulatory offending should rest on the defendant. This was the issue that the Court had left undecided in *Ministry of Transport v Burnetts Motors Ltd* [1980]

NZLR 51. Casey J had ruled in the Supreme Court that there was only an evidential burden on the defendant, thus in effect embodying the approach emphasised by Lord Diplock in *Sweet v Parsley*.

The majority judgment of Davison CJ, Cooke and Richardson JJ was delivered by Richardson J. In their opinion, the offence could not, applying the presumption in *Sweet v Parsley*, be characterised as an absolute offence. The penalties imposed under the Act (maximum fine $2,000, 12 months imprisonment, mandatory disqualification in the absence of special reasons) "meant that this was a serious rather than a minor offence". However, the majority did not consider this to be an offence to which *Woolmington* applied. In this regard, the *Strawbridge* criticism of *Ewart* was distinguished on the grounds that there, the Court "did not and was not called upon to explore the ramifications of the distinction between truly criminal offences and public welfare offences".

Two principal reasons were given for adopting the *Sault Ste Marie* classification. First, the Court considered that in public welfare offences, it was artificial to speak in terms of "mens rea", "because liability under legislation of this kind rarely turns on the presence or absence of any particular state of mind". However, "in social policy terms compliance with an objective standard of conduct is highly relevant". A further reason was that "the defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it". Therefore, "it is not unreasonable to require a defendant to bear the burden of proving that the breach occurred without fault on his part".

There are several points of criticism that may with respect be made of this reasoning. In the first place, the Court, in adopting the Canadian classification and in circumscribing *Woolmington* were, as McMullin J observed, judicially legislating. In this regard, although it is arguable that because the presumption of innocence is essentially a judicially created concept, the Courts may, to adopt the words of Lord Reid in *Pettitt v Pettitt*, "develop and adopt existing rules of the common law to meet new conditions", it is extremely doubtful whether the majority approach was acceptable here. For, as Lord Reid also recognised, the Courts ought not readily develop new principles where they are "dealing with matters which directly affect the likes and interests of large sections of the community and which raise issues which are the subject of public controversy and over which laymen are as well able to decide as lawyers". This would be "to encroach on the province of Parliament"

Admittedly, *Pettitt v Pettitt* was a case involving the division of matrimonial property which might more clearly and immediately be seen to be an issue affecting citizens at large; but so also it is submitted is any decision to limit the presumption of innocence by shifting the onus of proof. Certainly as the Judges in *Sweet v Parsley* recognised, Parliament is able and quite willing to reverse the onus of proof when it considers this to be necessary. Lord Reid observed this practice to be "not infrequent", a point which was forcefully made by McMullin J in his strong dissent. McMullin J said:

> There are a great number of statutes which provide that a defendant must prove the existence of a state of mind or state of facts to avoid liability. The Food and Drug Act 1969, Fisheries Act 1908, Distillation Act 1971, Indecent Publications Act 1963, Medicines Act 1981, Sale of Liquor Act 1962, are but a few. If Parliament recognises a need to place such an onus on a defendant in these special cases it is difficult to see why this Court should now legislate to place it on him in all others.

No mention is made of the Privy Council decision in *Lim Chin Aik v The Queen* [1963] AC 160, in which *Woolmington* was applied in the context of an immigration offence, which could not be properly described as criminal in a true sense. Although Lord Reid and Lord Pearce in *Sweet v Parsley* would appear to have considered there was some merit in a "quasi-criminal offence", neither failed to appreciate the importance of *Woolmington*. Nor did the other Judges suggest any retreat from *Woolmington*. Thus, the decision is open to the fundamental objection advanced by McMullin J that, "whilst the Supreme Court of Canada is at liberty to engage in judicial law making of a kind, this Court is not".

A further criticism of the majority opinion is that it may create as much uncertainty as did the doctrine of strict responsibility; as *Fraser v Beckett & Sterling Ltd* [1963] NZLR 481 illustrates. It is to be anticipated that the broad concept of a "public welfare regulatory" offence embodying a shift in the onus of proof will cause Judges similar difficulty. Already, as McMullin J noted, the Supreme Court of Canada in *Strasser v Roberge*, [12] divided four Judges to three, on the issue of whether strike activity was a mens rea or a public welfare offence. Further, as McMullin J postulated, if operating an aircraft so as to cause unnecessary danger is an offence to which *Woolmington* does not belong, what of dangerous driving of a motor vehicle? Does the fact that the dangerous driving culminates in injury or death effect a shift in the onus of proof? Already it is to be observed that in advance of *McKenzie*, but in response to Cooke J's observations in *Ministry of Transport v Burnetts Motors Ltd*, Holland J had expressed reservations about whether *Woolmington* applied to an excess blood alcohol offence.[13] As if to anticipate his own dissent in *McKenzie*, McMullin J in *Flyger v Auckland City Council* [1979] 1 NZLR 161, had ruled that it did. Judicial uncertainty in the criminal law, it is submitted, is unsatisfactory. As McMullin J emphasised, "it is important that (the criminal law) be certain and seen as fair in its application by citizens whose lives it affects".

Further, it is arguable that the opinion of the majority is open to the very same criticism, noted by Dickson J in *R v Sault Ste Marie*, of strict responsibility; "that it rests upon assumptions which have not been, and cannot be, empirically established". Although a noble judicial aspiration, it is submitted that it is unlikely that altering the onus of proof will better stimulate more "effective enforcement of high standards of public health and safety". Effective policing and publicity are far more likely to attain these goals.

The second rationale, that a shift in "the onus of proof is not unreasonable" because the evidence of innocence will be within the knowledge of the defendant, is also with respect unconvincing. Quite apart from the fact that the Courts have steadfastly stood against this reasoning as a justification for shifting the onus of proof, as McMullin J noted;[14] it fails because Parliament can so easily legislate if an offence presents particular difficulties of this kind for enforcement.

Accordingly, for the reasons which have been advanced, it is regrettable that the Court of Appeal in *McKenzie* has decided to follow the approach to characterisation of offences adopted in *Sault Ste Marie*. On its facts, the characterisation of water pollution as a strict liability offence, in traditional terminology as has been submitted, may have been defensible; but the characterisation of the defence in *McKenzie* which carried with it potential imprisonment was less so. Nor is there

evidence that *Woolmington* has caused the Courts any real difficulty in relation to offences of a "quasi-criminal" kind, or that the presumption of innocence had led to the frustration of legislation by judicial acceptance of specious defences. Rather it has been the doctrine of strict responsibility that has caused the Courts difficulty and concern. Given the Courts' traditional reluctance to discard the concept, the Howard concept of a half-way house offered an acceptable solution. It is understandable and laudable that the Court should wish to find an alternative to the plight of the "luckless victim", but it is regrettable that this was at the expense of *Woolmington*. Although a case of murder, *Woolmington*, as McMullin J reminded the Court, "was much more than this". It was "a case about the burden of proof generally". There was nothing in the decision to "limit its application to full *mens rea* cases".

1 Williams, "Criminal Law", (1st ed, 1953), pp 271-274; (2nd ed, 1961) 255-264, "Textbook of Criminal Law" (1st ed 1978) pp 182-183; pp 906-909.

2 Ibid, 267-272.

3 The concept appears under the heading "Legislative Suggestions" in *Criminal Law*, (2nd ed, 1961) pp 261-265 although his reference to *Leicester v Pearson* [1952] 2 QB 668 suggests he recognised the possibility of a judicially created half-way house (see 1st ed, 1953 at pp 272-273).

4 The more probable construction it is submitted is the latter, see *Textbook of Criminal Law*, 1978, pp 182-183, 906-907. Certainly Professor Howard considered that Glanville Williams meant the latter, see Howard (1960) 76 LQR 547, at 547-548.

5 "Strict Responsibility: Possible Solutions" (1947) MLR 417.

6 (1978) 85 DLR (3d) 161, at 175. Dickson J however, did somewhat detract from the force of this observation by his limitation of *Woolmington* "to criminal offences in the true sense" (ibid, 174).

7 See the categories for example set out in the judgment of Wright J in *Sherras v De Rutzen* [1895] 1 QB 918 at 922.

8 Note, Professor Williams *Textbook in Crime* (1st ed, 1978) p 905, is of the opinion "that absolute liability was a misnomer. The adjective 'strict' is better". See further, the writer's interchangeable use of the concepts in [1981] NZLJ 294 and note 6. The true analysis of *Sault Ste Marie* would appear to be that strict liability is in fact "intermediate", and that the traditional notion of strict liability is in fact the third category "absolute liability". For a further discussion see Dickson J in *Strasser v Roberge* (1980) 103 DLR (3d) 193, at 197-198, at 208.

9 [1906] 25 NZLR 709. This case was briefly referred to by Dickson J in *R v Sault Ste Marie* (1978) 85 DLR (2d) 161 at 174.

10 See also commentary on this case, Williams, *Criminal Law* (1st ed, 1953) pp 256-261.

11 Loc cit, at 365; criticised by Brett, "Strict Responsibility: Possible Solutions" (1947) MLR 417.

12 (1980) 103 DLR (3d) 193. Note, particularly the opinion of Dickson J in dissent at pp 197-198, at p 208. There, it is said that the onus of proof shifts only in absolute liability cases.

13 *Rooke v Auckland City Council*. (Unreported 28th July 1980, M2045/79). See comment [1981] NZLJ 294 at 299-300.

14 His Honour referred to *R v Spurge* [1961] 2 QB 205; *Burns v Bidder* [1966] 3 All ER 29; *R v Gosney* [1971] 2 QB 674. Further, for a statutory exception see s 67(8) Summary Proceedings Act 1975.

Delegated legislation and the Court of Appeal

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Regulations are one of the principal ways in which Government policy is put into effect. They can of course be made only pursuant to powers granted to the Executive by Parliament. The question of judicial review of this area of administrative law is considered by the author in this article.

In a number of recent important judgments the Court of Appeal has been confronted with the potentially sensitive issue of the extent to which the Courts may review Government Regulations (that are usually in the form of Orders in Council). The judgments are important because of the notorious extent to which regulations are used as a means of implementing Government policy in New Zealand and because of the minimal Parliamentary control of such regulations in this country. However since the landmark case of *Reade v Smith* [1959] NZLR 996 the New Zealand Courts have not hesitated to assert their right to review the Governor-General's Orders in Council. By way of contrast the Supreme Court of Canada has recently declared in *Thornes Hardware v The Queen* (1983) 14 DLR (3d) 577 that Orders in Council are not subject to review on the normal administrative law ground of "improper purposes". And it was only in 1981 and after considerable debate that the High Court of Australia decided in *Re Toohey* (1982) 56 ALJR 164 that regulations made by the Crown were in fact as reviewable as other forms of administrative action.

In New Zealand much of the recent case law emanating from the Court of Appeal has concerned regulations made under the extremely broad empowering clause of the Economic Stabilisation Act 1948. However after the successful challenge to the wage freeze regulation in the case of *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (which concerned the repugnancy of the regulations to the unqualified provisions of the State Services Conditions of Employment Act 1977) the empowering Act was amended. By s 5 of the Economic Stabilisation Amendment Act 1982 certain provisions of 15 specified Acts of Parliament and of any Acts of Parliament concerning rent control were made subject to stabilisation regulations enacted under the Economic Stabilisation Act. As well as that rather sweeping "Henry VIII" clause, s 9 of the amending Act provided that no less than 31 specified

regulations made under the Economic Stabilisation Act were deemed to be "validated and confirmed".

Those two sections will obviously lessen the prospects of a successful challenge to stabilisation regulations in the immediate future. However, the general principles laid down in the various judgments of the Court of Appeal will remain an invaluable guide for practitioners launching challenges to other sets of regulations.

The presumption of regularity

In the case of *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (which concerned an attack on the validity of delegated legislation in the form of school rules) the Court of Appeal adopted dicta of the House of Lords in *McEldowney v Fords* [1971] AC 632 to the effect that the onus lay upon the person challenging the delegated legislation to establish its invalidity. (This presumption of regularity is sometimes expressed by the latin maxim "omnia praesumuntur rite esse acta".)

The approach was confirmed by the Court of Appeal in *CREEDNZ v Governor-General* [1981] 1 NZLR 172. That case concerned a challenge to the validity of an Order in Council, made under the National Development Act 1979, applying the fast track procedure of the Act to the proposed Aramoana Smelter. Both Richardson J at pp 199-200 and McMullin J at p 209 noted the difficulty of the plaintiffs in challenging this type of Executive action. Richardson and Cooke JJ further noted the statutory presumption of validity of Orders in Council which was revealed in the Evidence Act 1908, s 46.

In *Reade v Smith* (supra) Turner J had indicated that it was an easier task to establish the invalidity of regulations when the opinion which the Governor-General was required to form under a subjective empowering clause was an opinion on a question of law rather than on a question of fact. The *CREEDNZ* case is a further illustration of that proposition. Although the Court of Appeal clearly reserved the right to invalidate an Order in Council if all the evidence pointed to relevant facts having been ignored, the Court of Appeal also indicated it would be reluctant to make that finding. The reason for that reluctance rests not only in the difficulty of gaining access to possibly confidential Government information but also in the traditional difficulty that Courts of Review face in finding against the Government especially on questions of facts and the merits.

The empowering Act

The issue of ultra vires is essentially the issue of statutory interpretation of a particular empowering clause. However some useful general points emerge from the judgments of the Court of Appeal.

In *Edwards v Onehunga High School Board* (supra) Speight J, delivering the judgment of the Court, observed that an objective empowering clause increased the judicial control of any delegated legislation made thereunder. This is because with such a clause the validity of the delegated legislation is expressed to depend not upon the formulation of the delegate's opinion but rather upon its effect. Since 1961, and the Algie Committee's recommendations, most empowering clauses are in fact enacted in an objective form. However it can be noted that the crucially important s 11 of the Economic Stabilisation Act 1948 is subjective in form. In *NZ Shop Employees Industrial Association of Workers v Attorney-General* [1976] 2 NZLR 521, 529 Turner P again noted how the plaintiff's task is harder with such a clause.

In that case Turner P stressed how the empowering clause must be read in the context of the statute as a whole. The Economic Stabilisation Act 1948 is a notable statute in that it does virtually nothing except declare its general purpose in s 3 (ie to promote "the economic stability of New Zealand") and then by s 11 authorise the Governor-General to make such regulations "as appear to him to be necessary or expedient for the general purpose of this Act . . .". His Honour stated that such a clause should be given a liberal interpretation and should be accorded an ambit far wider than a clause in an Act where Parliament has specifically, and in detail, dealt with the relevant subject matter. Similar views were expressed by McMullin J in *Brader v Minister of Transport* [1981] 1 NZLR 73, 81. The reason for this is apparent. If in its enactment Parliament has not prescribed careful limits on the delegate's power it can be assumed that Parliament intended the delegate to have a more general power to legislate.

As noted by Richardson J in *CREEDNZ v Governor-General* (supra) at p 197 the nature of the subject matter which the delegate is authorised to regulate is also a highly relevant factor. Thus the series of cases on various economic stabilisation regulations has clearly established that economic stabilisation is regarded by the Court of Appeal as a very special subject.

In a now oft-quoted passage in his judgment in the *Shop Employees* case (supra) Turner P declared at p 529:

> The ambit of the Act must by reason of the nature of its subject matter be regarded as a wide one. Measures to secure the economic stability of New Zealand need not usually be considered unless that economic stability appears in some degree to be threatened; and in times of economic stress measures will of necessity be such as to impose some burdens and restrictions on a great proportion of the community, and even to result in widespread hardship in greater or less degree. Moreover it will probably be found expedient in such situations to regulate and restrict the exercise of freedom, which in "normal" times would be left unimpaired.

That passage was cited with approval by the majority of the Court of Appeal in *Combined State Unions v State Services Co-ordinating Committee* (supra) at p 746 and by McMullin J in *Brader v Minister of Transport* (supra) at p 81. As the majority of the Court of Appeal similarly explained in *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 392 our Parliament by this Act had given wide authority to the Executive to make regulations promoting economic stability for the reason that ". . . rapid and strong action may be necessary from time to time in an effort to hold the economy in balance notwithstanding the pressures of the economic climate".

Certainly the judicial tolerance accorded the various regulations on economic stabilisation was not evident in earlier Supreme Court decisions or regulations concerning the more mundane matters of school transfer (*Reade v Smith* (supra)) and the cover of excavation holes (*Labour Department v Merritt Beazley Homes* [1976] 1 NZLR 505).

Along with the nature of the subject matter, the Courts will consider the constitutional role of the delegate. As emphasised by the various judgments in *CREEDNZ v Governor-General* the Executive Council must be recognised as ". . . the apex of the governmental structure" (per Cooke J at p 177) and therefore ". . . the realities of decision-making at that level must be recognised" (per Richardson J at p 201). Nevertheless the great judicial deference recently accorded the Governor-General in Council by the Supreme Court of Canada and by the Australian Courts prior to 1981

has not typified the New Zealand Court of Appeal's approach. If confirmation of that proposition were needed, it would be found in the judgments of McMullin and Richardson JJ in the *CREEDNZ* case. In that case their Honours separately asserted that the normal principles of review apply equally to the decisions of the Executive council as to the decisions of other administrative authorities.

However despite such bold assertions it can be confidently predicted that if the delegate is somewhat lower in status than the Governor-General in Council (eg a senior civil servant) then the Courts would be more aggressive in their review of the delegate's legislation.

Some Further Relevant Factors

(a) *Improper purposes*

The basic premise by which the Court of Appeal operates in reviewing delegated legislation is that any statutory discretion which empowers the making of delegated legislation is never an unfettered one (see, for example, the judgment of Cooke J in *Transport Ministry v Alexander* [1978] 1 NZLR 306, 309). As noted previously the principles of review applying to other types of administrative action apply equally to the making of delegated legislation. Thus irrelevant considerations must not be taken into account, relevant considerations must not be ignored (*CREEDNZ v Governor-General* (supra)), and the regulation-making power must be used to promote the objects and purposes of the empowering Act (*Brader v Minister of Transport* (supra), *NZ Shop Employees Industrial Association of Workers v Attorney-General* (supra) and *NZ Drivers Association v NZ Road Carriers* (supra)).

It would now seem that in this context the "dominant purpose" test is the key test in determining the validity of regulations (see *Brader v Ministry of Transport* (supra) at p 77 and *NZ Drivers Association v NZ Road Carriers* (supra) at p 388). Thus the majority of the Court of Appeal (Cooke, McMullin, Ongley JJ) indicated in their joint judgment in the *NZ Drivers Association* case at p 388 that ". . . a regulation made essentially for an authorised purpose will [not] fail if it happens to have some incidental effects which do not serve that purpose". In propounding this view the learned Judges followed the reasoning of the majority of the House of Lords in *McEldowney v Forde* [1971] AC 632 whereas in a different context the Court of Appeal had previously approved of the minority approach of Lord Diplock and Lord Pearce. The minority approach was perhaps more sophisticated. Lord Diplock had suggested that the Court should determine the extent to which the effect of the regulation was confined to the effect authorised by statute. However the recent adoption of the majority view by the Court of Appeal (and the implicit rejection of the minority view) may mean the Courts will become less involved in such difficult evaluative exercises.

It is interesting to note, however, that in both *Brader v Ministry of Transport* (supra) and *NZ Drivers Association v NZ Road Carriers* (supra) the Court of Appeal was careful to emphasise that even in the context of the Economic Stabilisation Act 1948 (with its wide purpose of "economic stability") the Court would invalidate any regulations where the connection with "economic stability" was only remote or tenuous. And in their joint dissenting judgment in the *NZ Drivers Association* case Woodhouse P and Richardson J held that a regulation attempting to prevent the negotiation or determination of award claims was indeed ultra vires the Economic Stabilisation Act 1948 in view of the earlier regulations freezing awards. They stated at p 381 "[p]olitical considerations . . . are not sheltered by the Economic Stabilisation Act".

(b) *The constitutional context*

In determining an issue such as whether the regulation is made for an improper purpose and is consequently invalid the Courts are undoubtedly influenced by such additional factors as the constitutional context. Thus, whilst in *NZ Shop Employees Industrial Association of Workers v Attorney-General* (supra) Turner P noted at p 528 that ". . . legislation by regulation has become a favoured method of implementing Government policy alike in dictatorships and free democracies" he observed at p 527 that in New Zealand "[t]here is no second chamber to act as a check on the measures put forward by the party in power in the House". (It could also have been noted that New Zealand lacks an effective written constitution or Bill of Rights.) Thus the clear implication of Turner P's observation is that the Courts should be particularly alert to check any potential abuse of Executive power.

Again in *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 when the issue concerned the possibility of the wage freeze regulations being repugnant to the State Services Conditions of Employment Act 1977 the majority of the Court of Appeal declared at p 747 in their joint judgment:

> Our constitutional duty is to resolve any conflict or doubt that arises in favour of the supremacy of Parliament. . . . Any other resolution would be too dangerous a constitutional precedent. In a case balanced as this one is it is vital that the Court should come down firmly on the side of that basic principle of democracy.

A similar emphasis on the principle of Parliamentary dominance is evident in the judgment of Cooke J in *Brader v Minister of Transport* [1981] 1 NZLR 73, 78.

(c) *The* Chester v Bateson *principle*

Another fundamental constitutional principle which can be expected, in appropriate circumstances, to influence the Courts in finding regulations to be ultra vires is the principle laid down in *Chester v Bateson* [1920] 1 KB 829. In that case it was held that in the absence of an express statutory authorisation the Courts will be especially reluctant to find a regulation valid if it purports to take away the jurisdiction of some Court.

Although the Court of Appeal has wholeheartedly affirmed this principle in *NZ Shop Employees Industrial Association of Workers v Attorney-General* (supra) and *NZ Drivers Association v NZ Road Carriers* (supra) it seems the principle has less impact and strength than the principle of Parliamentary supremacy. For instance in the *New Zealand Drivers Association* case it was clear beyond doubt that the challenged regulation purported to deprive the subject of the right of access to the Arbitration Court; but, as in the *Shop Employee's* case, the majority of the Court of Appeal articulated various reasons as to why the principle was inapplicable. It was stated, for example, that the Arbitration Court's function in fixing future rates of pay was arbitral rather than judicial, that the Arbitration Court's jurisdiction would necessarily have to be interfered with if the wage freeze regulations were to be effective, and that the Arbitration Court could only be used during the wage freeze as a platform for criticising Government policy.

It could be said that the majority of the Court of Appeal were indeed straining a little to find the *Chester v Bateson* principle inapplicable and the only apparent reason of this would be the judicial view that ". . . economic stability is a very special subject" (per Cooke, McMullin, Ongley JJ in *NZ Drivers Association v NZ Road Carriers* (supra)

at p 392. In another context the *Chester v Bateson* principle may be the additional factor needed to tip the balance in favour of a judicial determination of ultra vires.

(d) *"Uncertainty" and "repugnancy".*
It must be noted that the concept of ultra vires embraces a variety of grounds of review. Thus the Court of Appeal has found that not only may a regulation be invalid on the grounds of uncertainty (*Transport Ministry v Alexander* [1978] 1 NZLR 306) but also on the grounds of repugnancy (*Combined State Unions v State Services Co-ordinating Committee* (supra)). However, on the question of repugnancy, the Court of Appeal indicated in the *Combined State Unions* case (supra) at pp 746-7 that the wider the empowering clause the more likely it is that the clause will authorise regulations which conflict with other statutes.

The Merits of the Delegated Legislation

Traditionally it is a heresy to suggest that the Courts on review can concern themselves with the merits of the challenged administrative action. As the majority stated in *NZ Drivers Association v NZ Road Carriers* (supra) at p 388:

> It is elementary that the Court is not concerned with the wisdom or otherwise of regulations, nor with whether the Court considers them necessary, nor with assessing the comparative values of social policies.

However as Cooke J himself recognised in *Burr v Mayor of Blenheim* [1980] 2 NZLR 1, 4 the tendency in administrative law today is to ". . . depend less on clear and absolute rules than on an overall evaluation".

In a recent address *The Judge in Today's Society* Sir Owen Woodhouse, extra-judicially, also noted the increasing judicial involvement with policy considerations in administrative law cases.

Thus in some of the cases concerning the validity of delegated legislation the importance of policy considerations and the merits of the delegated legislation has become explicit. Indeed it is inevitable that the judicial determination of whether the delegate's opinion could reasonably have been held or of whether a regulation was reasonably capable of being related to the statutory purpose, inevitably leads the Courts to trespass a little into a consideration of the merits of the regulation.

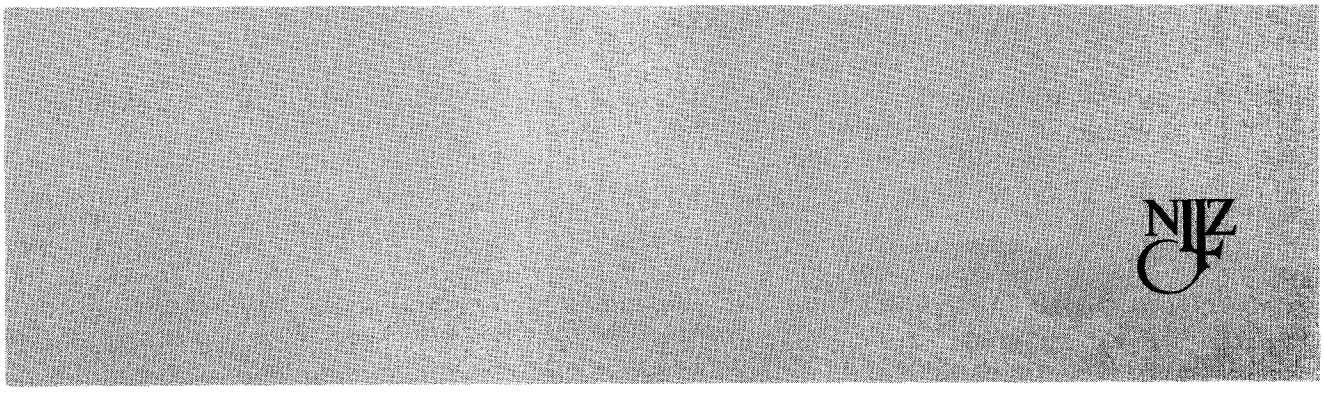
In *NZ Shop Employees Industrial Association of Workers v Attorney-General* (supra) Turner P argued at p 530 that the issue of ultra vires may ultimately be a question of degree. This was accepted as correct by both Cooke and McMullin JJ in *Brader v Ministry of Transport* [1981] 1 NZLR 73, at pp 78 and 80. The judgment of Turner P in the *NZ Shop Employees* case also makes it plain that the question of vires cannot be resolved simply by an analysis of statutory provisions without reference to the socio-political consequences of the challenged regulation. In his judgment Turner P said at p 529 that ". . . this question resolves itself. . . into the process of balancing the effect of the regulations on the effect [sic] jurisdiction of the Court of Arbitration on the one hand, against the importance of the purposes of the Economic Stabilisation Act on the other".

Similarly the majority of the Court in the *NZ Drivers Association* held that in determining whether the challenged regulation could reasonably be viewed as promoting economic stability under the empowering Act the regulation had to be seen in its context as part of a series of measures. More significantly, in their minority judgment Woodhouse P and Richardson J stated that in determining the validity of the regulation other social values and interests (such as the interest in the maintenance of harmonious industrial relations reflected in the Industrial Relations Act 1973) had also to be given due weight. The learned Judges then discussed the impact of the regulation on the citizen and New Zealand society and concluded that the challenged regulation would, if anything, be counter-productive. Such a finding certainly involves a finding on the merits and social policy of the regulation but it is interesting how all members of the Court were insisting that the regulation had to be viewed in its wider context.

Finally, it can be noted that in *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 182 Cooke J expressed the view that when government action was challenged the Courts must sometimes be concerned with the issues of public interest extending beyond the interests of the two sides to the litigation. That is yet another indication that the validity of delegated legislation cannot always be determined by a narrow process of statutory interpretation. Against that, however, it must be stated that members of the Court in the *CREEDNZ* case cautioned that the larger the policy content of a particular action the less well-equipped the Courts are to intervene. It was said that when more than one view was reasonably open as to whether the relevant criteria under the National Development Act 1979 had been considered then that was the end of the matter.

Conclusion

If the trend towards evaluating the context of the regulations were to continue, the task of the practitioner in predicting the outcome of an application for review would become even more difficult. Extrapolation from previous judicial precedents would be of only limited usefulness as so much would depend on the context. However the judgments of the Court of Appeal over the last decade would remain of considerable interest in revealing current judicial philosophy and would be valuable, perhaps most of all, for the frequent reassertion that even the highest level of Government decision-making is subject to judicial review.



Glasgow lease

By W K S Christiansen of the University of Auckland School of Architecture.

Lawyers who deal with local and charitable body leases, ground leasing, ground rent arbitrations, and the like will probably acknowledge familiarity with the "Glasgow" lease. But what do they really know about it? For that matter, what do any of us know about it?

Why has this type of leasehold tenure in New Zealand attracted a Scottish name? Lawyers and valuers are probably the most involved with Glasgow leases. Ask members of these professions if they are conversant with the origins and details and the immediate response is usually affirmative. Probe for an authoritative source and the responses tend to become rather vague and non-productive.

To readers of this journal this may not seem to be a very important issue, and that may be so. But it might at least be considered as intriguing. On the evidence available to the writer there is neither any connection between the origin of lease and the city of Glasgow, nor is what we here generally recognise as a Glasgow type of lease known in Glasgow or elsewhere in Scotland.

A search of local and overseas works of reference and textbooks on land law, legal terms, economic and land tenure history, property investment, fails to disclose any reference to the word "Glasgow" as being associated with, or descriptive of, a form of lease.

It would seem that the only literature on the subject has been written by and for valuers. And that is sparse enough. The only textbook definition is contained in a 1959 publication of the NZ Institute of Valuers. And there is a succession of brief descriptions in the journal of the NZ Institute of Valuers: the first in 1944 and others in 1958, 1969, and 1971. None of these is of more than a few lines.

Typical is the statement contained in the booklet *Leases & Lands* published by a group of Anglican trust bodies in 1978: "Perpetually renewable, 21-year ground leases are sometimes known as 'Glasgow' leases". Finally there is one definition in a guide to real estate terminology recently published at Massey University.

What do they all add up to? A Glasgow lease is apparently a lease of land only and not buildings; the term is for 5, 7, 10½, 14, 21 or 22 years; it is renewable in perpetuity; the rent is reviewable at regular intervals; the lessee owns the improvements and is entitled to compensation for them if he does not renew the ground lease. Significantly, several of the contributors make the point that Glasgow lease is a New Zealand expression.

While there may be a general consensus on the main features of the Glasgow lease there is obviously room for a range of detail within that general understanding. We now turn to methods adopted to seek a link between this lease and the city of Glasgow.

Lawyers will probably not need reminding that the Scottish legal and land tenure systems are very different from those in neighbouring England. It might therefore come as no surprise that what we in New Zealand call a "Glasgow" lease differs significantly from any of the traditional English forms of ground lease. What may be surprising is that the "Glasgow" lease also appears to be a stranger to the Scottish tradition!

Personal professional experience in England and Scotland including, as it happens, Glasgow itself, has revealed nothing like the so-called "Glasgow" lease. But memory can be unreliable. The opportunity arose recently to consult a Professor in the Faculty of Law at the University of Aberdeen. His reaction: "I have never before heard of this device". He passed the inquiry on to a Professor at Paisley College of Technology (near Glasgow) who commented:

> my lawyers have no knowledge of a Glasgow lease. They have been in the Glasgow area for many years, and have been involved in practice in Glasgow, and I would have expected them to know if there was such a lease. They have also contacted acquaintances of theirs in the profession in Glasgow and none of their legal contacts have come across such a lease under this name or otherwise.

One final effort was made through the Glasgow City Assessor's office which passed the inquiry on to the Solicitor's office of the Strathclyde Regional Council (in Glasgow). An examination was made of abstracts of typical deeds granted both by the Corporation of Glasgow and by Hutcheson's Hospital (a major landowner in this part of the world) in the 18th and 19th centuries. This failed to reveal anything resembling the "Glasgow" lease; "the position is much the same when one examines the published protocol books of Glasgow Notaries over the preceding two centuries".

The speculation has been offered by a Dunedin correspondent that perhaps the Glasgow lease can be traced back to the practice of putting the ground rent reviews up to public auction. This aspect was investigated in Glasgow without producing any definitive confirmation that such a practice has ever been prevalent.

By what appears to be simple coincidence a recent local ground rent arbitration award makes reference to *Glasgow Corporation v Muir & Others* 1943 (Auckland Harbour Board Rental Arbitration, reported in *NZ Valuer*, December 1982, p 225). But this case is to do with some children scalded by hot water spilled from a tea urn in a refreshment kiosk in a public park in 1940. This hardly seems to provide the link we are looking for.

Other faint hopes have been pursued. Someone has suggested that perhaps there was a Mr Glasgow who may have been responsible for the name. There is probably something, somewhere, which might shed some light. This writer's researching has so far drawn a blank. If any reader of this article has any answers they would be most welcome. We certainly have a general idea what a Glasgow lease consists of. When it got its name, and how and why are still a mystery.