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LAW CONFERENCE '84

As is now well known the principal judicial guest at the New Zealand Law Conference in Rotorua will be Lord Scarman. The first plenary session of the Conference will be an address by the Secretary-General of the Commonwealth Secretariat, Sir Shridath Ramphal.

There is always a problem for the organisers of a law conference in deciding on the best mix of legal topics to be discussed and the way in which they will be presented. Various ways have been tried at previous conferences. Different people will have different preferences.

The Organising Committee for Law Conference '84 has sought a programme that will be substantial in terms of the quality of the papers and the opportunity to consider them, and at the same time to provide a wide variety of topics of interest. Consideration was given to the experience of the recent Australian Law Conference in Brisbane and the Commonwealth Law Conference in Hong Kong, as well as reviewing past New Zealand practice.

The intention is that there will be a substantial paper which will then be spoken to by one or two other speakers. This will then be followed by a general discussion. The principal papers will be pre-published and available to all of those attending the conference before they go there. It is hoped there will be considerable involvement from the general body of those attending the Conference. Passivity will not be considered a virtue.

Among the topics that will be discussed are such matters as bio-ethics, the future of the conveyancer, human rights, negotiation and mediation, improvements in the Courts and computerisation, among others. It is intended that the sessions will be substantial ones in terms of the time available. It was felt that sometimes conferences have attempted to cover too much in too short a time. At Rotorua there will, however, often be two or three concurrent sessions being held so that choices will still have to be made.

The New Zealand Law Society is now conducting quite a substantial educational programme itself by way of seminars dealing with specific areas of the law. It is expected that Law Conference '84 will endeavour to provide an over-view of major areas of legal interest and concern to members of the profession. There will be a substantial contribution from overseas, not only from the three principal guests, Lord Scarman, Mr Fali Nariman, and Sir Shirdath Ramphal, but also in some of the paper writers who will be from Australia or the United Kingdom. It is hoped that there will be some valuable contribution also from North America.

The triennial law conferences have a great value in keeping New Zealand lawyers abreast of developments in the law in New Zealand. Perhaps even more importantly, they enable us to see these developments in relation to overseas trends and experiences in other countries of the Common Law tradition. In legal development, almost as much as in terms of our economy, New Zealand is a dependent country. We are developing a legal ethos of our own, but it is still one that is affected by and reflects the legal experience of other countries.

Our historical tradition is of course that of the Common Law of England. That in itself would make the attendance at the Conference of Lord Scarman as one of the Lords of Appeal in Ordinary a matter of symbolic significance. But in welcoming him as an overseas guest we must recognise that in another sense he is one of us. He is after all a member of the final appellate Court of the New Zealand judicial system; and must therefore be thought of, in one minor facet of his many-sided activities, as being a New Zealander even if neither a citizen nor a permanent resident. In this we have perhaps only another illustration of the old dictum that the life of the law is not logic, nor need it be.

P J Downey

Case and Comment

Misrepresentation — Agency — Contractual Remedies Act — Common Law

In *Resolute Maritime Inc v Nippon Kaiji Kyokai (The Skopas)* [1983] 2 All ER 1, s 2(1) of the Misrepresentation Act 1967 (UK) was considered. Section 2(1) states:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

The essence of the decision of Mustill J is that when an action is brought in reliance of s 2(1) in respect of a misrepresentation made by an agent to the plaintiff, only the principal will be liable under the Misrepresentation Act, not the agent. Tacitly, the Judge recognised that the agent would be separately liable in fraud or negligence under the common law. As the Judge remarked, the texts interpret s 2(1) of the Misrepresentation Act in a different manner.

The case is briefly noted because the result accords with what would also be the position in New Zealand under the provisions of s 6 of the Contractual Remedies Act 1979. Section 6(1) of the Act states:

> If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract —
>
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken.

With respect to s 6(i), Dawson & McLauchlan *The Contractual Remedies Act 1979*, p 23 state:

> . . . it is only the contracting party responsible for the misrepresentation who is liable to pay damages "as if the representation were a term" and who can be sued in Court. The personal tort liability of an agent is unaffected. Thus, the . . . agent continues to be liable for his negligent or fraudulent misrepresentation.

It is respectfully submitted that this statement is correct. (The New Zealand section is more clearly drafted in this respect that its English counterpart.)

On a different tack, cases are still filtering through the system which involve the pre-Contractual Remedies Act situation. In *Wallis v Brown* (High Court Nelson, A31/78, 30.5.83, Greig J) the plaintiff claimed damages for an alleged misrepresentation as to the carrying capacity of a farm which he purchased from the first defendant in 1977. The alleged misrepresentation was contained in an information sheet which has been prepared by Dalgety, on the instructions of the first defendant, and which was handed to the plaintiff.

Grieg J had to consider the position before the Contractual Remedies Act 1979. The Judge considered that the first defendant had fraudulently misrepresented the carrying capacity of the farm. By way of obiter, the Judge did not consider that the statement was a term of the contract or "even a collateral term".

The plaintiff had also sued Dalgety NZ Limited, the main cause of action being couched in terms of negligence. However, the Judge considered that Dalgety had not been negligent in reciting the information given to it by the first Defendant as to the carrying capacity of the farm and, in any case, considered that a disclaimer (which had been incorporated into an information sheet which had been circulated throughout the branches of Dalgety) was effective to exclude liability. (The plaintiff also sued Dalgety for breach of a fiduciary duty, alleging that in view of a longstanding relationship with Dalgety, Dalgety was the plaintiff's agent, as well as the first defendant's and therefore owed him a fiduciary duty. Grieg J, rejected this claim on the facts.)

The normal measure of damages was awarded to the plaintiff for the fraudulent misrepresentation of the first defendant, ie, the difference between the price paid and the proper value of the farm at the time of payment. (The measure of damages had to be reduced by the value of some hay and cattle which were included in the sale and there was a conflict of evidence as to the correct valuation of the property.)

S Dukeson
Whangarei

Oil and gas legislation in New Zealand and the investor

By B N Gunderson, a Wellington Practitioner.

In the past few months there has been a resurgence of interest in drilling for oil and gas off the New Zealand coast. There has also been a related flurry of activity on the stock market — both up and own — in the shares of the drilling companies. This article looks at the legislative provisions that are relevant to this highly speculative form of investment.

Introduction

In recent years there has been an unprecedented issue of licences by the New Zealand Government which permit the exploration for oil and gas. The increase in interest by oil exploration companies in New Zealand licence areas is due in part at least to the government's determination of a consistent policy in relation to exploration for oil gas in such areas as income tax, role of its national oil company, Petroleum Corporation of New Zealand ("Petrocorp"), royalties and licence conditions.[1] This increase in interest by the oil exploration companies generated significant market investor interest in New Zealand public companies which had acquired limited interests in prospecting licences and this has in turn encouraged the floatation of further companies which have more recently acquired interests in licences.

While the oil exploration companies which hold the major interests in the licences are experienced investors and prospectors and thus intimately aware of the legislation which governs the exploration of and production from their licensed areas, one queries whether the market investor in the New Zealand public companies has any knowledge of the same in the context of:

(a) the rights as to exploration under a prospecting licence and the conditions which must be met in terms of meeting an exploration work programme;
(b) the access of a licensee to a mining licence in the event of a discovery;
(c) the initial and specified terms of the mining licence;
(d) the government's power to control the work programme for the development of a discovery;
(e) the government's power to control production of oil and gas;
(f) the government's power to determine royalties on production;
(g) the government's control over the price of oil and gas sold in New Zealand; and
(h) the government's power to direct that production be processed or refined in New Zealand instead of being exported.

This review of the oil and gas legislation in New Zealand touches upon the above matters with the investor in mind.

Exploration and production

Oil and gas within the territorial limits of New Zealand is owned by the Crown and no person is permitted to prospect for or recover oil and gas except pursuant to a prospecting or mining licence issued by the Crown pursuant to the Petroleum Act 1937. The private landowner injuriously affected by the exercise of powers conferred by this legislation upon the Crown or a licensee is entitled to compensation pursuant to the public works legislation.

The legislative scheme for the control of the prospecting for and recovery of oil and gas is contained in the Petroleum Act 1937. As in many jurisdictions it addresses separately the two major but different phases of (1) prospecting for oil and gas and (2) its recovery or production. This review concentrates on legislation and government policy applicable to these phases leaving the detail of such matters as taxation, participation of Petrocorp and "farm in" arrangements for separate review.

Exploration

The Prospecting Licence

The Petroleum Act 1937 empowers the Minister of the Crown having jurisdiction to issue at *his discretion* a prospecting licence which authorises the licensee to prospect for oil and gas in the area therein defined, s 5(1). The Act provides:

(a) the term of the licence shall be as the Minister specifies up to a limit of five years s 6(1);
(b) the licence may be subject to a condition which specifies the terms upon which the Minister or any person authorised shall be entitled to participate in the prospecting or the production of oil and gas pursuant to a mining licence s 5(2);
(c) the licence may be subject to such other terms and in respect of such area and as the Minister specifies s 5(1);
(d) the licence will be subject to the condition that the licensee will "diligently and continuously" carry out the work programme approved by the Minister and specified in the licence in accordance with recognised good oil field practice s 5(3).

In practice prospective licensees lodge their interest in exploration with the Ministry of Energy which makes available detailed information in respect of existing and prospective prospecting licences and enter into negotiations with prospective licensees in relation to the terms of, the area subject to, the work programme for and other conditions associated with the prospecting licence.

The New Zealand Government will generally make a 40 percent contribution to the costs of an approved exploration work programme and require a 51 percent interest in any discovery which is developed. In these circumstances the gov-

ernment will usually contribute 51 percent of the development costs.[2] Utilising the provision described in (b) above, the government's contribution is made through Petrocorp. Its involvement is determined during the abovementioned negotiation phase and will be the subject of conditions to the licence. Petrocorp's participation will be as a joint licensee the detail of the relationship with the other oil exploration company obtaining the licence being the subject of a joint venture agreement.

Extension of term of the prospecting licence.

The licensee may prior to the expiration of the prospecting licence apply to the Minister for an extension s 6(2). An application for extension must specify:

(a) the area in respect of which the extension is sought (not exceeding one half of the licensed area);
(b) the details of the work programme to be carried out s 6(3).

If the licensee has substantially complied with the conditions of the prospecting licence and the Minister is "satisfied" that:

(a) the proposed work programme will provide for satisfactory exploration of the area; and
(b) the area concerned is such that it will not prevent or seriously hinder prospecting by subsequent licensees of the remaining area;

the Minister "shall" grant the extension for a period not in excess of the original term s 6(4). However, it is clear that one extension only can be obtained. s 6(5).

The contrast between the scope for the exercise of discretion by the Minister at the time of granting the licence and at the time of considering an extension is to be noted. The Minister has an express discretionary power when considering an application for a licence which can only be successfully reviewed judicially if he has regard to irrelevant factors. On the other hand, the Minister must grant the extension of that licence if "satisfied" that the licensee has met the statutory criteria. Thus, the licensee has an enforceable right and in the face of a decision by the Minister that he is not so satisfied may obtain judicial review so that if the Court determines that the Minister's decision is incorrect, it will grant a declaration to the effect that the extension must be granted. *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341. The policy of the legislation is clear namely, once having obtained Crown approval to prospect for an initial term, the licensee is entitled to an extension if he has met the conditions of his licence and proposes a realistic work programme for the reduced area.

This is further reflected in the context of the conditions which attach during the extended term. For example, the conditions of the licence during the initial term (other than those relating to the work programme) continue to apply unless otherwise agreed by the Minister and the licensee s 6(6). Naturally, if the work programme for the extended term differs, the licensee's obligations in respect of diligent and continuous performance relates to the new and not the old programme (subject to the Minister's ability to modify the same upon application by the licensee s 6(7) and s 10.

Rights of the prospecting licensee

A prospecting licence confers upon the licensee the exclusive right of exploration in the licensed area which must be exercised so as to interfere as little as possible with the occupation and use of the same by those who have a right of occupation or use, s 7(1) and (2).

He has a right to obtain a production title namely, a mining licence, upon a discovery if he "satisfies" the Minister that:

(a) there is a discovery in the licensed area that can be reasonably expected to be produced at a profit; and
(b) he will commence and continue production operations in accordance with recognised good oil field practice s 11 (1).

This is an enforceable right and, again, in the face of a decision by the Minister that he is not so satisfied the licensee may obtain judicial review so that if the Court determines that the Minister's decision is incorrect, it may declare that the licence should be issued, *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*, (supra). The mining licence will be in respect of the area subject to the prospecting licence or such smaller area as the Minister reasonably determines as being adequate s 17(2). If the licensee disagrees with any determination by the Minister, he may refer the matter to arbitration ss17(3) and 47J.

Production

The mining licence

The mining licence authorises the licensee to produce from the licensed area ie, "mine" the discovery s 12(1). On granting the licence, the Minister may impose terms upon which the Crown or any other person authorised to act on its behalf shall be entitled to participate in production s 12(2). As noted above, the Government will generally require Petrocorp's participation on a 51 percent basis.

Initial and specified terms of the mining licence

Prior to the Petroleum Amendment Act (No 2) 1980 a licensee held a mining licence for 40 years or such shorter term specified therein.[3] However, this amendment evidenced a fundamental change in government policy in relation to oil and gas exploration which followed that in other countries, especially the United Kingdom.[4] The changes made by this amendment followed a recognition of the importance of government control of energy resources and their development and are designed to secure to the Crown an element of control over production of discoveries. It is therefore important to review the legislation in relation to the initial and specified terms of a mining licence and the different rights which attach to the work programmes relative to each.

The initial term

Every mining licence is for a term which consists of an initial term and a specified term as determined by the Minister s 13(1). The initial term cannot exceed four years but where a work programme (or a modified work programme) has not been approved by the Minister, this term may be extended for a reasonable period to enable such to be determined. Similarly, if the Minister is of the opinion that the licensee is using reasonable endeavours to prepare a work programme and the remaining period of the initial term is insufficient for that purpose, he may extend the term for a reasonable period to enable such to be done and be determined s 13(2).

A licensee of a mining licence for an initial term cannot commence construction of works (eg, production facilities, pipelines and treatment, processing and storage facilities) for the production of oil or gas until the Minister has approved a work programme (or modified work programme) and his licence has been extended for the specified term s 14A(2). Accordingly, during the initial term the licensee must submit a work programme for the development of the discovery. It must comprise:

(a) a description of the proposed works;
(b) the location and use of those works;
(c) a construction schedule and the date of the commencement of production; and
(d) the types and quantities of pet-

roleum to be produced (including particulars of the production programme).

In addition, the licensee must submit a cost estimate for the work programme s 14A(34).

Within a reasonable period of time the Minister must respond to the licensee either approving the work programme or withholding approval for either of the following reasons:

(a) the development of the discovery as proposed by the work programme would be *contrary to recognised good oil field practice*; or

(b) the production of oil or gas in the types or quantities as proposed by the work programme would be *contrary to the national interest s 14A(4).*

In either case the licensee may submit a modified work programme and again the Minister must respond in a like manner s 14A(5). However, it is important to note that the Minister must prior to withholding approval on the basis described in (a) above, advise the licensee of the reasons why he proposes to do so and prior to withholding approval on the basis described in (b) above, advise the licensee of the changes to the work programme necessary to meet the requirements of the national interest. Again, in either case, the Minister must give the licensee a reasonable opportunity to make representations s 14A(6).

If at the end of this process the Minister withholds his approval of a work programme, the licensee's redress is dependent upon the basis upon which the Minister withholds his approval. For example, if approval is withheld on the basis that it is contrary to recognised good oil field practice, the licensee may refer the matter to arbitration as provided under the Act. However, if it is withheld on the basis that it is contrary to national interest, his decision is final and binding and cannot be the subject of judicial review s 14(7) and (9).

If the Minister's decision to withhold on the basis of good oil field practice is upheld in the arbitration process, the Minister notifies the licensee of his intention to revoke the licence unless a modified work programme is submitted within three months and is approved s 14A(8). Naturally, if the Minister's decision is not upheld he must approve the work programme s 14A(10).

If a work programme (or modified work programme) is not approved the licence is revoked s 14A(12). If approval has been withheld on the grounds that such is contrary to national interest and the licence is revoked accordingly, the Crown must reimburse the licensee for:

(a) the costs of the geological and geophysical review, evaluation work, and exploration work carried out during the term of the prospecting licence and the initial term; and

(b) the evaluation and exploration costs in respect of the preparation of the work programme spent on the discovery together with interest at the rate of interest payable on 5-year Government Stock s 14A(13). In the event of dispute, either may refer the same to arbitration s 14A(14).

The specified term

If the work programme (or modified work programme) is approved, the Minister extends the mining licence for the specified term. The work programme, as approved, constitutes the working obligation of the licensee for the duration of the specified term s 14A(11).

The specified term is fixed by the Minister but cannot exceed 40 years from the date upon which the work programme is approved. However, where the licensee can satisfy the Minister on two grounds, namely that (1) the discovery cannot be economically depleted during the remainder of that term *and* (2) he cannot do so due to causes beyond his control, and a work programme is approved (the abovementioned procedure applies), the Minister *shall* extend the specified term to enable that work programme to be completed s 13(3)(a) and(b)5. However, the Minister *may* in his discretion similarly extend the specified term in circumstances where the Minister is satisfied as to the first of the abovementioned grounds s 13(3)(c). The rationale for the distinction between the duty to extend in the first case and a discretion in the second is obvious.

The minister's power to control production

The Petroleum Act 1937 now confers specific powers upon the Minister to control the development or production of a discovery of oil and gas.[6]

For example, the Minister has power to refuse to extend the mining licence if he is satisfied that the production rate from the discovery would be *contrary to the public interest* s 14B(1). His decision on this matter is not subject to review s 14B(8). In these circumstances the Minister specifies the period during which production is postponed and requires the licensee to either:

(a) accept deferment of his rights to an extension to a specified term for the period of postponement; or

(b) surrender his rights under the mining licence in exchange for reimbursement of the "necessary actual cost" of the geological and geophysical review, evaluation work, and exploration work (including appraisal wells) carried out during the term of the prospecting licence and any evaluation and exploration costs incurred in preparing the work programme. In addition to the foregoing costs,the licensee receives interest at the rate payable on 5-year Government Stock s 14B(2).

For cases where there is more than one holder of a licence there is provision for those who do not elect to defer the licence, to assign their interest to a holder who does or (if there be none) to the Minister in exchange for the appropriate share of such costs s 14B(4). In any case where the quantum of costs are disputed the dispute is referred to arbitration s 14B(7).

Another means of control is expressed in terms of a power to reduce the area licensed under a prospecting licence or revoke the same in instances where there has been a failure to develop a discovery. Thus, if the Minister is satisfied that:

(a) a prospecting licensee has made a discovery;

(b) the licensee is not carrying out the necessary appraisal work and has not applied for a mining licence; and

(c) failure to develop the discovery would be contrary to public interest;

the Minister may give six months notice to the licensee that he will reduce the licensed area *so as to exclude the discovery* (thus, making the area available to others) or if the remaining area would not allow prospecting operations, revoke the licence s 14C(1). The only means for escape for the licensee is to apply for a mining licence and satisfy the Minister that he is making every endeavour to complete a work programme for the development of the discovery s 14C(2). If he fails to so comply, the Minister again may reduce the licensed area or revoke the licence s 14C(3).

The licensee is of course reimbursed the appropriate costs, as in the case of mining licensee who does not accept the postponement of his ability to produce, in the event of the discovery being removed from the licence or the licence itself being revoked and again these costs may be determined by arbitration s 14C(6) and (7).

Royalties

Prior to 1980 the royalty payable by a licensee was computed at the rate specified in the licence on the well head value of the oil and gas.[7] In 1980 a different approach was undertaken.[8] The general rule is that royalty is computed at the rate specified in the licence on the "selling value" of the oil and gas (with the point for determination of the latter also being specified) but it is clearly contemplated that these matters may be subject to government policy, negotiation and agreement s 18C(2).

The specified rate

Government policy is to determine a rate of 12 percent at the time the prospecting licence is issued. The rate of royalty specified in the mining licence will be that specified in the prospecting licence (being usually 12½ percent although there may be different rates for different areas within the licensed area to reflect their different promise s 18(3). The rate can be increased by the Minister where the specified term of the mining licence has to be extended to allow full exploitation of a discovery s 18(5).

The selling value of oil and gas

The rate is calculated by reference to the selling value of oil and gas, determined at a point fixed by the Minister and specified in the licence (there may be different points for crude oil, condensate and gas) s 18(7). Eg, at the point of delivery such as at the stage of loading into a tanker or at the point of transfer of title of the saleable product.[9] The selling value of oil and condensate is dependent upon whether it is exported. Consequently, the selling value of oil and condensate exported from New Zealand *and* gas, is the arm's length price for the same with due allowance for freight and processing costs associated with different points of sale s 15(8). In the case of oil and condensate not exported, the selling value is determined by the Minister by reference to the aggregate fob world price as at the New Zealand loading facility and the freight and landing charges on the oil and condensate from the loading facility to the refinery tanks at Marsden Point, New Zealand s 18(9).

The sale price for oil and condensate in New Zealand

It is a feature of the oil and gas licensing legislation in New Zealand that the price for oil and condensate sold in New Zealand specifies the price which the vendor is entitled to recover. If oil and gas is not exported from New Zealand, the vendor can recover the "approved price" where the sale takes place at the refinery tanks and at the same price with appropriate adjustments where the point of sale is elsewhere s 18A(2).

The "approved price" is dependent upon whether the oil or condensate sold is produced under a licence in a quarter in which 20 percent or more of the total production is exported. If so, the "approved price" is an export price which is defined in terms of an fob arm's length world price as at the New Zealand loading facility plus freight and landing charges from that facility to the refinery tanks. If not, the "approved price" is an import price defined in terms of an fob arm's length world price of imported feedstocks for the New Zealand refinery (with adjustment for quality) and the actual freight and landing charges on the same from the loading facility to the refinery tanks. s 18A(1).

Government direction that oil and gas be refined in New Zealand

Consistent with the provisions which enact means for the Minister to control the development and production of a discovery is Minister's power to require that production be refined in New Zealand. If, after consultation with the licensee and having regard to the *national interest*, the Minister is satisfied that petroleum or other products can be processed or refined from oil and gas produced under a licence he may direct that such takes place in New Zealand and prohibit the export of that oil and gas from New Zealand s 19(1). If the licensee does not have appropriate facilities for the processing or refining, the Minister may direct the owner of the appropriate to undertake the processing or refining on behalf of the licensee on terms as the owner and licensee may agree and failing agreement upon terms as *determined by the Minister s 19(2).*

Conclusion

This review of the legislation in relation to the phases of (1) prospecting for oil and gas and (2) its recovery or production illustrates the extent of the Government's control in respect of these phases. The manner or degree to which a Government will exercise its control will of course be determined by its view of the world scene in relation to energy and natural resources and the advent of future "oil shocks" of the same kind seen in recent times. But an investor must recognise that while the oil and gas explorer may epitomise the free market entrepreneur, he operates within a legislative structure which grants to the government of the day severe control over the ability of an oil and gas explorer for, develop and export oil and gas.

For the domestic share market investor the review may well illustrate that there is information which may provide some clue to the industry's (and Government's) view of the prospects of licensed areas eg, (1) the areas covered by prospecting licences; (2) the terms of those licences; (3) the extent of the exploration work programme approved by the Minister; (4) the extent of Petrocorp's participation and (5) the rate of royalty specified in the licence (especially whether different rates apply to different areas within the same).

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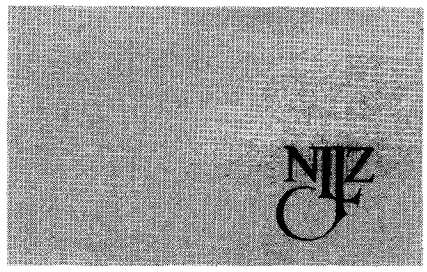
1. See eg, *Prospectus for Petroleum Exploration in New Zealand* issued by the Ministry of Energy, Wellington, New Zealand, June 1980.
2. *Prospectus for Petroleum Exploration in New Zealand*, supra, p 38. However, the government has recently granted some licences on terms of a 20 percent contribution for 25½ percent share in development and others without any government participation whatsoever.
3. Section 13 as inseted by s 1(2), Petroleum Amendment Act 1975 and repealed by s 3, Petroleum Amendment (No 2) Act 1980.
4. Eg, see The Petroleum (Production) Regulations 1976 (UK), Schedules 4 and 5.
5. This is enforceable: *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*, (supra).
6. These being introduced by the Petroleum Amendment Act (No 2) 1980.
7. Section 18 repealed by s 5(1) of the Petroleum Amendment Act (No 2) 1908.
8. See s 5 of the Petroleum Amendment Act (No 2) 1980. The repeal of the well head as the point of value was probably undertaken because of the difficulty (and therefore scope for dispute) of ascertaining the appropriate deductions for processing costs in order to determine the value.
9. *Prospectus for Petroleum Exploration in New Zealand*, supra, p 36.



Bias and Administrative Tribunals

By C R Pidgeon, of Auckland.

Administrative Tribunals, like the biblical poor, are always with us. The quality of their decisions inevitably varies according to their constitution. This quality may of course look very different to lawyers, to politicians, to the parties, and to the general public. Presumably at least one of the parties, the successful one, will always be favourably impressed by the quality of the decision in any individual case. Because tribunals are often composed of laymen, or at least a majority of laymen, with particular knowledge and experience in the area concerned, the risk of bias or the appearance of bias is understandable. This article looks at the legal meaning of bias, which of course is not identical with the more commonplace understanding of the term.

Bias is defined in the *Concise Oxford Dictionary* as "inclination, predisposition, prejudice, influence".

If there are factors which may improperly influence a tribunal in favour of one party over the other, or if there is such prejudice on the subject matter that the tribunal has reached fixed and unalterable conclusions, not founded on reason or understanding so that there is not a fair hearing, the Courts will take that into account as bias disqualifying the tribunal or member of the tribunal from determining the issues before it.

The exception to this proposition is where of necessity the tribunal is required to determine the issue, or the otherwise disqualified member is required to sit to make a quorum because there is no option either because the statute creating the tribunal or the rules of common law provide no other alternative, *Jeffs v New Zealand Dairy Board* [1967] NZLR 1057, 1066.

It is in this area that many of the most difficult problems arise.

Most people can recognise the possibility of bias if the tribunal has a pecuniary interest in the subject matter, or the members of the tribunal have a friendship or personal relationship to one of the parties. The effect of strongly held views presents some difficulties. Administrative Tribunals are perfectly entitled to adopt a general policy as regards issues likely to arise before them. No complaint can be made of that. It is where the tribunal applies a predetermined rule of policy in such a way that it completely fetters the exercise of its discretion rendering it incapable of considering the merits of a particular case, that the Courts will intervene.

Tests for determining bias

> Three tests have been propounded and applied: a real likelihood test; a test of reasonable suspicion; and a requirement of proof of actual bias. The real likelihood and reasonable suspicion tests have had the greatest currency, and at various times, the Courts have moved between them and applied them concurrently. At present the weight of authority favours the more stringent reasonable suspicion test.[1]

This appears to be the test adopted by the Courts in New Zealand as can be seen in *Anderton v Auckland City Council* [1978] 1 NZLR 657, 686. Although earlier the Court of Appeal in *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 seemed to favour "a real likelihood of bias" as being the appropriate test. The view of Mahon J follows the trend of current Australian authority. On occasions it is very difficult to conceptualise a distinction between the two tests. As Mr Justice Mahon pointed out in *Anderton's* case the distinction blurs.

Wade in *Administative Law* 5 ed p 431 points out that if "likelihood" is given the meaning of "possibility" then it equates with "suspicion" with the result that in conjunction with an objective approach, the "real likelihood" test would not give any different results than the "reasonable suspicion" test. However he points out that several judicial statements equate "likelihood" with "probability" and in this sense it must differ essentially from "suspicion". However in most cases either test will lead to the same result.

There is a wide-ranging debate at present as to whether the requirements of natural justice in relation to the aspect of bias are in some respects different where domestic tribunals are concerned. It is important to preserve public confidence in the administration of justice so that the Courts are freed from any reasonable suspicion of bias. Some Judges however have taken the view that where domestic tribunals are concerned there is not the need for such stringency.

In *Mahony v National Coursing Association* [1978] 1 NZLR 161 Mr Justice Glass stated at pp 171-2 that:

> the members, generally speaking, have agreed to abide by a set of rules of the authority of the committee to enforce them, if necessary by expulsion. The committee members cannot, in the nature of things divest themselves of the manifold predelictions from prejudices resulting from past association with members. Apprehension of bias could be generated in all kinds of ways. If it was a disqualifying consideration, the enforcement of the consensual rules would be largely unworkable. There may be some circumstances where a suspicion of bias would operate to disqualify a member

> of a domestic tribunal. Generally speaking it does not so operate and, in particular, it cannot operate with respect to tribunals such as those set up in the articles of the defendant Association.

This particular Association had been formed to carry on the business of greyhound racing.

The viewpoint expressed by Mr Justice Glass was approved by the Full Court of the Federal Court of Australia in *Caine v Jenkins* (1979) 42 FLR 188. The Court held that an expelled Union Secretary had not been denied natural justice despite the fact that the adjudicating committee included persons who had laid some of the charges which had been considered, had supported a resolution condemning the Secretary for one of the acts of respect of which he was charged and had previously expressed a viewpoint that he was guilty of the offences charged. Incredibly enough, the evidence disclosed that one of the three member committee had threatened to kill the Secretary only months before the hearing and the other members had admitted under cross-examination that they had approached the hearing with the attitude that the Secretary had to change their belief that he was guilty of some of the charges. The trial Judge held that the Appellant had not established a sufficient degree of bias to vitiate the committee's proceedings! The Court acknowledged that a finding of actual bias could have been made on the evidence presented at the hearing but was content to accept the trial Judge's findings.

Is it really accurate for domestic tribunals to be described as consensual tribunals? Is there any logical need to differentiate between non-statutory tribunals and statutory tribunals and Courts? Mr Tracey in his article "Bias and Non-Statutory Administrative Bodies — a wrong turning" is clearly of the view that there is no reason to differentiate. Is it right that it is necessary to prove bias before the decision of a non-statutory tribunal can be upset when a man's livelihood is sometimes at stake?

Mr Tracey in his interesting article goes on to say at p 87:

> On the other hand, a history of personal animosity between a member of a tribunal and a person charged; the voluntary combination of the role of adjudicator and layer of charges; or of the roles of adjudicator and witness of disputed facts are facts which will disqualify a member of a statutory tribunal. Surely a member of a voluntary association who faces charges which could lead to his expulsion or the imposition of some other serious penalty, is entitled to no less a standard of protection, particularly when his livelihood may suffer as a result.

Nevertheless the state of the authorities is such that where domestic tribunals are concerned a suspicion of bias may not be sufficient to operate to disqualify a member of a domestic tribunal. It is impossible however to be confident on this point.

The justification for a different standard is expressed by de Smith at p 256 as follows:

> ... the administration of internal discipline in educational institutions, trade unions, clubs and even professional associations is apt to present special problems. Those who have to make decisions can hardly insulate themselves from the general ethos of their organisation; they are likely to have firm views about the proper regulation of its affairs, and they would often be familiar with the issues and the conduct of the parties before they assume their role as adjudicators. Application of the rules against interest and bias must be tempered with realism; for instance, it may be right to require evidence of actual bias rather than mere likelihood of bias before a decision is set aside by a Court.

Doctrine of necessity

In some cases there may appear to be little alternative to having a tribunal or members of a tribunal sitting even although they may be biased. Where the application of the strict criteria regarding bias would cause a failure of justice because there is no other competent tribunal or quorum the common law has held under "the doctrine of necessity" that the tribunal or individual members of it are not disqualified. A well-known example of this doctrine in action is the decision of the Privy Council in *Jeffs v NZ Dairy Board* (supra). The New Zealand Dairy Board, a statutory body, was obliged to determine zones of operation in respect of certain dairy factories. The Board had under its statutory powers advanced money to one of the dairy factory proprietors and was clearly in a position of having a financial interest and thus disqualified from resolving the zoning issue.

In their Lordships' view the conclusion was inescapable. That Parliament intended in conferring the power to determine zoning issues to make an exception to the general rule. The challenge to jurisdiction was therefore rejected.

Another illustration of this principle arose out of a constitutional squabble in Saskatchewan where certain members the Judiciary were of the view that it was against the Canadian Constitution to levy Judges with income tax. The only parties that could finally resolve the interpretation issue was the Judiciary. The case went right through to the Privy Council which confirmed the view that there was no other alternative but for the Judges themselves to determine the issue and the doctrine of necessity was endorsed. As a matter of interest both at first instances and in the Privy Council the Courts found against the viewpoint of certain of the judiciary holding that judicial salaries could be taxed *The Judges v The Attorney-General of Saskatchewan* [1937] 2 DLR 209.

The present state of the law has been well expressed:

> the doctrine will operate when the only adjudicator with jurisdiction is disqualified, or, in multi-member tribunals where a quorum cannot be found because of disqualification, provided that the cause of the disqualification is involuntary. It will not operate when the cause is voluntary, except in the rare case in which the disqualified adjudicator is the only person with power to perform a formal act which must be performed if the course of justice is to continue. No distinction should be drawn between statutory and domestic tribunals in this area of law.[2]

Illustrations of the operation of this doctrine include:

(a) where an otherwise disqualified person's participation is authorised by statute, see the *Jeffs* decision (supra)
(b) where there is no other adjudicator and the action performed is an administrative formality, *Re Tooth & Co Ltd v Tooheys Ltd* (1978) 39 FLR 1, 7.
(c) where there is no other adjudicator and a conflict of interest is created by different statutes, for example in the question of the taxation of judicial salaries referred to above, *The Judges* (supra)
(d) where the adjudicators are disqualified as a result of acts beyond their control, *Re Caccomo and Minister of Manpower or Immigration* (1977) 75 DLR (3d) 720.

The doctrine however does not operate where there is another qualified adjudicator available, such as a differently constituted tribunal. Or if the acts which would otherwise disqualify the member or the tribunal were not voluntary.

Interesting factual situations sometimes arise in this field. On the one hand you get the type of situation that was caused with

the Australian Trade Practices Tribunal when the Deputy President who sat with two lay members died. The relevant statute gave the President of the tribunal power to give directions as to the arrangement of business and if necessary to replace a member. The parties concerned made conflicting submissions as to how the discretion should be exercised. It was in the interests of one party to stall the proceedings which involved tied houses in the liquor industry, and that party sought a completely reconstituted tribunal and a fresh hearing or as an alternative a replacement for the Judge and a continuation of the hearing which had lasted spasmodically for 12 months. There was a transcript of the evidence available and the final submissions had not been made when the Judge died. No power to delegate the discretionary power existed in the legislation.

Mr Justice Dean was in the embarrassing situation of having been counsel for one of the parties in the early stages. He took the view however and was upheld by the Courts that he was obliged as an administrative formality to act. He chose to appoint a replacement and direct that the proceedings continue with a new President and the existing lay members.

Where there is statutory provision for the appointment of an alternative adjudicator or tribunal, the trend of authority suggests that an "ad hoc" appointment should be made where there was a reasonable likelihood of bias or actual bias. However it should be pointed out that there is a recent South Australian decision to the effect that those with power to make an "ad hoc" apointment are not bound to act *R v Cawthorne ex p Public Service Association of South Australia Inc* (1977) 17 SASR 321. This decision appears to be in conflict with most authorities.

An interesting illustration of the operation of this principle occurred in a case before the Supreme Court of Texas in 1925 involving an organisation called "the Woodmen of the World" of which all the Judges of the Supreme Court of Texas were members. The Governor resolved the issue by appointment of an ad hoc Court of three women.[2]

The problem of a predetermination can arise in town planning, especially where there is a large scale development and the local council has earlier entered into contractual relationships with the developer. There is still a duty for the competent authority to act with an open mind in determining the planning issues.[3] In *Anderton's* case of course the Court held that there was actual bias. The situation was in the ultimate saved by the fact of pending local body elections which could result in a differently composed Council committee dealing with the application. In upsetting the decision the Court did not prevent the possibility of the filing of a fresh application by the developer with the hearing being before a differently constituted committee.

The appointment of an independent commissioner under the power given in the Town and Country Planning Act could well be considered on occasions, particularly when the council concerned is the applicant or is otherwise intimately involved in the application.

Whitmore and Aronson in their text, *Review of Administrative Action* (1978) refer to the interesting decision of *R v Optical Board of Registration; ex parte Qurban* [1933] 5 ASR 1. A complaint had been made to the Chairman of the Board alleging that the optician had behaved indecently towards a woman who had gone to his rooms for consultation. The Chairman of the Board decided to send other women as decoys. As a result of the reports from these women charges were laid. It should be pointed out that the Chairman had consulted at least two other Board members before taking the decision to build up a case in this way against this optician. The Court held that the Board as a body had become prosecutors or accusers to an extent which could not be saved by the doctrine of necessity. The disqualifying acts were voluntary. The fact that their decision was appealable did not save it. As a result the decision was quashed. This decision is of course not authority for a proposition that a Board cannot act as a prosecutor and adjudicator. Indeed professional bodies do act in this way when disciplining its members. It is the extent of the activities of the body in carrying out its investgatory functions which could lead to the disqualification.

Remedy

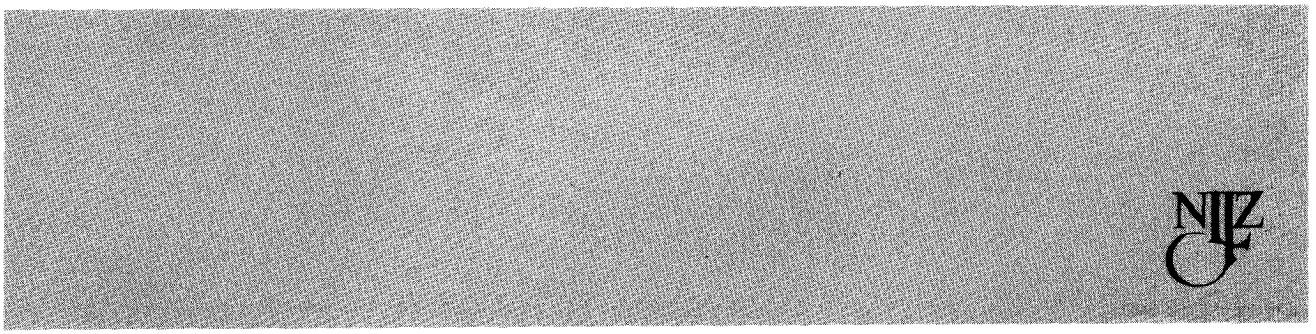
In many cases the problem of potential bias is known to counsel before a hearing. In those cases the practical method of dealing with the situation is to raise the problem with the Secretary of the Tribunal at an early stage. In the majority of cases other than the cases where the doctrine of necessity is applicable appropriate steps are taken by the tribunal to ensure that a possibly disqualified member does not sit. Where however, that sensible approach is not taken by the tribunal, or the reasons for disqualification are not known prior to the hearing, the issue should be raised at the hearing and if the submission is unsuccessful the application for review procedure set out in s 4 of the Judicature Amendment Act 1972 could be available. Certain restrictions have been placed on this right under the Town Planning legislation and reference would need to be made to that Act and the National Development Act 1979 where appropriate.

In cases of non-statutory tribunals where the application for review procedure is inapplicable the other prerogative remedies such as injunction or the granting of a declaration under the Declaratory Judgments Act 1908 may be available.

1 "*Bias and Non-Statutory Administrative Bodies — A wrong turning*," by R R S Tracey (1983) ALJ 80. See also de Smith's *Judicial Review of Administrative Action* (9 ed (1980) pp 262-264).

2 Cited by Frank (1947) 56 Harr L R 605, 611.

3 *Anderton v Auckland City Council* [1978] 1 NZLR 657.
Lower Hutt City Council v Banks [1974] 1 NZLR 545 and *Attorney-General ex rel Benfield v Wellington City Council* [1979] 2 NZLR 385. For a critical discussion of the last decision see an article "Councils, Planning and Bias" [1980] 10 VUWLR 453.



Lord Denning: an appreciation

By Anthony Grant, an Auckland Practitioner.

"Law is a plant that lives long before it throws out bulbs."[1]

With Lord Denning, the plant threw up a bulb: a determination that law should equate with justice. Of all men of his generation, Lord Denning has cared about justice.

His idea of justice has not been shared by all (but it has usually been shared by many) and his methods of achieving it have often been anathema to legal purists. Even so, as a result of his example, many Judges now strive to find ways to achieve justice where once they acquiesced in injustice. They have seen that new times require new laws and that in the process of this change, principle must not be enslaved by precedent.

The great shame is that he could not leave a better route for those who follow: what he has left is a pathway having more pitfalls than paving stones.

So unorthordox has he been that, in a way, he almost fits the description which Professor Jolowitz made of Jeremy Bentham:

> He was a scholar with no respect for scholarship, a jurist with no respect for law... and a dreamer of dreams whose horse-sense criticised the abuses of his age with such effect that he became one of the chief agencies in the reforming period of the... century.[2]

As a scholar, Lord Denning could dismiss established rules with unscholarly declamation. For example, in a will interpretation case he said:

> ...the Courts may get bogged down in distinctions between conceptual uncertainty and evidential uncertainty and between conditions subsequent and conditions precedent. The testator may want to cut out all that cackle. ...For my part, I would not blame him. I would give effect to his intentions, (*Re Tuck's Settlement Trusts [1978] 1 All ER 1054.*)

An equity Judge, on discovering to his surprise how Denning had dismembered the House of Lord's law concerning implied and resulting trusts, spent many pages exposing the heresy. Denning's response was the simple retort that, "...In this Court, we consistently hold", etc.[3] — a technique employed so frequently that he resembled a legal Charles de Gaulle. "La France — c'est moi!" became "La Loi — c'est moi!".

Precedent

Throughout his judicial life he refused to do obeisance at the altar of precedent. According to his philosophy:

> I never say, "I regret having to come to this conclusion but I have no option". There is always a way round. There is always an option-in-my philosophy — by which justice can be done. (*The Family Story, 208.*)

His cause was laudable but his weapons were crude. To find the "way round" he would use any weapon no matter how unconventional: the only obvious criterion was whether it would work. One awkward precedent was dismissed with the statement that "a lot of water has flowed under the bridge" since it had been decided. Another was "quite out of date". *(Verrall v Greay Yarmouth BC* [1981] All ER, 843.) Of two unreported cases he said, "I do not think we need pause on the unreported cases. ...They should be left in the oblivion to which the reporters quite rightly consign them." *Bremer Vulkan v South India Shipping* (1978) All ER 422 (The House of Lords will not now allow unreported cases to be cited without special leave — *Roberts Petroleum v Bernard Kenny The Times* 11.2.83, and the English Court of Appeal is also concerned about them — *Stanley v International Harveser The Times* 7.2.83). An inconvenient precedent that arose from a problem at a paint shop "may be binding... if there is another such paint shop anywhere but it is not in my opinion binding for anything else" *London Transport v Betts* [1958] 2 All ER 655, HL.

At the top of the system of precedent sat the House of Lords which until 1966 claimed that its decisions were unchangeable, no matter how unjust they might be. Denning mocked the practice during a debate in the House saying:

> The law at the moment is illogical, inconsistent and absurd.... I am afraid one has to face the fact that it is the fault of the interpretation which has been put on it by this House sitting judicially, which is infallible, which never makes a mistake and which can never correct itself.[4]

And it was his reluctance to follow such cases that contributed to the Practice Note in 1966 in which the Lords eventually indicated that they would not be absolutely bound by precedent.

Comparison

It should not be thought that Lord Denning stands out from the ranks of great reforming Judges as a maverick. They have all had to face the same problems and their devices have often been unorthodox.

It is very interesting to compare Lord Denning with two of the most famous Judges, Lord Mansfield and Lord Coke (a comparison Denning has often made himself) both of whom now have the reputation of being great reformers. Many people think that what they did was approved in their own day but this is not so. These men were scholars and jurists of recognised renown, but in time the devices which they sometimes used have been forgotten.

The great Lord Coke had a habit of using passably good Latin maxims which usually had an air of antiquity about them, in spite of the fact that he had just invented them![5] Another of his techniques was the selective citation of cases from the *Year Books*. No-one knew then as well as he did and he was always able to foil an advocate by quoting a case which was to the contrary effect of the one cited. Professor Plucknett says that "by a careful selection of material, Coke was able to conceal the inconsistencies and difficulties which were inherent in his position".

If Lord Mansfield disliked a precedent he sometimes used the device of blaming the law reporter for "misreporting" it.[6] In one case, when he could find no more satisfactory way of rejecting an appeal, he did so on the basis that the Magistrates' documents of appointment were unstamped: *R v Fisher* (1781) Caldecott Magistrate Cases, 135. He could dismiss precedents on much broader grounds. In the famous case concerning the liberty of James Sommersett, the Negro slave, Lord Mansfield said:

> I care not for the supposed dicta of Judges, however eminent, if they are contrary to all principle. The dicta cited were probably misunderstood; and, at all events, they are to be disregarded.[7]

As Lord Campbell said of Mansfield: "It was indispensibly necessary for him... to overrule many dicta to be found in the Old Reporters...[8]

In Lord Manfield's day, the punishment for stealing an item worth more than 40 shillings was death. Wishing to circumvent this law, he advised the jury in one case to find a gold item to be of less value than that. When the prosecutor exclaimed with indignation, "Under 40 shillings, my Lord! Why, *the fashion* alone, cost me more than double the sum" Lord Mansfield calmly observed, "God forbid gentlemen, we should hang a man for fashion's sake".

In the days when it was necessary to prove an "indenture" (a parchment which had a ragged edge) and the document before him did not have such an edge, Mansfield took hold of it, looked at it with one eye and then pronounced judgment: "I am of opinion that this is not a straight mathematical line, therefore it...comes within your own definition of an indenture."[9]

The comparison between these three Judges should be taken a little further. Their motives were remarkably similar: Lord Mansfield declared that "there is no injury or wrong for which the law does not provide a remedy", *Taylor v Horden* (1757) Burrow, 119; Lord Coke, "no wrong or injury...can be done but that this shall be reformed or punished in one Court or other by due course of law";[10] Lord Denning:

> I should be sorry to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on. We should then be going back to the days when a man's rights depended on whether he could fit them into a prescribed form of action; whereas in these days the principle to be applied is that where there is a right there should be a remedy. (*The Discipline of Law*, 151-152.)

Critics

For all three men, law was far more than just an occupation. It was a passion, and all three were prepared to stand out for what they believed even though it took them into the heart of controversy. Lord Coke was driven from office and when he wished to publish legal works thereafter, the King intervened to stop him: in office or out, Coke's influence was so great that the authorities lived in fear of him.

For his judicial sympathy to minorities, Lord Mansfield's house was one of the first buildings to be attacked and set on fire in the Gordon riots. He was also viciously libelled in the press by the anonymous "Junius". This is part of a letter of "Junius" published in the *London Evening Post* on 14 November 1770:

> Our language has no term of reproach, the mind has no idea of detestation, which has not already been happily applied to you and exhausted.... In contempt of the common law of England, you have made it your study to introduce into the Court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman Code, the Law of Nations and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect? By such treacherous arts, the noble simplicity and spirit of our Saxon Laws were first corrupted.... Even in matters of private property, we see the same bias.... Instead of these positive rules by which the judgment of a Court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice.... I feel for human nature when I see a man so gifted as you are, descend to such vile practices — Yet do not suffer your vanity to console you too much. Believe me, my good Lord, you are not admired in the same degree in which you are detested....[11]

And in a later letter Junius wrote: "The Cunning Scotchman(ie, Mansfield) never speaks truth without a fraudulent design...."

Lord Denning too has had many critics. In 1981 most of a book, *Justice, Lord Denning and the Constitution*, was given to the criticism of him. In a series of strident essays, several academic lawyers took Lord Denning to task for his judgments in various areas of the law. Headlines in *The Times* on 29, 30 and 31 January 1980 illustrate the kind of public criticism he received: "Ignore Denning ruling Mr Scargill says"; "Bitter criticism of Lord Denning"; "Suspicion that Lord Denning is biased" — strong words from such a staid paper. The popular press was not so restrained.

Reformers must face opposition in proportion to their resolve to reform. Lord Mansfield's experience led him to say that "a popular Judge is an odious and pernicious character". In another continent, Mr Justice Holmes "the Great Reformer", discovered what this could mean: Theodore Roosevelt, in a colourful turn of phrase said, "I could carve out of a banana a Judge with more backbone than that!"[12]

Friendliness

The personal qualities of friendliness and politeness which Lord Denning has shown throughout his judicial career will probably not be so well known in years to come. He treated litigants in person, and incompetent counsel with great civility. Even a mendacious witness could be disarmed by his charm. When Dr Wallersteiner, the epitome of a white collar criminal, was cross-examined in Lord Denning's Court, See *Wallersteiner v Moir* [1974] 3 All ER 217, he replied to one question from counsel that he "didn't understand the point of the question" to which Lord Denning leaned forward and in the most pleasant way said that he should not worry about that but try to answer the question anyway!

Clarity of expression

To many lawyers Lord Denning's most striking talent was his gift of expression. A legal judgment is almost *the* most lifeless of all literary forms but, by use of headings and a constant striving for clarity, Lord Denning made the *Law Reports* almost inviting.

When students struggled with the law reports, there was at least one Judge who was easy to understand. The famous American legal commentator, James Kent, found the study of law in his student days "encumbered with voluminous rubbish"[13] and Lord Campbell put it even better when he spoke of "the drudgery of toiling through tiresome textbooks and rubbishy reports"[14] for those who understand these sentiments of Lord Denning's judgments were always a welcome relief.

How refreshing to hear a Judge say, "The arguments [of Counsel] became complicated beyond belief", *Buttes Gas & Oil v Hammer* [1980] 3 All ER, 483; and "That argument is not only unattractive. It is quite wrong" *Bunge v Deutche Conti* [1979] 2 Ll R, 437; and to see an occasional aphorism, such as "Children are like trees: they grow stronger with firm roots", *Re Weston's Settlement* [1968] 3 All ER, 342. How pleasant also to read bold declarations of justice like this: "We shall not give moneyed might priority over social justice", *Williams & Glynns Bank v Boland* [1979] 2 All ER, 706.

Faults

Yet even his strongest admirer has to acknowledge some failings. When a judg-

ment is delivered in two different versions even a disciple should be concerned. This happened in *Parsons v Uttley Ingham* in 1975 and in *Re X* in 1974. One version of his judgment in *Parsons* is given in (1977) 2 Lloyds Reports 522 and another in [1977] 3 WLR 990. In *Re X* he is recorded in *The Times Law Report* as having said that there was an action for invasion of privacy but in the subsequent official *Law Report* the relevant passage denied the existence of any such right. "The foolish and the dead alone never change their opinion" [15] but there are times when even the wise should not change them.

During his judicial career he was criticised for being too politically aligned with some courses, especially his outspoken criticisms of trade unions. Yet in this context it is interesting to recall that Lord Mansfield when Chief Justice was not only a member of Cabinet but regularly attended Cabinet meetings.[16] Judicial standards change from age to age and Lord Denning's political profile was small by comparison with that of both Coke and Mansfield.

His achievement

Lord Denning will probably be remembered most for giving law a new direction. While his successors do not have the same passion for reform and are unlikely to push law to the same parameters which he did, it is most important that law should not become the preserve of technicians. Technicians treat words with a reverence they do not deserve and cease to recall the spirit which caused them to be spoken. Baron Parke (later Lord Wensleydale) in the nineteenth century was a skillful technician of this type and was acknowledged as a very able Judge — yet this was his philosophy, "It is the province of the Judge... not to speculate upon what is best, in his opinion, for the advantage of the community."[17] When Judges refuse to speculate on what is best for the community, law will atrophy and all will suffer. On the other hand, too many judicial speculators would create havoc: but a Coke or a Mansfield or a Denning appear so infrequently that they should be greeted with enthusiasm.

The new structure which they promote cannot be created without the destruction of part of the old, but the new structure when it is built, is infinitely better than the old. As *The Times* said in one of its leaders for 28 June 1975 "Thank God for Lord Denning".

1 O W Holmes Jnr, *Introduction to the Radical Basis of Legal Institutions*, 1923 Vol XI Modern Legal Philosophy Series.

Where to now Mareva?

By R J Asher, an Auckland practitioner.

The Mareva Injunction has been described as something of a "growth industry". This article again surveys the field and develops further some of the points made by Miss Julie Maxton in her article on Mareva Injunctions published in [1983] NZLJ 142 and the case note published in [1983] NZLJ 198. In this article Mr R J Asher suggests that there would be value in some statutory clarification and formal procedures and enforcement remedies in respect of this new development.

The Mareva injunction was born in 1976. The midwife, perhaps the father, was Lord Denning. Its development was rapid and in 1981 it received legislative recognition in the United Kingdom.

As a rare instance of overt judicial law-making, it has received a great deal of academic attention. It was suggested in one of the first New Zealand articles on the subject, that the Mareva jurisdiction would not be greatly used in New Zealand because it is not an international commercial centre.[1] This prediction has proven largely accurate; only one Mareva decision in New Zealand has been reported,[2] and only eight others are referred to in the journals.[3] Indeed there have been more articles on the subject than cases. However, the number of applications appears to be increasing and it can be anticipated that they will become more common as the jurisdiction becomes more widely accepted and understood.

The purpose of this article is to submit that the Mareva jurisdiction should be given legislative definition in New Zealand. A number of particuar factors make this desirable.

1 Dubious bases of jurisdiction

The "origins" of the Mareva jurisdiction were stated by Lord Denning in *Rasu Maritima S A v Perusahean Pertambangan* [1978] QB 644. They have been referred to consistently in the decisions that followed. Lord Denning likened the injunction to the ancient remedy of foreign attachment as once practised in the City of London, and to remedies at present practised in several continental jurisdictions and the United States. However the remedy of foreign attachment was peculiar to the City of London, had long since fallen into disuse, and was limited to cases where the

2 *Jeremy Bentham & the Law*, Stevens, 1948, 1.

3 *Kowalczuk v K* [1973] 2 All ER 1045b. (The Judge was Bagnall J. Of Bagnall's judgment a commentator in 94 LQR 45 recalled Cardozo's saying "the demon of formalism tempts the intellect with the lure of scientific order".) Sir Alexander Turner was similarly dismissed in *The Discipline of Law*: "Everything he says is worthy of careful consideration: but I am on record as being in favour". etc. pp 216, 217.

4 248 Parl Deb HL (5th Ser) cols 1332-3 (25 April 1963).

5 Plucknett, *A Concise History of the Common Law*, 5th ed 283.

6 Fifoot, *Lord Mansfield*, 198-229.

7 Campbell's *Lives of the Chief Justices* Vol. III, 292-293.

8 ibid, 304.

9 ibid Vol IV, 24.

10 Coke 4, Institute 71.

11 Heward, *Lord Mansfield*, 129-130.

12 (1980) 43 MLR 731.

13 Harding, *Law Making & Law Makers in British History*, 1980, 163.

14 Campbell's *Lives of the Chief Justices* Vol III, 187.

15 Brandeis, quoted in Goodhart, *Five Jewish Judges*, OUP, 1949, 25.

16 Campbell's *Lives of the Chief Justices* Vol III, 328 ff.

17 Quoted in Lord Hodson's 1962 Holdsworth Lecture, *Judicial Discretion and its Exercise*.

defendant was overseas. The similar continental remedies provided no basis for the jurisdiction. In the only House of Lords case where the jurisdiction was considered in any depth, *Siskina (Cargo Owners) v Distos S A* [1979] AC 210 at 261 the Law Lords expressly forebore from either approving or disapproving the jurisdiction, and expressed some scepticism as to its origins.

The most persuasive basis for the jurisdiction in the United Kingdom was the 1873 Supreme Court and Judicature Court Act repeated almost exactly in s 45 of the Supreme Court and Judicature (Consolidation) Act 1925 which provided that:

> A mandamus or an injunction may be granted or a receiver appointed by interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient.

There is no equivalent section or rule in New Zealand or New South Wales, but in both these jurisdictions the section in the Judicature Act (in New Zealand s 16) which provides:

> The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

has been held sufficient to confer the jurisdiction (*Hunt v BP Exploration Company (Libya) Ltd*) [1980] 1 NZLR 104 at 116-118.

Although the jurisdiction is referred to as having been "found", the reality is that existing principles have been moulded to meet a brand new commercial need with a brand new procedural device. It is submitted that this is an entirely legitimate application of existing principles to a new problem. However in the absence of a House of Lords or New Zealand Court of Appeal decision upholding the jurisdiction, it is not out of the realm of possibility that the New Zealand High Court decisions recognising the jurisdiction could be overruled and the jurisdiction held not to exist, pending legislative intervention.

2 The unique nature of the new remedy

The Mareva injunction is not an "interim injunction" in the *American Cyanamid* sense. Interim injunctions traditionally provide short-term protection to a right of plaintiff if he has an arguable case. In the words of Lord Diplock in *American Cyanamid Co v Ethican Ltd* [1975] AC 396, 406; [1975] 1 All ER 504, 509.

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial

The essence of the ordinary interim injunction is the protection up to trial of a "right". A Mareva injunction does not in the same sense protect a cause of action, but rather prevents a possible breach of the Court procedure. At the time of the granting of a Mareva injunction a plaintiff is not having an existing right protected; he simply asks to be protected from a potential abuse of procedure. Again in the words of Lord Diplock in the *Siskina* case (supra):

> . . . a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. . . . [It is] merely ancillary and incidental to the pre-existing cause of action.

The *American Cyanamid* "good arguable case" test does not really apply to Mareva injunctions, despite Lord Denning's early references to it in the Mareva context. In *Z Ltd v A-Z and AA-LL* [1982] QB 558; [1982] 1 All ER 566 at 572 the English Court of Appeal held that an injunction should only be granted to a plaintiff where it was "likely" that he would get judgment for "a certain or approximate sum". Moreover the plaintiff had to establish that the defendant had assets within the jurisdiction and that there was a real risk of assets being disposed of. In an earlier case Lawton LJ[4] in a passage quoted by Barker J in *Hunt v BP Exploration (Libya) Limited* (supra) said:

> There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction. For commercial men, when assessing risks, there is no commercial equivalent of the Criminal Records Office or *Ruff's Guide to the Turf*. What they have to do is to find out all they can about the party with whom they are dealing, including origins, business domicile, length of time in business, assets and the like; and they will probably be wary of the appearances of wealth which are not backed by known assets. In my judgment the Commercial Court should approve applications for Mareva injunctions in the same way. Its Judges have special experience of commercial cases and they can be expected to identify likely debt dodgers as well as, probably better than, most businessmen. They should not expect to be given proof of previous defaults or specific incidents of commercial malpractice. Further they should remember that affidavits asserting belief in, or the fear of, likely defaults have no probative value unless the sources and grounds thereof are set out.

Thus an arguable cause of action, or an arguable likelihood of disposal of assets is not enough. Indeed these two criteria exist at arguable levels in most actions. The Courts have been at pains to point out that the general rule that a debtor can deal freely with his assets still exists[5] and it is highly desirable that a heavy onus rests on a plaintiff seeking such relief., Despite this, it may be that a Mareva will be granted in the future even where there is no existing prima facie case, but it is inevitable that a cause of action will accrue. In *Riley McKay Pty Limited v McKay* [1982] 1 NSWLR 264, 276. A Marvea injunction was granted at first instance by Rogers J where one of the causes of action was in respect of alleged preferential payments made by a debtor company, where a winding up petition had been issued, a provisional liquidator appointed, but no winding up order made. The New South Wales Court left open the question of whether a vested cause of action was essential to jurisdiction.

Thus the Mareva injunction is different from an ordinary interim injunction in both its function and the tests to be applied (although the "balance of convenience" is a consideration common to both). The English Courts have stated a number of considerations and rules that are unique to the remedy. New Zealand Courts are following these English decisions.

Moreover the Mareva injunction in most cases will affect third parties. Moneys and assets that are in danger of being dissipated will generally be in the hands of institutions or other third parties; a prohibition on sale may affect the rights of an interested purchaser. There is conflict on the question of whether a Mareva injunction is a right in personam or in rem[6] but in any event it seems clear that if third parties are named in the injunction and served with it, they will be in contempt of Court if they deal with the assets, (see *Z Ltd v A Z Ltd* [1982] QB 588).

A further unique aspect of Mareva

injunctions is that they may continue in force after judgment, in aid of execution, *Stewart Chartering Ltd v C O Managements S A* [1980] 1 All ER 718 at 719 per Goff LJ. In contrast, orthodox interim injunctions cannot by their very nature survive unchanged after judgment, although they may become permanent injunctions.

These diverse and unique features of the Mareva injunction make it desirable that it be in some way formalised and brought within the existing system of procedural and execution remedies. It really plugs a gap in these remedies; it has features of the pre-judgment charging order, the post-judgment charging order and the R 478 preservation of assets order. Its very existence highlights the deficiencies and confusions of existing rules.

3 Areas of uncertainty as to the future development of remedy

The ancient doctrine of "foreign attachment", relied on by Lord Denning when he discovered the Mareva injunction, and referred to by Barker J in *Hunt*, (supra) provided only for a restraining order against a debtor outside the jurisdiction. This factor was generally stated to be a prerequisite to the exercise of the Mareva jurisdiction in the early cases, but in later decisions was rejected or ignored by Commercial Judges. The matter was put beyond doubt in the United Kingdom by the enactment of s 37(3) of the Supreme Court Act 1981, which provided as follows:

> The power of the High Court . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within the jurisdiction shall be exercisable in cases where the party is, as well as in cases where he is not, domiciled resident or present within that jurisdiction.

Prichard J in *Mayall v Weal Webb*[3] described this issue in New Zealand as a "moot point". In *De Vries v De Vries*[3] Hardie Boyes J although he made no express statement on the point, appeared to accept that the jurisdiction applied to defendants in New Zealand (he refused the injunction on other grounds). In *Reilly McKay Pty Ltd v McKay* (supra) the New South Wales Court of Appeal in upholding the Mareva jurisdiction in that State appeared to accept, again without making any express statement, that the fact that a defendant was now in Australia was not a limitation on the power to grant an injunction.

As was pointed out by the House of Lords in the *Siskina* case (supra) the "foreign debtors" prerequisite was illogical and unfair, and it now seems that in New Zealand it is no longer required.

Nevertheless the caution with which Judges approach this question shows that in the absence of any definitive legislative pronouncement it is difficult to state with confidence the boundaries to the jurisdiction.

Another difficult and important question is whether the Mareva injunction extends to dispositions within the jurisdiction. The early classic formulations of the doctrine emphasised the danger of assets being removed *out of* the jurisdiction as the "heart and core" of the Mareva injunction, (see *Barclay Johnson v Yuill* [1980] 3 All ER 190. A submission that the jurisdiction extended to dispositions within the jurisdiction was expressly rejected by Rogers J of the New South Wales Supreme Court in *Turner v Sylvester*]1981] 2 NSWLR 295, 305. There is a sound policy reason for this limitation. The removal of assets out of the jurisdiction leaves the local Court helpless. This is not so if the assets are within the jurisdiction, for the Insolvency Act 1970 and the Companies Act contain rules expressly designed to unravel fraudulent dispositions by a debtor who has endeavoured to defeat the effect of a potential or actual judgment and subsequent bankruptcy.

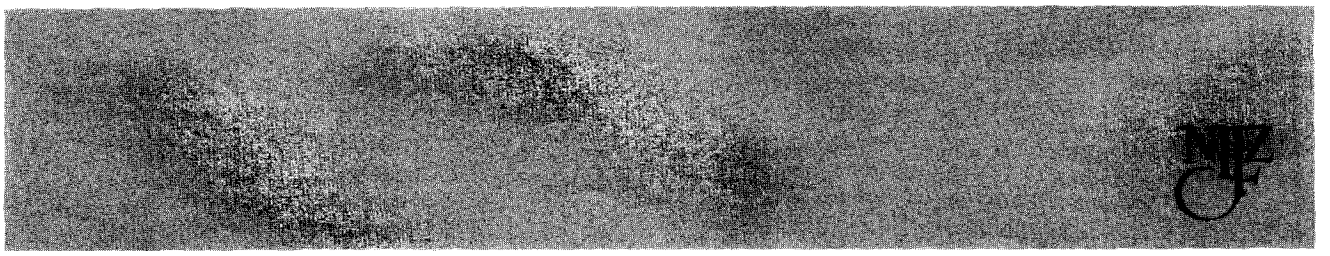
Unfortunately these rules can only be invoked after bankruptcy or winding up. An unscrupulous debtor has ample time to recklessly squander his assets or cunningly conceal them while the judgment and execution processes are slowly invoked. A Mareva injunction, on proof of a real risk of disposition to defeat judgment, can foil such a course of conduct.

In the United Kingdom s 32(3) has been interpreted as extending the jurisdiction to disposition within the country, *Z Ltd v AZ Ltd* (supra). In *De Vries v De Vries*[3] the defendant was within the jurisdiction, and Hardie Boyes J did not seem to consider himself precluded for that reason from granting an injunction. It is submitted that the existing protection to creditors from disposition within the jurisdiction is inadequate and that it is desirable to extend the Mareva jurisdiction to this area.

4 Conclusion

The Mareva injunction is a splendid example of judicial activism, which is probably why it is such a popular subject of articles such as this. Whatever its origins it must be recognised as a new remedy, different in its nature from the *American Cyanamid* type interim injunction, and orthodox enforcement procedures. It does not preserve or prevent the frustration of a cause of action; nor is it an execution process. It is essentially a remedy designed to preclude a deliberate frustration of post-judgment enforcement procedures. It does not preserve an existing right like an interim injunction, but protects potential remedies. Because of the Mareva injunction's unique nature the principles of its application are different from those applying to other remedies. The willingness of Judges to prohibit dispositions within the jurisdiction may result in its more frequent incidence. In the United Kingdom those principles have been carefully outlined by statute and case law. Such a clarification is needed in New Zealand.

Moreover the jurisdiction should be rationalised with the procedural and enforcement remedies. Pursuant to R 314 of the Code of Civil Procedure prior to judgment an interim charging order may be granted as proof that the debtor is making away with his property, or about to quit New Zealand with the intention of defeating his creditors. After judgment the remedy is available as of right. The Insolvency Act 1967 at ss 64 and 65 provides that a debtor's property may be seized in certain circumstances prior to adjudication. The Code of Civil



Procedure provides at RR 476-478 that certain property can be preserved by order of the Court pending the disposition of an action. The High Court has a general power to appoint receivers in certain contexts derived from the law administered by the Court of Chancery before the Judicature Act. In the Admiralty jurisdiction there is a right by an action in rem to arrest property which is the subject of a dispute, and to enforce a judgment. Remedies have been developed in this important area in a random and entirely unco-ordinated way. In many circumstances there may be several methods by which a plaintiff can obtain security. Although this is not in itself a bad thing, the confusion and irrationality of the existing situation begs for reform.

If express provisions are invoked it is to be hoped that they will be widely couched as it would be difficult to set out exact boundary lines and safeguards, without distorting further development of the new remedy as it is tested in commercial litigation. Obviously there is a good deal of fine tuning still to be done.

1 C B Cato "The Mareva Injunction and its Application in New Zealand" [1980] NZLJ 270 at 27.

2 *Hunt v BP Exploration (Libya) Ltd* [1980] NZLR 104, 108.

3 *Mosen v Donselaar* (Unreported Wellington Registry A327/75, 13 October 1978, Quilliam J; *System and Programs (NZ) Ltd v PRC Public Management Services & Others* [1978] Recent Law 264 Jeffries J); *Sea Link Ltd v Transpacific Container Services Ltd & Others* (Unreported, Auckland Registry, A270/82, 5 October 1982, Chilwell J); *Mayall v Weal & Others* (Unreported, Hamilton Registry A182/82, 29 October 1982 Prichard J); *Dowler v Carbines* (Unreported, Auckland Registry, A1017/82, 7 October 1982 Barker J); *De Vries v De Vries* (Unreported, Christchurch Registry A33/83, 29 April 1983, Hardie Boyes J); *National Westminster Finance New Zealand Limited v Butler* (Unreported Auckland Registry A233/83, 3 August 1983 Barker J); *Taranaki Demolition (1978) Limited (In Liquidation) v Lehndorf* (Unreported, New Plymouth Registry A36/83 28 July 1983 Davison CJ).

4 *Third Chandris Shipping Corporation v Unimarine SA* [1979] 2 All ER 972, 987; [1979] QB 645, 677-672.

5 *The Angel Bell* [1982] 2 WLR 488 at 495; *Reilly McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276.

6 Lord Denning and Eversleigh J in *Z Ltd v AZ Ltd* [1982] QB 558 said it was, but an earlier Court of Appeal in *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 1966; [1978] 3 All ER 164 said it was not. The latter case was followed by Goff J in *The Angel Bell* [1982] WLR 488.

BOOKS

Index to New Zealand Legal Writing

By J F Northey. Published by Legal Research Foundation Inc, 2 ed 1982. ISBNZO-908581-19-X(pbk)

Reviewed by P J Downey

To attempt to review this second edition of the *Index to New Zealand Legal Writing* is a little like the proverbial task of trying to review the telephone directory. Basically it is a work of reference which no one in their right senses would be expected to read through from A to Z, or if you are of a mathematical bent from page 1 to 260.

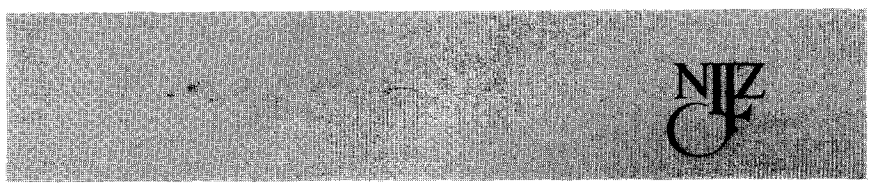
This second edition is intended, according to the preface, to include all New Zealand legal writing between 1954 and 1981. This means that the original edition and the subsequent supplements that were issued have now been replaced in their entirety. The *Index* has served an invaluable purpose and this second edition will be of equal value. The original *Index* appeared in 1977 and it is to be hoped that the Legal Research Foundation will feel that new editions at five-year intervals will be justified. Certainly the second edition of the *Index* is a much more substantial one. It runs to some 260pp by comparison with the 124pp of the original edition.

The *Index* continues to be divided into two parts. Part I is an index to books, theses, dissertations and articles. Part II is an index to case notes. Within each part the articles or the cases are assembled under subject headings which are themselves then divided into separate topics. The very first subject, for instance, is *Accident Compensation* and this is subdivided into the topics of "Accident Compensation Act", "Action for Damages", "Criminal Injuries Compensation Act", "Woodhouse Report" and "Workers Compensation Act". Some of the subject headings listed, however, do not have full entries of their own but are cross-referenced. For example there is a subject heading shown for *Bailment* but this is shown as appearing under the more general title of *Commercial Law*.

Unfortunately, however, this type of indexing is not carried through to the extent that it might have been. For instance, under the heading *Family Law* there are 18 subheadings. An index listing all of these topics, as well as the main subject headings, would have been most useful. "Bigamy", for instance, has only one entry under *Family Law*. This topic, however, is repeated under *Criminal Law* and there is another entry added. It is dangerous therefore to think that because there is a topic listed under one of the subject headings that it may not also be listed under some other subject heading and contain additional material. Another example of this point is that *Homosexuality* as a topic has one entry under the subject heading of *Civil Rights* but seven quite different entries under the subject *Criminal Law*.

The sources from which the material is taken are a wide ranging set of journals, reviews and magazines. There are some slightly surprising inclusions and some equally surprising omissions. For instance, both *Comment* and *Landfall* are included, but the *National Business Review* and the *New Zealand International Review* are not. Presumably a line had to be drawn somewhere, but some of the comments in the *National Business Review* on specific cases have been particularly clear. *Australian Outlook* the journal of the Australian Institute of International Affairs is listed whereas, as noted above, the *New Zealand International Review* of the New Zealand Institute, which also contains some useful material on international law, is not.

In reviewing a work of this nature a commentator feels under some compulsion almost, to find something to be critical about. In making some criticisms such as those above a false impression can, however, be created. This work is important, clear, and will be extremely useful not only to academic lawyers but also to barristers and solicitors.



Lawyers and the Consumer Interest

By Robert G Evans and Michael J Trebilcock,
Butterworths (1982) xxiii459ppv

Reviewed by John Lenart, Massey University.

Subtitled *Regulating the Market for Legal Services*, this book is part of a new monograph series on studies in Law and Economics. Published by Butterworths (Canada) in collaboration with the Law and Economics programme at the University of Toronto, Faculty of Law, the book contains 15 essays on various aspects of the legal industry. It provides further evidence of the progressive, impressive and radical stature of current Canadian law.

In the Preface, the tone is set for the reader. The legal industry is part of the private sector in all westernised societies. Good economic performance can be measured by the efficiency of the industry as a whole, its responsiveness to the needs and wishes of its users (clients), as well as its maximisation of efficient use of resources. But the legal industry is also subject to extensive public regulation, delegated to the legal profession collectively to set its own standards of entry and to regulate the conduct of its members. Against this background, the elusive concept of "justice" can be viewed, from the perspective of both the client's ultimate objective as well as the institutionalised structure of the services required to achieve it. Thus an interesting, wide-ranging and somehow elusive framework; yet the collection of essays as a whole does provide the reader with fascinating insights of this tapestry.

The essays themselves are organised under four admittedly loose headings. Time and space does not permit a critical analysis of each contribution. Some of those more attractive than others to the whimsical fancy of this reviewer will be discussed. Within that comment itself lies one of the overall strengths of the book. There are essays that will strike some local readers as being of little import or interest, while others will be stimulated by the same material.

Part I is subtitled "Major Regulatory Issues and Perspectives". The second paper is *Public Attitudes Towards Lawyers: An Information Perspective* by Janet Yale, whose thrust is twofold. Firstly, the unfavourable public image of lawyers compared to that of other occupations is empirically examined. Comparisons of attitude studies on an international level are made. Discussion includes a paper on the topic presented to the 1978 New Zealand Law Society Conference by the Heylen Research Centre. While Yale acknowledges the unsuitability of meaningful comparison, based on differing methodologies, she nonetheless demonstrates that the overall image of lawyers is perceived at best in negative terms.

Having established her premise, the writer explores the hypothesis that information deficiencies in the market for lawyers' services contribute to and account for the statistical negative sentiments. This area investigates how lawyers are selected, client satisfaction and complaint resolution. The conclusion includes a discussion of the perennial advertising debate, and also notes that the major dissatisfaction with legal performance is work habits (lack of reporting, accessability, etc) and high fees. The essay while being easy to read, is incisive, clear and methodologically sound. It prompts interesting speculation as to the outcome of an updated survey in this country.

In Part II, "Pricing and Competitive Behaviour" is discussed. Of topical concern to practitioners in this country, is Professor Trebilcock's lively essay, *Competitive Advertising*. In the introduction, he outlines the extent to which the profession may advertise under the differing Federal Legislation of Canadian Provinces. Such discussion leads to a separation of the topic into two areas, price advertising and non-price advertising. Under price advertising, the author starts with the result of surveys showing that 60-65 percent of clients do not discuss fees with their lawyers prior to engagement, and almost 50 percent did not discuss them at all.

The focus then shifts to the advantages of price advertising, and Trebilcock is quick to suggest that the supposed major advantage — lower prices for consumers — is of limited value in rational discussion of the debate. To this reviewer at least, it would appear that in conjuction with the theme of Yale's essay (see above), public perception of pricing is of critical importance in the overall picture, and was too easily dismissed. This point is all the more evident when in his conclusion, the author makes important reference to the conflict of interest with which a self-regulatory profession is faced when discussing advertising. Despite this criticism, the essay makes provocative and compelling reading.

"The Efficient Production of Legal Services" is the grouping for Part III. The five essays range from a discussion on manpower policy within the profession, through the provision of certain legal services by non-lawyers, to the regulating of continuing competence within the profession and beyond to the extra-terrestrial area of incorporation by lawyers.

On this last topic, Professor Prichard's thoughtful treatment of a vexed issue is somewhat outdated. Having outlined recent Canadian experience, and having elaborated on the pros and cons of allowing incorporation, including a separate section on tax implications as the principle reason behind the push for such allowance, the author points out in conclusion that due to recent legislative changes the tax disadvantage of non-incorporation has now been mitigated. Further, he points to no benefit to the ultimate consumer and suggests that incorporation would be an overall disadvantage. A further criticism is that Prichard does not discuss the area of advertising, which could be an important factor in the incorporation equation.

The final three essays are under the heading "Lawyers-Legal Services-Social Justice". Professor Dunlop's essay, *Compensation for Personal Injuries* draws heavily on the Accident Compensation model from New Zealand. While it is of undoubted interest in Canada where lawyers debate the ramifications of "first party insurance", there is a sense of "déja vu" and a wry smile as one remembers the days of debate concerning that "hot potato" known as the *Woodhouse Report*.

Of much relevance however, is RJ Gathercole's *Legal Services and the Poor*, an in-depth analysis of legal aid. Differing types of services in the USA, the UK and Canada are discussed and compared. The inadequacies of the legal aid system are discussed, not simply from the professional viewpoint, as appeared to be the case recently in New Zealand, but from the least equally important perspective of the client who cannot afford his standard middle-class luxury. Gathercole then addresses the question of how to deal with the problem and points to useful though radical approaches. Certainly, these merit serious consideration here in New Zealand and, as the author suggests in conclusion the ultimate responsibility rests with Governmental and professional commitment, if the poor are to receive "effective" service.

While not essential reading for business success, this book is an important contribution to anyone interested or involved in law reform, legal progress in its widest sense, as well as the confluence of law and economics.

The book provides a fascinating reflection of Canadian legal enlightenment. In some of its themes, this country used to be much envied, but in others, there is some serious thinking yet to be done.

Caught out in Court: How will psychology in New Zealand measure up?

By Ross St George, Department of Education, Massey University.

The following article is based on the author's presidential address to the New Zealand Psychological Society given at the University of Auckland in August this year. The audience therefore was one of psychologists rather than lawyers. The issues raised, however, must be of interest to lawyers and provide a new look at what lawyers, and Judges, do in Court.

It should come as no great surprise that the disciplines of psychology and law share areas of common interest and concern. After all, psychology has laid claim to the study of human behaviour and experience as its special domain while law also has a special interest in what people do and why.

Clearly, however, the approaches of these two disciplines differ. Psychology generally attempts to employ systematic empirical methods to study behaviour and experience. In aiming to be an effective scientific discipline, psychology seeks reliable and valid data on which to base accounts of thought, feeling and action that have both predictive and explanatory power.

Law, on the other hand does not normally aspire to scientific status for it is primarily a social system developed to regulate the conduct of the members of a community. But the law also bases much of its practice upon establishing a factual data base and seeks through both formal and informal systems or proceedings to generate and enforce rules expressing what behaviour is permissible by members of a community and what is not. Thus, both disciplines overlap in their interest in behaviour. Whether this overlap of interest will lead to co-operation or conflict between professionals in the two disciplines is a moot point. However the surge of interest in the mutual problems of psychology and law is certainly upon us (see Blackman, Muller and Chapman, in press, who develop the above themes).

Seven years ago Tapp (1976) in the first *Annual Review of Psychology* chapter on psychology and the law referred to the paper as an "overture". Monahan and Loftus (1982) referred to their second chapter in this publication as a "crescendo". In the intervening year the British Psychological Society had established its Division of Criminological and Legal Psychology and the American Psychological Association formed Division 41, Psychology and Law. Meantime one-third of the graduate psychology departments in the US are reported offering courses related to law. The journal *Law and Human Behaviour* has been established as a specialised publication and mainstream journals such as *Psychological Bulletin*, *Psychological Review* and *Professional Psychology* are carrying articles linking the disciplines of psychology and law.

Psychology is clearly showing an interest in the law and the legal process. Of course, there has always been interest and concern at the interface between some areas of mutual concern, for example, in the areas of mental stability, sanity or otherwise, in criminal cases; or in the behaviours and competencies of family members, adults and children, in domestic and family law cases. For some psychologists the issue, crudely put, has been one of whose "expert witness testimony" before the law will be more expert. Is it to be the testimony of the psychologist, the psychiatrist, the physician or the lawyers? As I shall attempt to illustrate, the interest of psychology in the law, in New Zealand as elsewhere, can and should be developed beyond merely finding another forum for the pursuit of old rivalries. This is because the law is currently interested in psychology and developing an acceptance of psychology.

In their review Monahan and Loftus, organise the mutual interests between psychology and law into three domains: substantive law, the legal process and the legal system. Each domain will now be considered briefly.

Substantive law

As Monahan and Loftus point out, "Law is based on an underlying set of assumptions about how people act and how their actions can be controlled" (p 443). This involves two sets of assumptions which are basically empirical in nature. There are those assumptions *descriptive* of human behaviour, ie "how people act". They give the examples like the "fact" that normal people intend their actions but the mentally ill may not. The second set of assumptions are *consequential* in nature, ie about how actions can be controlled. Here Monahan and Loftus point out that "criminal law assumes that if people expect punishment to follow certain actions, they will be less likely to do them" (p 443). A very different example would be that of tax law where it is assumed that the deduction of mortgage interest payments will increase home ownership or that the deduction of charitable donations will increase donations. Psychology, through the study of the contexts, antecedents and consequences of behaviour may yet have as much to say on tax law as on criminal law and court the Minister of Finance as much as the Minister of Justice.

In the widest sense then, a great deal of psychology is relevant to substantive law for, rightly or wrongly, almost every aspect of human behaviour could be subject to legal regulation. There are of course areas where psychological theory and research would appear to have a direct and obvious bearing upon substantive law in terms of both descriptive and consequential assumptions. Examples would be psychopathology, child development, statistics and assessment. Theory and research in these fields intersect with law on questions such as insanity defense, child custody, child competency in decision making and educational, employment or service discrimination.

The legal process

In this domain in Monahan and Loftus see the interests of psychology and the law coming together primarily in the context of the trial but also in other legal proceeding settings. The focus is on "the ritualised crucible in which conflicts are resolved" (p 447).

Here psychology and the legal process can enrich each other by researching and understanding the "more formal aspects of how the law resolves conflicts between individuals (as in contract or tort law) or between an individual and the state (as in criminal or administrative law) in the application of substantive legal principles" (Monahan and Loftus, p 447).

Psychology and psychologists have begun to study a range of role components in the legal process. For instance, juror characteristics in relation to defendant characteristics have a bearing upon the leniency or otherwise of treatment (Nemeth, 1981). Jury selection, or more correctly jury elimination, by the process of *voir dire* ("to see what he or she says") has been subjected to study in terms of a number of factors. The imbalances in the jury pool in social, economic, educational, ethnic and attitudinal terms has been one such area of study (see McConahay, Mullin and Frederick, 1977; Vidmar and Judson, 1981). Another more subtle psychological perspective to the process of *voir dire* has been outlined by Suggs and Sales (1978) in terms of psychologists assisting in the preliminary examination process to determine prospective juror competency. They review what are considered to be both judically unacceptable and acceptable psychological strategies during the *voir dire* proceedings. These range across the generally unacceptable methods of ingratiation and indoctrination to the more acceptable approaches of juror investigation in terms of demographic characteristics, attitudinal stance and legal reasoning development. However, as Suggs and Sales note, the empirical evidence to substantiate acceptable *voir dire* processes and procedures is extremely limited while the legal advice is, for the most part, hypothesis and folklore. They argue for increased collaboration and research.

Social psychological research on the effects of defendant characteristics upon juror and jury judgments has been very popular using a range of simulation paradigms (see Greenberg and Ruback, 1981). Law-related defendant characteristics that have been found to increase the probability of guilty verdicts in simulations include being in custody, offering evidence oneself of extenuating circumstances rather than through an impartial witness and too severely protesting one's innocence (summarised in Monahan and Loftus). Meantime extra-legal defendant characteristics such as sex, race or socio-economic status have not been found to consistently affect simulated juror decisions. But simulations are just that, and the simulation evidence that physically and socially attractive defendants were treated more leniently than their unattractive peers was not sustained in the few non-simulation studies of attractiveness effects upon defendant treatment (again see Monahan and Loftus).

In the domain of the legal process the effects of evidence, its method of introduction, presentation and treatment have also been of considerable interest to psychologists. The fields of perception and memory certainly have a contribution to the psychology of law. Eyewitness research has documented the effects of age and race upon the reliability of the identification of others (Smith and Winograd 1978, Goldstein, 1979) and the manner of questioning leading towards recognition has also been found to affect the reliability of identification (Loftus, Miller and Burns, 1978). As Monahan and Loftus remark the unreliability of eyewitness identification presents a dilemma for the law since eyewitness evidence is highly valued in the legal process. In cases involving perceptual accuracy the jury may have to decide who to believe — the eyewitness or the eyewitness researcher.

At present there is in principle no difficulty in psychologists qualifying as "expert" and thus being allowed to give relevant opinion evidence. However, judging from the reception of psychiatric testimony, it is apparent that the Courts will be equally wary of "trial by psychologists" as by psychiatrists (see Cato, [1980] NZLJ 288; R v McKay [1967] NZLJ 139; R v Moore [1982] NZLJ 242).

Other foci of interest to psychologists in the legal process concern the influence of legal procedure on the resolution of legal disputes. The central psychological study is that of Thibaut and Walker (1975) which contrasted the "adversarial" model, where the parties in dispute exercise considerable control over proceedings, with the "inquisitorial" model where a third party decision-maker exercises procedural discretion. La Tour, Houlden, Walker and Thibaut's (1976) survey showed that in the United States and Europe the "adversarial" model was perceived to be fairer. Walker, Lind and Thibaut (1979) have gone on to look at perceptions of fairness of both procedure and outcome arrived at. They made the important but not surprising point that perceptions of fairness of a legal procedure enhanced perceptions of fairness of the outcome, but only for those participating in the decision making. This was not the case for observers nor for persons affected by the decision but excluded from the processes of reaching that decision.

In the legal process and particularly in the case of jury trials, civil or criminal, Judges offer to the jurors a set of decision rules concerning the application of the law to the factual issues they must consider. For most of us, psychologists included, it will come as no surprise that jurors find these instructions largely incomprehensible. Monahan and Loftus cite studies indicating "...that only half the jurors instructed in the burden of proof...understood that the defendant did not have to prove his or her innocence..." and that jurors understood "...only half of what was explained to them, largely due to the prolix construction of what passes in the law for prose" (p 451). The example they cite is "innocent misrecollection is not uncommon". As with aspects of legal paper work frequent obstacles to comprehension can be minimised with or without the assistance of psychology.

The legal system

The third domain of possible mutual interest to psychology and the law is that of the legal system itself or, more correctly, the legal systems such as criminal justice, mental health law, family law and employment law which all are of interest to psychologists.

Within these systems psychologists have primarily attempted to extend their influence in the areas of decision-making covering jurisdiction, commitment, care and custody. They have also been active in the promotion of both "positive rights" (eg, the right to treatment) and "negative rights" (eg, the right to refuse specific treatments).

Change to the systems themselves has also been sought through changes in the law. The sobering conclusion to date for

psychologists working in or close to such legal systems is that it is difficult to achieve "fundamental change through the law... (in systems)... where decisions are so unstructured and inaccessible to direct legal regulation" (Monahan and Loftus, p 454.)

Perhaps as King (1982) has suggested psychologists have misperceived the legal system in that it is not a system in a strict scientific sense. Rather it operates in conjunction with political, economic, cultural and philosophical forces which must mix with any inputs from psychology into the structures and operations of the legal system. At this level there are limits to the power of psychology in the making of law just as we are seeing the potential for limits to the power of psychology under the law which is the final theme I wish to develop here.

The "Law" of psychology

Under this heading consideration is given to the legal regulation of psychology, which was until recently a phenomenon of North America and to a lesser extent Europe. Now of course, the Psychologists Act (1981) in New Zealand sets out to reserve the term Registered Psychologist for those psychologists who by dint of degrees and experience are considered by the Board to be worthy of being a registered psychologist. As yet the Board through its operations or schedules attached to the Act has not regulated the actions of such psychologists. Covertly, however, registration decisions will signal some measure of regulation (or lack of it) over what really constitutes sufficient education and experience in psychology to be registered. We do not have an Act registering psychologists that delineates what they may or may not do, nor as yet a body of case law under the Act that might attempt to define any of the boundaries of psychology or competencies of psychologists. But, it is very early days. I take it that you are familiar with the fact that this is not necessarily the case elsewhere.

In the United States a wide variety of issues relating particularly to psychological assessment, access to services, and child care and custody which involve psychology and psychologists have reached the Courts and lawfully binding decisions effecting psychologists and others are being arrived at by legal processes. Bersoff (1980) has presented a very thorough review of legal regulation of psychological assessment in the public schools in the US which could be studied to advantage with respect to practices in New Zealand.

Now, it is true that we in New Zealand look primarily to the United Kingdom with respect to legal precedent, although increasingly in many areas of legal practice, and especially on a range of social and family related issues, consideration is given to both US Supreme Court and State Court decisions and to Federal and State legislation. However, the regulation of psychology under the law has also occurred in the United Kingdom. A case in point was the complaint made against the APU Occupational Interests Guide under the Sex Discrimination Act which brought about changes to that instrument (see Freeman, 1979; Closs, 1976, 1979). It does not take too much imagination to look beyond the Psychologists Act (1981) to other New Zealand legislation to see the potential for the law to regulate psychology here. Indeed a New Zealand Psychological Society Working Party and then Interim Committee reported to Council on implications for psychologists of the Human Rights Commission Act (Barrer, 1981). But, where is that concern now? There is little evidence that psychologists in New Zealand are being in any way formally educated about the interface between psychology and the law, the contributions of psychology to law and law to psychology and the regulation of psychology by the law.

The Tests and Standards Committee of the Society was recently directed by Council of the New Zealand Psychological Society to look at a request from the International Test Commission for information on local legistration with a bearing upon the use of psychological tests. While the Committee had a particular focus in relation to this request it was evident that psychologists, and particularly those engaging in applied professional practice, should be conversant with the substantive aspects of:

(a) The Race Relations Act 1971 (and amendements).
(b) The Human Rights Commission Act 1977 (and amendments).
(c) The Psychologists Act 1981.
(d) The Official Information Act 1982.

In addition some groups of psychologists should pay particular regard to the details of the Mental Health Act 1969, and to a range of criminal justice and penal legislation, both of which are currently under review.

The need for a heightened awareness was spelt out in a recent Consumer Institute publication (August 1983). In reviewing some of the likely consequences of the Official Information Act it was noted that, "the psychological services of the Education Department and divisions of the Justice Department may will have to reveal to clients the case notes that have been made about them or else claim that disclosures would be likely to prejudice the physical or mental health of the clients". Given that the above would also largely be true with respect to institutions and agencies of the departments of Health, Social Welfare, Labour and Defence, many psychologists in New Zealand should display a new regard for the letter and intent of some laws.

It is said that "ignorance is bliss". Perhaps in our professional roles, as distinct from scientific and academic pursuits, psychologists have been exceedingly blissful. Our happiness may not last as provisions for legal adjudication of disputes involving or against psychologists are invoked. Already, a quick tour through the schedules of complaints of the annual reports to Parliament of the Human Rights Commission indicates that issues relevant to psychology and possibly involving psychologists and psychological practice have been considered. Examples would be Case A81 on questionnaire design, Case A1169 on bias in employment interviews, Cases A1022 and A1302 on examination and test bias or cases A1086 and A1156 on selective entry and selection criteria.

A concluding comment

How then does psychology in New Zealand measure up with reference to knowledge of the law and involvement with legal process? Not particularly well would have to be my answer. Without either university teaching departments or the Society taking a stronger lead we or a psychologist colleague may shortly be caught out in Court.

As a lawyer friend remarked "Don't rely on being self-taught about the law of torts". In our jargon, psychologists need to attend to the behaviour of laws as well as the laws of behaviour.

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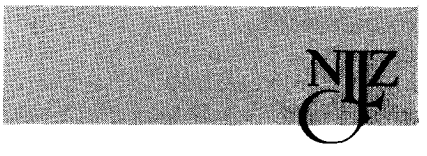
1. This paper owes a great deal to the stimulating review of the relationships between law and psychology by Monahan and Loftus (1982) "The Psychology of Law", in *Annual Review of Psychology*. The debt is not disguised. I am also grateful for the advice, comment and material provided by Mr Patrick Downey, former Chief Human Rights Commissioner, Mr Michael Keys, Solicitor, Palmerston North, and Mr Timothy McBride, Senior Lecturer in Law, University of Auckland.

For references to the works cited in the text see p 372



Police complaints procedures

The release of the report by Colin Nicolson QC on the police investigation of the circumstances surrounding the shooting by a police officer of Paul Chase has stimulated public interest in and discussion of such tragic incidents. The following paper is on the broader question of procedures for making and dealing with complaints against the police.

This paper is one issued by the Public Issues Committee of the Auckland District Law Society. Its views are its own. It cannot and does not necessarily represent the views of all lawyers nor has the subject under discussion necessarily been considered by the Council of the Auckland District Law Society.

The committee was formed to encourage its members to consider and comment on public issues, for the public benefit, it is hoped, particularly public issues with a legal element. The committee's standing must stem solely from the quality of the papers it releases and the comments it makes.

In a paper earlier this year, we advocated the holding of an inquiry, with an independent judicial element, into each incident involving the potentially dangerous discharge of a firearm by the police. This left for separate consideration the wider question of police complaints procedures generally, and in particular the handling of complaints made by members of the public which do not arise out of firearms incidents. This broader issue is one on which there has been increasing public concern in recent years, particularly since the 1981 Springbok Tour, when numbers of protestors who had laid complaints concerning police action publicly expressed dissatisfaction with the handling and outcome of complaints.

The recently released report of the Chief Ombudsman, sustaining 75 out of a total of 173 complaints made to him concerning police actions during the Tour has further fuelled the public debate.

In the latest annual Report of the New Zealand Police just presented to the House of Representatives, the Commissioner of Police announced the establishment of a national recording and monitoring system for all complaints against the police, and commented:

> Currently the entire complaints system under review with the objective of ensuring that we have an arrangement which is not only the most fair and efficient practicable, but is seen to be so.

We consider the time is ripe therefore to consider the present system of dealing with complaints and its adequacy, and to indicate this Committee's views of the possible alternatives to the present system.

The present system

The present system of dealing with complaints against the police is largely an informal one. It involves the citizen who complains of the conduct of the police making his or her complaint direct to the senior officer in charge of the particular police district concerned. The police regard themselves as bound to investigate all bona fide complaints. Indeed, Police General Instruction J80 (1) provides:

> Investigations into complaints made to the Police about the Service or individual members, and other internal investigations that are undertaken into suspected cases of misconduct must be conducted thoroughly and fairly so that:
>
> (a) the particular issue is resolved, and
>
> (b) the public's confidence in the ability of the Police to conduct its own internal investigations is maintained.

Usually, a written statement is obtained from the complainant and all known civilian witnesses. In the majority of cases, the complaint is investigated, or at least reviewed, by an officer of inspector's rank. It is normal practice also for all police personnel involved in the incident which gave rise to the complaint to be interviewed.

If a complaint upon investigation is regarded as substantiated, it may then be the subject of disciplinary charges and a full Police Tribunal inquiry under s 33 of the Police Act 1958. Alternatively, a substantiated complaint may be dealt with under reg 46 of the Police Regulations 1959, which lays down no less than 62 disciplinary offences. A further possibility is that the subject matter of the complaint may form the basis for a criminal prosecution against the police officer concerned.

Until last year it appears that the police, while keeping statistics on the number of charges brought against their members under either the Police Act or Regulations, did not keep statistics in respect of the number of complaints received but not proceeded with as formal disciplinary offences, or of the outcome of such complaints. The lack of hard information in this area has made it impossible to assess either the success rate of complaints against the police or indeed the effectiveness of the present informal procedure. In the Police Commissioner's latest annual Report, we are told that a total of 246 complaints were made against the Police during the 1982 calendar year. Of these, a total of 42 (17.08 percent) were found to be "justified". The actual outcome of these complaints and the action taken is not made clear.

It is further to be noted that the present complaints system, both at the informal initial level and at the level of disciplinary proceedings, is closed to the complainant, the public and news media. The complainant may participate in disciplinary proceedings by giving evidence as a witness, but will not otherwise be permitted to participate or to be present.

If a complaint is investigated and rejected by the police as unsubstantiated, a complainant may complain further to the Ombudsman against the police rejection of the complaint. It is not possible to complain to the Ombudsman direct (Ombuds-

men Act 1975, s 13(7)(d)). The Ombudsman's jurisdiction is limited in law to "matters of administration", and accordingly, the Ombudsman is required to, and usually does, limit his investigation to considering whether the police have carried out a thorough and speedy investigation. The Ombudsman's function is therefore to review the police investigation and consider whether the police handling of the complaints was satisfactory as a "matter of administration". He is not entitled to hear and determine the original complaint itself. Thus the Ombudsman's inquiry is not a fresh inquiry, and indeed may come many months after the event. He cannot, and does not usually attempt to, resolve questions of conflicting evidence as between the complainant and a police officer.

In addition to the system of police complaints, there are certain theoretical alternatives open to a citizen who complains of police misconduct. Where the misconduct complained of may constitute a criminal offence, it is open to him to bring a private prosecution against the police officer concerned, assuming the officer can be identified and located. The complainant may bring an action for damages against the police officer concerned or against the Crown in a limited range of circumstances. He may sue for exemplary damages for assault, or for damages for false imprisonment or trespass to property, if any of these situations has arisen.

Where the citizen is himself facing a criminal charge in respect of the same incident as gives rise to his complaint, he may be able to raise the subject matter of the complaint as part of his defence to the criminal charge.

Where a death has occurred, the family of the deceased may be able to raise matters of concern at the coroner's inquest into the death.

It is our view that none of these alternatives to a full complaints procedure is adequate. The private citizen generally lacks the financial and other resources to carry out a proper investigation, or to pursue either a private prosecution or an action for damages. Nor are these remedies available in many complaints situations, in particular where there is a complaint of high-handed police behaviour falling short of a criminal offence or other breach of the law. Clearly also, an inquest will not be of any relevance to the majority of police complaints; and is in any event directed simply to determining the narrow question of the cause of death.

So far as civil actions claiming damages against either an individual police officer or the Police Department, or both, are concerned, these are, as we have stated, available only in a limited range of situations. In addition, the expense of mounting such proceedings is such as to make them totally impractical as an effective, across-the-board remedy. Moreover, s 60 (3) of the Police Act operates as a very great disincentive to actions for damages against either individual police of the Police De-partment. That subsection provides in part that if a plaintiff is unsuccessful in an action against the police, the defendant "shall recover his full costs as between solicitor and client".

The effect appears to be that it is mandatory for the Court to award to the police the whole of their legal expenses. This means that a plaintiff suing the police runs the risk that he will be ordered to pay a sum which may run into many thousands of dollars if he does not succeed. The subsection goes on to state that even if a plaintiff is successful, he is not entitled to costs unless the Court "certifies its approval of the action". These provisions involve a complete departure from the basis on which costs are normally awarded and assessed in civil actions, and are the only such provisions that we are aware of in our law. While as already indicated we do not consider that a civil action against the police provides an adequate remedy on its own, we do not believe that the police should enjoy the favoured position which they do under s 60(3). The subsection should be repealed, leaving the police in the same position as to costs as any other litigant.

The defects of the present system

We believe that there are a number of defects in the present largely informal system of dealing with complaints against the police. First and most importantly, the system offends against a basic legal principle: that is, that no one should be Judge in his or her own cause. In retaining control of the complaints procedure from first to last, the police are investigating themselves; and no matter how conscientiously they do it, the process by which results are reached is in our view fundamentally flawed. This point has been made by a number of eminent commentators, some of high judicial rank. It was made most recently by Mr Justice Stewart in the Report of the Royal Commission into Drug Trafficking in Australia and New Zealand:

> Fundamentally, the question is philosophical and so basic to western society's notions of justice and fair play that anything that does not take account of it is unacceptable.

He goes on to say:

> In the whole of the debate about police regulation and accountability and the manner in which complaints should be handled, the question most often asked is how can justice be done if police are ultimately Judges in their own cause, at each stage from complaint to final disposition? Where is the check on corruption if there is no independent audit? It is clear that a number of complaints made against the police are the product of malicious, vexatious, disturbed or criminal minds; equally clearly there are many genuine complaints who cannot be so classified.

Secondly, we consider it open to serious question whether the present system operates effectively. To be effective, we consider that a complaints system should operate to the reasonable satisfaction not only of the police but of complainants. While clearly there will always be a significant number of complaints against the police which are quite unjustified, such statistical material as is available supports our own collective impression that a low percentage of complaints is actually upheld. This fact coupled with the absence, in the vast majority of cases at least, of any detailed reasons for the rejection of the complaint must in our view leave a large number of complainants dissatisfied with the police handling of their complaint.

Thirdly, the present system operates in almost total secrecy and therefore without any real accountability to the public either directly or through their chosen representatives in Parliament. While we accept that there are reasons why some aspects of the process should be kept confidential, we do not consider that the present almost total blackout of information of any sort of the workings of the procedure is either desirable or consistent with current trends away from secrecy and in favour of freedom of information.

Fourthly, we consider it highly likely that the present system operates to deter a significant number of potential complainants from complaining. At present, someone wishing to complain about the actions of the police has no alternative to lodging his or her complaint with the police themselves. In practice, this means submitting to an interview at a police station, quite possibly the very station at which the subject matter of the complaint occurred. The interview is carried out by a member of the body of persons about whom the complainant is complaining. This must in our view be a daunting and discouraging prospect for a significant number of potential complainants.

A further defect of the present system arises when the complainant is facing a criminal charge relating to the same events as his own complaint. This may occur

when there are conflicting allegations of assault as between complainant and a police officer, and the police charge the complainant with assault. The pursuit of a complaint to the police in such circumstances follows the normal procedure outlined above. That is, the complainant and any witnesses are interviewed and invited to give a written statement. In some circumstances, this may involve the complainant or a witness in an admission of criminal wrong-doing. At the very least, the police will be presented with a full outline of the defence case and statements from all witnesses which can be measured against their testimony in Court. This runs counter to accepted notions of criminal justice, which permit the defendant to refrain from revealing the nature of his defence and the names of his witnesses until the prosecution has proved its case against him to at least a prima facie level.

The Chief Ombudsman's recent report illustrates in the course of the analysis of a number of the specific Springbok Tour related complaints, the considerable number of difficulties that do arise in practice with the present system.

The need for reform

Notwithstanding a number of serious defects in the present system, it may be argued by some that the issue of police complaints procedures is not of sufficient importance to warrant the introduction of change, particularly change which will necessarily be major and costly. We believe that the issues raised transcend the interests of individual complainants whether past or future. They are quite inseparable from the issue of public confidence in the police.

In this connection is must be stressed that in the public interest we give the police, quite properly, a wide range of powers not possessed by any other members of our society. The police are entitled by law in appropriate circumstances to restrict freedom of movement on public thoroughfares, to enter private property, and to take citizens into custody. In all of these areas they have greater power than the ordinary citizen. They are entitled by law in appropriate circumstances to utilise a greater degree of force than is the ordinary citizen.

We entrust these powers to all members of our police force without question, from the most junior constable fresh from Trentham to the most senior and experienced officers. While we must, of course, recognise that the police are only human and make mistakes like the rest of us, by the very nature of the powers they wield and the training they undergo, a high standard of conduct is to be expected of them.

If therefore an allegation of abuse of power or excessive force is made against a member of the police, it is in our opinion of the greatest public importance that such an allegation be properly investigated and, if necessary, made the subject of remedial action. The same point is made in different ways by two leading Judges, one English, the other Australian:

> A complaints procedure which is generally acknowledged to be fair and impartial — to the public and to the accused police officer — is essential if the police are to enjoy the degree of public support they must have in order to discharge their onerous and necessary task. If public confidence in the complaints procedure is to be secured, the early introduction of an independent element in the investigation of complaints and the establishment of a conciliation process are vital.

(Lord Scarman, *Report on the Brixton Disorders, 10-12 April 1981*).

> The police are in the vanguard of the administration of justice in our society. The honour and discipline of the force are integral to its effectiveness and must be maintained. Complaints do occur and are likely to increase with growing knowledge of and sensitivity to rights. Some will be vexatious. Others will be unjust. Still others will be justified and will require action. The machinery for action must be fair and just to the police and public alike. For the appearance of justice and for the protection of the standing of the police, the procedure can not be left wholly to the police themselves.

(The Honourable Mr Justice Kirby, Australian Law Reform Commission Report No 9, *Complaints Against Police*).

The need for reform in this area has been recognised in England, Canada and Australia. As will be mentioned later, change has already been introduced in Australia at the Commonwealth level. In the Stewart Report referred to earlier, a strong recommendation is made for the introduction of similar changes at State level.

The alternatives for change

Broadly speaking, the complaints process can be divided into three separate stages:

(i) Reception of the complaint;
(ii) Investigation;
(iii) Determination (including conciliation and formal ajudication, where either of these is appropriate).

An attempt to introduce an independent element into any of these three stages runs at least two risks. The first is that it may shift the responsibility for the discipline and morale of the police force away from the Commissioner of Police, whose primary responsibility it must always be. The second is that if change is introduced without the confidence and support of the police as a whole, it will fail due to the lack of the necessary co-operation at all levels of the police.

The Complaints (Australian Federal Police) Act 1981, a Commonwealth of Australia statute dealing only with Federal, not State, police, is an attempt to balance the various competing considerations referred to in the course of this paper. Briefly, the Act provides a complaints procedure for two separate classes of complaint:

> Complaints about "action taken" by a member of the police where the complaint is "in substance about the practices and procedures of the Australian Federal Police"; and
> Complaints about "action taken" by a member of the police which do not relate primarily to practices and procedures; in particular, complaints about specific instances of misconduct by police officers.

Complaints of either class may be laid either with the police or with the Federal Ombudsman direct. The general scheme of the legislation, however, is that the police themselves have the initial responsibility for investigating the second category of complaint, which will generally involve allegations of specific wrongdoing. The Ombudsman has the primary responsibility for investigating the first class of complaint, which is more likely to involve mainly administrative matters.

For the purpose of investigating the specific allegation class of complaint, a separate division of the Federal Police is created, the "Investigation Division". Specially chosen staff of this Division have power (as does the Ombudsman) to require police officers to produce documents or answer questions, notwithstanding that this may tend to incriminate the officer concerned. However, the answers to questions and the documents produced are not admissible in evidence in civil or criminal proceedings. In addition, the Ombudsman must be supplied with particulars of *all* complaints referred to in the Investigation Division.

The Investigation Division must when the investigation is complete provide copies of a report in writing of the result of the investigation to the Ombudsman, the member of the police concerned and to the complainant. The Commissioner of Police is then to consider whether action should be taken by way of charging the member concerned with a disciplinary offence, and must "confer" with the Ombudsman con-

cerning any action which he proposes to take or not to take as the case may be. Where the Commissioner and the Ombudsman cannot agree on the proposed action in respect of the complaint, the matter is referred to the Attorney-General for his direction.

In respect of complaints concerning practices and procedures, the Ombudsman has broad powers, and may conduct his own investigation, with or without police assistance. After investigation, the Ombudsman has wide powers to report and make recommendations. Where in the case of complaints involving specific allegations the Ombudsman considers that the complaint is being or has been inadequately investigated, he has additional powers, and may if he so desires conduct his own investigation.

Provision is also made for conciliation of complaints both by the Commissioner of Police and by the Ombudsman. A Police Disciplinary Tribunal presided over by a Judge is also set up to deal with disciplinary charges against officers.

A different mode is currently being proposed by the New Zealand Police Association. The Association proposes the creation of an office of "Examiner of Police Practices and Procedures". The Examiner is to be a Judge of the High Court, or is to be given that status. He is to be under the administrative direction of the Chief Justice. His role is to be confined to maintaining an oversight of police methods, with power to recommend changes where appropriate to the Commissioner of Police. Responsibility for police practices and procedures and the decision whether or not to prosecute in particular cases is to remain solely with the Commissioner of Police.

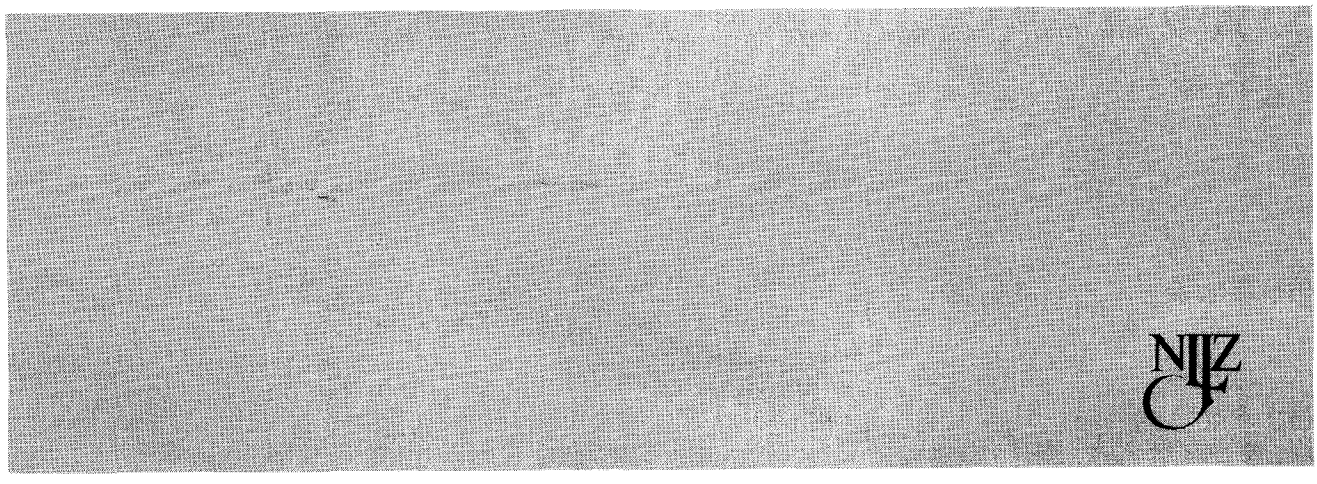
A number of other options have been proposed by various interested parties. These include the appointment of a High Court or District Court Judge in each police district to supervise and review police investigation of complaints generally; and the creation of a "Police Ombudsman" either utilising a lawyer appointed for that purpose or the office of the existing Ombudsman.

We do not think that the Police Association proposal goes far enough, in that it is limited to investigation of police practices and would not appear to provide a workable system for reviewing the many relatively minor complaints about specific police misconduct which are nonetheless an important aspect of any complaints system. Furthermore, with the exception of serious incidents such as those involving police use of firearms, we believe that there would be problems with utilising a High Court Judge or someone of that standing to fulfil what we see as more of an investigative role than a judicial one. Indeed, we consider it quite likely that High Court Judges would be most reluctant to take on such a responsibility outside of their traditional area. As for the other proposals we do not consider that the defects in the present system would be sufficiently rectified by the introduction of a system of ex post facto review of an internal police adjudication of complaints. In effect, this already occurs to a large extent with the present system involving the Ombudsman, who has however on earlier occasions publicly pointed out serious weaknesses and limitations in his powers in respect of complaints about the police.

On balance therefore, this Committee favours the introduction of change along the lines of the Australian legislation outlined above. Two aspects of the Australian legislation may however need to be adapted for New Zealand purposes. In the first place, we would like to see, for the reasons already outlined, the first stage of the complaints process — that of complaints reception — taken out of the hands of the police. We would like to see the introduction of complaints reception centres, staffed by non-police personnel, to which persons wishing to complain could be referred. These centres could be at District Courts, and the function of complaints reception could easily be performed by trained Court personnel. In addition, the right to complain to the Ombudsman direct which is incorporated in the Australian legislation should also apply.

We are also far from certain that the creation of a special separate investigative branch for police complaints would be warranted. Experience overseas has shown that police officers under investigation are sometimes less co-operative with and more suspicious of a separate investigation branch than they are with a system which is integrated into the overall police operation. While therefore we are satisfied that the police are the best suited and the best equipped to deal with the investigation stage of the complaints processs, it may well be that a separate investigative branch would not be necessary or appropriate for this country. However, as the Ombudsman's report into Springbok tour complaints shows, the manner in which the police interviewers conduct themselves is of crucial importance in ensuring an absence of even the appearance of bias. Investigative personnel would therefore in our view have to be carefully selected and given appropriate training before commencing their duties.

In summary therefore, we consider that the present system of police complaints is inadequate and open to objection on a number of fundamental grounds. Change should be made by way of legislative amendment to introduce an independent element into stage one of the complaints process — that of the complaints reception — and to the final stage — that of adjudication of complaints. Generalised complaints about matters of police practice should be directly investigated by the Ombudsman. Conciliation processes should be introduced. It is our view that the need for change is a pressing one, and should not be delayed until some further period of social upheaval comparable to the 1981 Springbok tour is upon us.



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