THE NEW ZEALAND
LAW JOURNAL
21 AUGUST 1984

A new government

A change of government means more than a change of style, although what is often described or dismissed as merely a matter of style is usually indicative of a more basic change in attitude, in approach and in substance. Understandably the attitudes of the business community, including farmers, manufacturers, retailers, employers and trade unionists get most of the media attention. Given the economic situation this is proper, and indeed it represents our normal sense of priorities.

The legal profession has its own sense of priorities, and even within the profession there would be different expectations. One matter that has become obviously in need of attention is the whole situation concerning the legal machinery to effect a change of administration. It is an absurd anomoly that a government can be obliged by constitutional convention, in such circumstances as happened in the middle of July, to take steps to change the law in flat contradiction to its own policy and the basis on which it just fought an election campaign. Whatever the justifications for it, (and in this particular case of devaluation and controls on interest rates they were rather obvious), it puts the outgoing government in a situation of apparent hypocrisy that is unreasonable.

Changes of government are one of the essentials of the democratic system. The method by which this is done, the actual legal machinery, is therefore of great constitutional significance. The differences in the way this issue is dealt with as say between Great Britain and the United States, has a great deal to tell about the nature of the constitution in each country. In Great Britain the change-over is practically instantaneous, whereas in the United States there is a delay of 10 or 11 weeks. This is because in the one case an alternative government is elected, whereas in the United States an individual is elected as President and he then has to start to form an administration.

It is hoped to have the legal implications of the change-over machinery in New Zealand looked at in articles in future issues of the *New Zealand Law Journal* because it is a matter of considerable significance for the proper working of our democratic system of government.

P J Downey

Message to the Profession

From the Attorney-General

It is a pleasure to have the opportunity to convey a message to members of the legal profession. The two portfolios of Attorney-General and Minister of Justice are of great importance to the legal profession. I promise to do my best to uphold the high traditions of those offices.

As Attorney-General I shall use every effort to uphold the independence of the Judiciary and the rule of law. We are fortunate in New Zealand to have a legal profession of high quality which has shown itself to be increasingly aware of social attitudes and developments. It is a profession which is both competent and progressive.

The Government of which I am a member has policies which will make the lives of New Zealand lawyers even more interesting and challenging than they are now. The introduction of a Bill of Rights will be studied closely by the profession; it will need to be since the profession will have a major role in its implementation. The introduction of a full time Law Reform Commission will change the process of law reform in New Zealand. The reform of Parliament and the law making procedures will be of great interest to the profession.

I am aware also of the current difficulties in the administration of justice. Court accommodation continues to be a serious problem in too many areas. The problems of legal aid continue to concern the profession.

No doubt everyone knows the state of the economy means that the expenditure of new resources on the administration of the law cannot be expected at an early date. But I will make what improvements I can within the constraints which exist.

I look forward to working closely with the legal profession. These will be exciting years in the law.

Geoffrey Palmer
Attorney-General

The Public and the Courts —

A Parliamentarian's perspective

By Hon Geoffrey Palmer, Member of Parliament for Christchurch Central, Deputy Prime Minister.

There is published herewith the concluding Parts V and VI of a lecture given by Mr Geoffrey Palmer MP. This was the Annual Lecture in the Distinguished Scholars Program (sic) at the University of Windsor, Ontario, Canada, on 12 March 1984. In Part I Mr Palmer explained his background as an academic lawyer and more recently as a legislator. In Part II he spoke of his experience as a Law Professor at the University of Iowa in teaching courses concerned with the resolution of conflict within and without the legal system. In Part III he explains his involvement in the move for an Accident Compensation system separated from the concept of negligence as a branch of the traditional law of torts. Part IV dealt with the Social Welfare system as it has developed in New Zealand and the formal appeal rights built into the system. In Parts V and VI he speaks of his experience as a Member of Parliament, and the new view this has given him of the legal system; and then he sums up the points he has been making in the earlier part of the paper. It is these two latter Parts that are published here as being of particular interest to the legal profession. The complete text of Mr Palmer's address is to be published in volume V of "The Windsor Yearbook of Access to Justice".

In New Zealand a Member of Parliament has close contact with his or her constituents. The electorates have a total population of only 32,650. This makes a sensitive political environment in which many members of the public have the opportunity of transmitting their concerns directly and personally to their Member of Parliament.

Most New Zealand MPs conduct a weekly clinic in their electorates in which members of the public can have an interview with the MP. Many people telephone their MP to point out some weakness in Government administration and complain about a policy.

My own electorate is a central city seat which contains the business district of the City of Christchurch. It contains many flats and the population is highly transitory in the inner city area. It tends to be working class. It is an extremely safe Labour Party seat.

I have an office in the electorate in front of my house. It used to be a doctor's surgery. It is open for three hours each working day and on Saturday morning. The office is staffed by an electorate secretary who is paid mostly by me and partly by the party. I see constituents on Saturday mornings and sometimes on Sunday mornings. In addition many telephone my home.

In my electorate there are an average of 35 constituency cases per week. Many of those do not involve difficult questions and can be answered immediately with no need for further action by the MP.

Legal inquiries

Inquiries which are the most common are inquiries about the availability of state houses, social welfare benefits and the work of several other government departments. But a significant number of the inquiries are of a legal nature. This is probably partly due to the fact that it is well known by the public that I was a law professor before going into Parliament. And since being in Parliament I have spoken frequently on legal and constitutional matters. This has certainly led to constituents with legal problems trying to get a little free legal advice or trying to check out the quality of the advice they are already getting. There is a quantifiable relationship between the frequency of constituency inquiries and the television exposure of the MP. If I am on a current affairs television programme on Sunday evening, for example, the electorate office tends to have very many inquiries on Monday morning.

I say this to indicate that the selection of constituency cases is not random. No doubt a farmer MP in a rural electorate has a constituency caseload quite different from mine. Nonetheless it is a noticeable feature of my caseload how frequent and widespread are complaints about the legal process. And despite my legal background I am confident that many Members of Parliament have frequent complaints about the operations of the legal system.

For example, one of my constituents asked me to read the trial transcript of a Tasmanian murder case arising out of the death of my constituent's brother. He felt more should have been done to secure a conviction.

A businessman rang me the very day I wrote this portion of the lecture saying he had been advised that a civil action in the High Court in

Christchurch could not be heard before 1985 and his firm would go broke if it could not secure a substantial judgment before then. What could I do? Indeed, the range of constituency cases involving the legal system and its performance has worried me. The system seemed to me to be performing much better when I was a law professor than it has seemed to be performing since I have seen it through the eyes of my constituents.

I have gone back through the records of four years of constituency inquiries to try and quantify what the concerns are. The cases examined only relate to those of which a record has been kept and I only keep a record if some further action from me is possible or likely to be called for.

Analysis of 4 Years Constituency Inquiries in the Electorate of Christchurch Central, 1 October 1979-30 September 1983

Total number of Cases	909		
Number of Cases involving disputes capable of being dealt with by the legal system or complaints concerning the administration of justice	126		13.8%

Categories	*No of Cases*		*%*
1 Disputes between two parties:			
Family	18		
Neighbours (including gangs)	22		
Other	8	48	38.10
2 Consumer & Business disputes		11	8.73
3 Disputes with a Government agency		30	23.81
4 Complaints about the administration of justice:			
Concerning Lawyers	5		
Concerning Police and Traffic Officers	10		
Other	22	37	29.36
		126	100.00

Personal disputes

The first category is easily the biggest and is dominated by disputes between neighbours and family disputes. In the family disputes custody and matrimonial property were the dominant issues. New Zealand has a statutory system of community property in which in most cases the property is split 50/50. The grounds for divorce are living apart for two years. There is a new Family Court which is non-adversary and which emphasises counselling. Despite all these developments these family disputes wound people deeply. And the Court processes associated with them are resented, even hated.

Disputes involving neighbours are bitter beyond anything I had believed possible. In my electorate there are always three or four gangs at any one time. They are motorcycle gangs for the most part. They have names like the Devil's Henchmen and the Mongrel Mob. They fortify their houses. They engage in something which approaches warfare with rival gangs. They hold rowdy parties. They tend to terrify neighbours. They involve very difficult legal problems as their activities disturb the quiet enjoyment of the properties of people who live in the vicinity. While they have very strict surveillance from the police the problems are serious for the neighbours. Property values decline near gang homes. Sleep is often difficult.

Disputes between tenants of multiple flats are also common and cause a high level of emotional resentment. I have found no satisfactory way of resolving the disputes. It should be noted, however, that landlord and tenant cases do not appear in these records. Although complaints are frequent, they are referred directly to the Tenants Protection Association which provides an excellent system of advice.

Disputes with business and government

Business and consumer disputes are surprisingly uncommon but when they do occur they centre around hire purchase and insurance.

Disputes with a government agency (including local government) are the grist of the MP's workload and usually involve correcting oversights in administration. These are the interventions described in the previous section of this lecture – social welfare benefits and housing comprising the majority of cases. But there are also a number of disputes involving the Government which contain a significant legal element: immigration, customs matters, the processing of licensing applications of various types, and Social Welfare Department action in respect to supervision of children.

Administration of justice

Disputes about the administration of justice. There is a category of constituents – fortunately rare, but totally obsessive – who have a sort of litigation neurosis. They sue. They often represent themselves. They lose. They have a sense of grievance that goes on for ever and they are always trying to interest someone in it. I had one constituent who thought the police were directing laser beams up his rear end. He had been a committed patient in a mental hospital some years before and felt the police were responsible for that. He had tried every legal remedy he could against them.

Some of these obsessive litigants become quite learned in law in a strange way! But I find them very sad. They can never be convinced to give it away. And sometimes there is an injustice at the very beginning which cannot later be rectified.

Mental hospital patients are frequent complainers concerning the justice of the procedures which caused them to become or remain patients.

There are complaints about members of the legal profession – what they have done, whether they should have done it, whether they were negligent. I refer these constituents to the Law Society to make a complaint, but I doubt that many do.

I should add that a great many complaints about the legal profession are received over the telephone – probably an average of two a week. But since I cannot do anything about these in most instances, a record is not kept.

Included in this category are

complaints about the conduct of the police. These were frequent about the time of the Springbok rugby tour when they played their test match in my electorate in 1981.

Matters of concern

There are dangers distilling insights from the data I have presented. Some of the insights are not capable of quantification. But from the records a number of features emerge.

First, and perhaps no great surprise to anyone, for most of those who have been involved with the judicial process there is great concern at the delays. Sometimes it is because the Courts have too much work. Sometimes it is because there have been adjournments. Sometimes it is because the lawyers involved have been dilatory (it is well known among potential litigants that going to law takes a long time). But most of the people I deal with want to have action fast. They are simply not interested in going to law if delay is involved and it always is.

From the point of view of the person in the street there is great truth in the legal maxim justice delayed is justice denied. For many constituents to whom I suggest going to a solicitor with a view to taking a case in Court, the prospect of delay makes the option an unacceptable means of resolving the dispute. Relief is not sufficiently proximate to be attractive.

There is another set of objections frequently encountered. The intitial step of visiting a lawyer is frequently resisted. Lawyers inhabit formal looking offices which for many of my constituents make up a rather forbidding and intimidating environment. There is in my electorate a Citizens Advice Bureau in which it is possible to get preliminary legal advice and it is well used. Nonetheless, it has surprised and saddened me coming as it were from the other end of the law, how easily discouraged people are from seeking a legal remedy by the social factors involved in using "the system".

Associated with this hesitancy to take the first step is the question of cost. While New Zealand has a reasonably good system of civil legal aid it involves examination of means and litigants are expected to make a contribution to the expenses in proportion with their ability to pay. How much is not known at the beginning. And inflation has certainly eroded the limits of the legal aid scheme. The question of expense is an extremely important deterrent for many of my constituents.

In Christchurch we have a Small Claims Tribunal presided over by a referee and designed to be informal, quick and cheap. I have had some success in persuading constituents to take some of their troubles there, but I have also had a couple of complaints about the results. There is one irreducible fact in all litigation. Someone loses and they tend not to like losing.

The Small Claims Tribunals are not yet spread all over New Zealand and I would certainly advocate that they should be. The jurisdiction is limited to $500 per claim, which is probably too low. The Tribunal appears to be particularly good in the ordinary sort of consumer problems over the sale of merchandise. It is not empowered to handle most of the issues involved in disputes between neighbours.

Civil litigation and the citizen

The most serious conclusion I have reached is how little relevance the techniques of civil litigation have to the problems of ordinary citizens. For most of them the law of torts may just as well not exist. Negligence, nuisance, defamation, trespass to land, the police torts are often highly relevant to the needs of ordinary people. But they just do not bother because it will take too long, cost too much or involve a lot of trouble. Let me underline the attitude with an example.

An old lady was being kept awake repeatedly at night by the activities of a nearby gang. She was ill and found the activities of the gang made it impossible for her to sleep on many nights. I went and personally investigated the situation closely. Then I wrote her the following letter:

> Dear Constituent:
> Following the visit my wife and I paid to your house on Saturday night I have been thinking a great deal about the problem you raised in your letter and the accompanying petition concerning the objection of residents to "The Devil's Henchmen" who occupy the premises at 75 Barbour Street.
>
> On the evening in question it was difficult for me to form a proper appreciation of the question since the premises were quiet. I came back on Sunday afternoon and saw a large number of youths drinking beer and lounging around on motorcycles in front of the house. But there was nothing in their conduct at that time which was in any way contrary to the law.
>
> I have read the letters forwarded to you by the Associate Town Clerk on behalf of the Mayor. I have made some enquiries from Councillor Caygill, who is also one of my colleagues. He confirms the view that there is no bylaw under which the occupants of number 75 Barbour Street can be evicted by the City Council. It would appear therefore that the Mayor has gone as far as the law will permit him by requiring compliance with the Housing Improvement Act 1945.
>
> The only solution which seems available to you would be to approach your solicitor and ask him to bring civil proceedings in the Court for private nuisance. If the noise is so great, so prolonged and so repeated as to make ordinary residential use of the surrounding premises impossible, I believe that a Court will grant an injunction against the owner of the premises to prevent him and his tenants using it in such a manner. Should all the petitioners who signed your petition be prepared to contribute to the cost of such proceedings, then the cost for each individual should not be too great.
>
> I believe the law does provide a remedy if the noise disruption and inconvenience can be proved to be so great as to seriously disturb people of ordinary sensibilities. There is a case decided in New Zealand which will be of some assistance to you: *Bloodworth v Cormack* (1949) New Zealand Law Reports 1058.
>
> . . . A letter from your solicitor to the landlord may induce him to give notice to the tenants rather than undergo the expense and embarrassment of legal proceedings.
>
> Please don't hesitate to get in touch with me if you believe there is anything further I can do in the matter. I might add that I myself live in a house which is next door to a house occupied by the Mongrel Mob. But so far I have found no reason to complain about their conduct.

My constituent wrote to me regretting

that I was unable to "assist her in any way". The suggestion regarding civil action was simply not regarded by her as even worth considering. She wrote to the Prime Minister. He replied that gang members had to live somewhere. On receipt of this somewhat peremptory communication my constituent regarded my efforts with more favour.

Gang cases have been a significant problem in my electorate. There have been a number of serious incidents concerning them – even a case of homicide in which a shot gun was discharged from a car into a house.

A constituent asked me to come and see where pellets had lodged in a wall near where his daughter slept. Another case involved molotov cocktails being lobbed over the fence of an 80-year-old constituent. They did not go off and were there for me to see when I went round to have a look. I did have one enterprising neighbour who bought the house the gang were in, but that option is not available to many.

In the case of gangs I have tried to persuade the City Council to enforce its building bylaws to prevent the fortification of houses – but there is a marked reluctance to do this. And the problem tends to fade into a question of inadequate legislation. Noise is another problem for which there is no adequate law.

So far as my constituents are concerned they tend to the view that either a problem can be dealt with by the criminal law or it cannot be dealt with at all. Civil remedies are little known and not much regarded when they are known. That is why I tend to the view that we are living in the twilight of civil litigation. I suggest as a result of this experience that the civil Courts are of growing irrelevance.

The reluctance to approach the legal profession concerning disputes must have consequences for dispute settlement. Elihu Root is reported to have said, ". . . about half the practice of a decent lawyer consists in telling would-be clients they are damned fools and should stop". In other words, law offices function as places which dispose of disputes without going to Court. It is done by discouragement and it is done by bargaining. But if the client never enters the system the dispute settlement mechanism does not operate. Instead anger and frustration remain unabated.

There are one or two signs of fresh avenues emerging for the resolution of some of the disputes I have described here. Last year the New Zealand Parliament passed the Community Mediation Service (Pilot Project) Act 1983. If facilitated the establishment and operation of a voluntary community based mediation service in Christchurch. The idea for the Bill came from a lecturer in law at the University of Canterbury who is an Australian. She had had substantial experience with the legislation establishing a mediation service in New South Wales. Jane Chart [as quoted in 452 NZ Parliamentary Debates 2330] described the purpose of the service:

> Mediation involves disputants voluntarily coming together in a neutral place with an impartial third party who assists them to reach a *mutually* acceptable resolution of their differences. In contrast to adjudication, the objective of mediation is that both parties should emerge as winners.

When this new service begins soon in Christchurch I shall be interested to see how many of my constituency problems can be funnelled into it.

General themes

Drawing the strands of these divergent themes together is not easy. I shall attempt it in a tentative fashion only. The conception of law shared by many of my constituents revolves around the police and the criminal law. Adjustment of disputes through the civil Courts is not an option acceptable to most ordinary people despite the existence of legal aid.

It is not so much a question of unmet legal needs as a question of unacceptable or unapproachable legal processes. The process and culture of the law are not congenial to a great many people in the community.

The universe of lawyers revolves to a great extent around the Courts. That concentration is too great and has persisted too long. Other methods of dispute settlement more in tune with the attitudes of the community need to be developed. Community mediation and similar developments are to be encouraged. My impression based on the experiences set out here is that the legal profession lags behind the community, especially the more humble section of it, in its attitude to dispute settlement.

It is obvious enough that the Courts are a less important part of the whole machinery of Government than they were a century ago. The development of the welfare state and the methods of administration which have grown around it make that inevitable. And modern administrative law can play an important role in preserving standards through judicial review in the superior Courts.

But in the end the access to justice issues have to be decided on the quality of performance at the sharp end. Politicians are likely to have a greater impact on that than Judges. The lawmaking powers of the higher Judiciary are important and I see scope for expansion of these – I advocate, for example, the adoption of a Bill of Rights for New Zealand.

I am left finally in the position of advocating pluralism in dispute settlement. We need a variety of approaches and institutions to deal with the variety of people and disputes. The right mix will always be an issue of controversy and it will be difficult to achieve. Creativity, diversity and a willingness to experiment will be the way to solve access to justice problems in the future.

The access to justice perspective is an enriching method of analysing the problems of the modern welfare state. The issues are difficult and the methods of analysis are still in their infancy. The challenge needs to be grasped or the drift towards anarchy will grow perceptibly stronger. □

. . . and a good Judge too.

What is it like to be a Judge? Most of the time it is very satisfying. One enjoys the prestige. Courtrooms contain every symbol of authority that a set designer could imagine. Everyone stands up when you come in. You wear a costume identifying you as, if not quite divine, someone special. Attendants twitter all around. Most striking, at every sitting, at least two highly trained lawyers, whose job it is to talk, who *love* to talk, allow you to interrupt them whenever you want.

– **Irving R Kaufman,**
Chief Judge of the US Court of Appeals for the Second Circuit.

"Negligence" in pursuit of fairness

By J Cadenhead of Christchurch

This article is based on a paper given by the author to a Wellington District Law Society seminar in June 1984. The author was counsel for the appellant in the Meates *case. The article explains the background to that decision in the developing law of negligence. In an earlier article on this subject in (1983) 1 Canta LR 25 the author made particular reference to an article in the* Cambridge Law Journal *by the Rt Hon Sir Robin Cooke on "Remoteness of Damages and Judicial Discretion" (1978) CLJ 288.*

> The law of unjust enrichment – and the principles of equity more generally – cannot have ceased growing at some climatic date in England, any more than tort law stopped before *Donoghue v Stevenson*.
> – Cooke J in *Hayward v Giordani* [1983] 1 NZLR 140, 148

Fairness

It may be wondered what a quotation concerning the evolving field of constructive trust is doing in a brief commentary on the modern law of negligence. It is the belief of the writer that since the late nineteen seventies the civil law of obligation has developed apace towards a common quest of endeavouring to attain essential fairness between man and man. Certainly, in regard to the law of negligence, this has given rise to outbursts alleging judicial irresponsibility, as, it is said, Judges freed from the shackles of particularised relational duties are left to administer justice according to the essential merits between the parties.[1]

Negligence in this regard, being a duty imposed by the law, has developed towards this goal no more rapidly than other areas. The attacking role of the constructive trust has been considerably enlarged by *Hayward v Giordani* (supra) particularly now that the same may be "imputed" and that it may no longer be necessary "to fashion phantoms of common intention in order to resolve the property relations between parties". Again the recognition that "unjust enrichment" lies at the heart of the constructive trust is an exciting conceptual development. Constructive trust need no longer rest entirely on the concept of equitable fraud.

Estoppel

Another instrument in the effort to attain essential fairness between the parties has been through the devise of estoppel. Again the trend has been to break down the traditional insistence upon categorised rules. As Cooke J said in *Coupe v J M Coupe Publishing Ltd* [1981] 1 NZLR 275, 278:

> The precise lines between estoppel (legal or equitable), acquiescence, assent, waiver, election and conduct precluding relief are well known to be difficult to draw and it is not always profitable to try to draw them. . . .
>
> In considering authorities in this general field I think that the label attached by a Court to the ground for its decision is often not the most important factor. It is more instructive to note the kind of circumstances which have lead Courts to hold that a certain contention is not open to a party.

As one commentator has pointed out there are a series of English Court of Appeal estoppel cases which have expanded the scope of estoppel.[2] These cases have not been restricted to defined categories. The inquiry is simply whether in all the circumstances it was unconscionable for the defendant to take advantage of a situation pertaining between the parties. Such cases point the way to a law of obligation arising, because of assurance given, and because detrimental reliance has occurred on the faith of such assurances. The common denominator is a striving to do fairness between the parties and the breaking down of rigid rules limiting the relief sought.[3]

The field of intellectual property has given rise to the equitable protection of confidential property. As Lord Denning MR said in *Seagar v Copydex Ltd* [1967] 2 All ER 415, 417.

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.[4]

Similarly the law of "unlawful interference with economic interests" has recently been confirmed in *Van Camp Chocolate Ltd v Aulsebrooks Ltd* [1984] BCL 447, but lies in a field of law "that is not yet in an advanced state of development. Many points of principle remain to be resolved."

Contract

Substantial statutory inroads have been made to the law of contract – that part of the law of obligation where the duties are fixed by the parties themselves. Such statutes have given the Judges in many cases a discretion to do justice between the parties. The privity rule has been eroded by the Contracts (Privity) Act 1981. These statutory interventions with one noticeable exception, namely the Credit Contracts Act 1981 have proved welcome simplifications to the law of contract and have provided an effective vehicle to do justice between the parties. The traditional analysis into offer and acceptance is now recognised in *Boulder Consolidated Ltd v Tangaere* [1980] NZLR 560, as not necessarily essential to the spelling out of a contract. As Lord Wilberforce observed in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 696:

> the movement of the law of contract is away from a rigid theory of autonomy towards the discovery, or, I do not hesitate to say, imposition – by the Courts of just solutions, which can be ascribed to reasonable men in the position of the parties.

Again it is clear, as in *O'Connor v Hart* [1983] 1 NZLR 280 and *Archer v Cutler* [1980] 1 NZLR 386, that questions of "fairness", "unfairness" and "unconscionability" are being used by the Court in policing inequality of bargaining power in contract. Even in the realm of building contract law the principle of "fairness" has been used to disentitle a person taking advantage of his breach of contract in *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347, particularly per McMullin J at 368 to 371.

Why then the criticism of the law of negligence in keeping pace with the prevailing mood of "fairness"? In assessing whether modern negligence is proving an effective instrument of "fairness" some recent cases are noted.

Negligence and fairness in recent cases

(i) *Allied Finance and Investments Ltd v Haddow & Co* [1983] 1 NZLR 22

A moneylending company lent money on the security of a yacht which the respondent was thought to be buying. On the settlement of the loan transaction the appellant's solicitors required from the respondent's solicitors an undertaking and certificate "that the instrument by way of security is fully binding on R K Hill and on behalf of our client that there are no other charges whatsoever on the yacht".

The loan was then made. The respondent solicitors knew that Hill was not the owner of the boat, but rather a company that he was a director of and controlling shareholder. The money was not intended to be used to enable Hill himself to purchase the yacht.

The seller of the yacht was not paid in full and he seized it selling for a deficit. Hill became bankrupt.

The seller sued the respondent Hill's solicitors for the balance of the loan. The High Court Judge dismissed the claim on the ground that the solicitors owed no duty to the plaintiff.

Concurrent duty in contract

Cooke J observed that it made no practical difference whether there was or not a concurrent duty in contract. He reaffirmed *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553, and the latest leading case in the House of Lords *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, as indicating that in ascertaining the duty of care the two broad areas of inquiry are the degree of proximity between the parties and whether there are other considerations to negative or restrict a duty.

Normally the relationship between two solicitors acting for respective clients did not create a relationship which was sufficiently proximate. Each solicitor is entitled to expect the other party will look to his solicitor or advice and protection.

However where on request a solicitor gives another a certificate on which the other party must naturally be expected to act added an additional factor. There was proximity. Far from disclaiming responsibility the solicitor had accepted it.

Richardson J after examining the now well recognised two-tier approach of *Anns v Merton London Borough Council* [1978] AC 728 then made the following important conceptual observations p 29:

> On this approach there is one general principle of negligence liability which is subject to special qualifications grounded in policy, rather than a list of duty situations. . . .
>
> Before doing so I add two comments. The first is that the adoption of a general principle of law cut down by policy considerations in particular cases rather than using policy to extend (or not extend) liability to particular novel situations may tend to accelerate the expansion of the tort in our society. This is because under a general rule new situations are potentially covered and it may well be more difficult to justify an exception on policy grounds. Even so, and this is the second point, the ambit of the duty of care will be determined on a case by case basis.

Richardson J then on similar lines to Cooke J spelt out liability arising out of the duty of care in giving the certificate. Before leaving the case His Honour observed at p 31:

> Finally, to the extent that the action in negligence is a loss allocation mechanism there is much to be said for the view that where in relationships of proximity laymen rely on the advice of professionals the costs of that careless advice should be borne by the professional advisors who are in a position to protect themselves by professional negligence insurance and in that way to spread the risk.

McMullin J stressed the fact that the *Hedley Byrne* principle is not subject to any strict classification or rigid rules or categories. His Honour then adverted to an important principle in regard to solicitors at p 34.

> It has long been held that a solicitor owes no duty to a person other than his own client. Where parties to a transaction are represented by their own solicitors a relationship of proximity or neighbourhood such as to important a duty of care from one solicitor to a client of another will rarely arise. In such cases the duty of a solicitor will be to his client alone. As Megarry V-C said in *Ross v Caunters* [1979] 3 All ER 580:

> In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly", that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client (ibid, 599).

But where a special reliance is placed on the solicitor by a client of another there seems no reason why a liability in tort should not arise. But before the proximity relationship is established to make the solicitor liable there must be some degree of reliance established.

(ii) *Gartside v Sheffield, Young & Ellis* [1983] 1 NZLR 37

The testatrix, aged 89 notified the defendants (a firm of solicitors) that she wished to make a new will. Three days later a member of the firm visited the testatrix and received instructions to draw up a will, which would have left the residue of the estate to the plaintiff. The testatrix died seven days later before any will had been presented to her in accordance with her latest instructions. Probate was granted of her previous will. The plaintiff brought an action claiming $50,000 damages for negligence. The defendants moved to strike out the statement of claim. In the High Court the Judge held there was no duty of care owed by the defendants to the plaintiff in the circumstances disclosed in the statement of claim and it was struck out. The plaintiff appealed.

Cooke J at p 40 noted *Ross v Caunters* (supra) where it was held that a solicitor who had been instructed to carry out a transaction that would confer a benefit on an identified third person owed a duty to that third person in carrying out the transaction. The duty arose out of foreseeability and a direct result of the application of *Donoghue v Stevenson* [1932] AC 562 Cooke J drew no distinction beteween the cases of defective execution as opposed to the alleged careless failure to carry out instructions as was the instant case.

The statement of claim did not seek to make out any case of reliance or representation to the plaintiff. However on the facts there was a "patent closeness and directness of the effect on the plaintiff – coupled with the absence of any other effective remedy".

Richardson J on the reliance point, said p 47:

> but it is not essential in this class of case that the plaintiff should have acted to his detriment in reliance on assurances of the defendants. The plaintiff loses out without any act on his part and the solicitor can reasonably foresee that his negligence will bring that about.

Cooke J stressed the special feature of the testator-solicitor-intended beneficiary category as also important on the damages aspect. As he said at p 43:

> Generally speaking, damages in tort have been given to compensate for impairment of the plaintiff's existing position. This includes of course loss of prospects. An assessment of the value of the plaintiff's prospects is often necessary in tort. But it has not been usual in tort to give damages representing the benefit that would have accrued to the plaintiff if the defendant had performed a promise. . . . To allow an intended beneficiary damages for being denied a testamentary benefit is not to commit oneself to any wider proposition as to when loss of a spes may be a legitimate head of compensation in tort.

Both Richardson J and McMullin J allowed recovery of damages as on the basis of a reasonable prospect or chance of enjoying a financial benefit having been lost.

On the policy aspect Richardson J reaffirmed his view that the costs of carelessness was a business risk against which solicitors could insure. He also adverted to the fact that the sanction of a negligence suit provided an incentive for lawyers to conform their conduct to a reaosnable standard of care.

McMullin J observed the duty of care that arose to a third party by a negligent solicitor arose by law, not because he made a contract, but rather because he entered upon the activity. The privity obstacle had never been a problem in tort.

(iii) *Macpherson & Kelly v Kevin J Prunty & Associates* [1983] VR 573.

This case was a decision of the Full Court of Victoria concerning the liability inter se of two firms of solicitors for contribution or indemnity arising out of a liability to a common client for damages. The issue was whether the liability of a solicitor to a client occurred concurrently both in contract and in tort if he discharged his duties negligently. Lush and Beach JJ held that that was the case, but Murphy J dissented.

The case is important as it highlights the two main problems that result in a concurrent liability situation, namely limitation periods and contribution or apportionment between all the parties for liability to share in the damages. As Murphy J said at p 586.

> But the distinction between personal causes of action arising out of contract and out of tort, have received statutory recognition in several statutes (eg, Limitations of Actions, County Court Act (Eng), Wrongs (Contributory Negligence) Act, Wrongs (Tort Feasors) Act), requiring Courts to consider, in the light of the relevant statute, into which category the particular case falls. As has been pointed out, the dichotomy is not historical nor scientific.

Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] 1 Ch 384 had also found a concurrent duty by a solicitor in contract and tort. He was of the view that in regard to a limitation point that the solicitor could be sued in tort and so time ran when the damages occurred. However that case must now be read subject to a decision of the English Court of Appeal *Foster v Outred & Co* [1982] 2 All ER 753 which seems to hold that time, where economic loss only, is being claimed in tort, time should run from when the act causing the damage was committed. In other words a limitation period akin to a cause of action based on contract. In that case it was when effective reliance on the solicitor's advice had taken place.

The recent Australian case as stated highlights the difficulties

arising from concurrent liability situations. The same are however easily solved by legislation recognising the situation and clarifying the pressure points.

(iv) *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938

This case was a decision of the English Court of Appeal extending the duty of care as set out in *Anns v Merton London Borough* (1977) 2 All ER 492, to a receiver in relationship to a guarantor concerning the realisation of a Company's assets.

Briefly the facts were that in 1977 a Company borrowed money from the Bank on the security of a debenture which gave the Bank a floating charge on the Company's assets and empowered it on default to appoint a receiver to take possession of the assets and to sell them. The debenture provided that the receiver was to be deemed to be the agent of the Company. The Bank also required the Company's two directors (the guarantors) personally to guarantee the Company's idebtedness to the bank up to a limit of £75,000.

In 1978 the Company's business had declined and in 1981 the Bank appointed a receiver. There was evidence that the Bank instructed the receiver to realise the Company's assets as soon as possible and that in accordance with thoese instructions the receiver instructed an auctioneer to hold a sale of the Company's stock as soon as possible.

The guarantors claimed that in consequence of the Bank's instructions the sale was held at the wrong time of the year, that it was poorly advertised and therefore poorly attended. The stock was sold for considerably less than its real value. The amount realised was barely sufficient to cover the costs of realisation and after payment of preferential creditors nothing remained to pay off the Bank's overdraft. The Bank issued a writ against the guarantors claiming the full amount of their guarantee of £75,000 together with interest.

In the High Court the Judge held in favour of the Bank on the ground that any claim which the guarantors had in respect of the incompetent conduct of the sale lay against the receiver and not against the Bank. The guarantors appealed to the Court of Appeal submitting that they ought to be given leave to defend the Bank's claim.

It was held that the duty of care owed by the receiver of the Company in disposing of the Company's assets was owed not only to the Company but also to the guarantor of the Company's liability under the debenture. This was because the liability of the guarantor depended on the amount which was realised by the assets and he was therefore within the test of "sufficient proximity" to the receiver for him to owe the guarantor a duty to use reasonable care to obtain the best possible price in the circumstances. It was also held that there were triable issues. The first was as to whether the Bank could be liable for the conduct of the receivership by giving instructions to the receiver in the conduct of the receivership in respect of the sale of the Company's assets so as to make the receiver its agent. The second was whether the receiver had been negligent in the conduct of the sale so that the Bank on the basis of principal and agent was liable for its negligence. Lord Denning MR said at p 942:

> If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagors so as to reduce the balance owing as much as possible and also to the guarantor so that he is made liable for as little as possible on the guarantee. This duty is only a particular application of the general duty of care to your neighbour which was stated in Lord Atkin in *Donoghue v Stevenson* and applied in many cases since. . . . The mortgagor and the guarantor are clearly in very close "proximity" to those who conduct the sale. The duty of care is owing to them, if not to the general body of creditors of the mortgagor. . . .
>
> The receiver is the agent of the Company, not of the debenture holder, the Bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the Company (of which he is the agent) to clear off as much of its indebtedness to the Bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the Company.

The New Zealand position is stated by Cooke J in *Meates v AG* [1983] 1 NZLR 308 at p 374 as follows:

> The extent of a receiver's duties to the debtor, company or its shareholders, in the light of the modern scope of the tort of negligence, is not, I think, clearly settled, as we saw in *Consolidated Traders Ltd v Downes* [1981] 2 NZLR 247, an interlocutory injunction case, where authorities were collected and there was some reference to a receiver's duties in the judgment, but no examination in depth was called for. Since then *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938 has been decided in the English Court of Appeal. The decision supports the view that a receiver may owe a duty of care to a company in disposing of its assets and that the creditor who has appointed the receiver may become liable for the conduct of the receivership by giving instructions which make the receiver its agent. Compare as to a mortgagee exercising the power of sale *Tse Kwong Lam v Wong Chit Chen* (1983) 3 All ER 54.

It would seem that in line with the current duty of care that in commercial transactions a requirement of reasonableness will be imported to the actions of receivers and mortgagees to those persons within their immediate proximity. The older cases to the effect that all that need be shown on their part is good faith may prove a dangerous precedent.

(v) *Meates v Attorney-General* [1983] 1 NZLR 308.

The facts in this case are complicated and it is not intended in any way to traverse them in detail. Suffice to say that this was a shareholders action brought in regard to the development of a company Matai Industries Limited in which the shareholders owned all the share capital. The company was formed in 1973. It was formed after the General Election in 1972 when the Labour Government came to power.

It was alleged that the then Prime Minister Norman Kirk, and the Minister of Trade and Industry had encouraged the setting up of a

company in the South Island of New Zealand to promote industry in that region. The main allegations of negligence were that the shareholders had been persuaded by assurances and encouragement of financial and regional development assistance by the Government to incorporate and then invest their money in Matai Industries Ltd. When it became apparent that the company was facing a liquidity and financial crisis further negligence was alleged showing reliance on assurances and encouragement of financial assistance and help to carry the company on rather than retrench. It was further alleged that when the company was placed into receivership assurances were given that "the interests of shareholders would be protected".

It was argued that the shareholders and the Government were analogous to partners or similar to persons engaged in a joint venture. Reliance was placed on the assurances of financial help and assistance from the Government to put the money in the venture and to keep the money in the venture.

The Court of Appeal comprising of Woodhouse P and Ongley J divided with Cooke J on the facts as to whether or not negligence had been proved. It is not intended to comment at all on the factual situation.

However the Court unanimously held that in all the circumstances a duty of care could be owed to the shareholders. There was a sufficient relationship of proximity within the reasonable contemplation of the Government that carelessness on its part might be likely to cause damage to the shareholders.

The Court was not prepared to entertain the concept that Ministers of the Crown could not as such carry on a business or profession. They necessarily held themselves out as having special knowledge and authority in the fields of their own portfolios, or, in the case of the Prime Minister, the major fields of his Government's policy. The Court was not prepared as a matter of policy to restrict ministerial responsibility in such circumstances. There was a clear duty on the Government to be careful in its predictions of official help, and the advice given in the statements made to the shareholders. Cooke J at p 379 further held that it could be artificial to distinguish between statements and other actions.

The case had also been framed in contract but the contractual allegations had been dismissed by the Court. It was argued that there could be no remedy for a gratuitous negligent promise.

It is in this area that the interest in the case centres. The majority judgment p 335 said:

> *Promises or assurances.* The second submission of Counsel for the respondent is that the *Hedley Byrne* principle has never been extended to undertakings or assurances in respect of future action. And the answer in our opinion is that although a promise may fall short of a contractual commitment, none the less, if it is provided by somebody who intends it to be acted upon and who is in an exclusive position to give effect to it, let alone the Central Government, then surely it is likely to be received as a far more powerful piece of information than mere opinion whether supplied by a man in a professional capacity or by some other person sufficiently equipped and interested enough in the subject-matter to express a serious view upon it. In essence the complaint in the present case is that the alleged advice given in the form of promises or undertakings by the Government was that the Government itself would prevent shareholder losses by one means or another, just as the creditors were actually protected. It is a claim that all this really went beyond an expression of opinion or belief that some particular or limited action might be taken. We think that far from relieving those concerned in such a case from the exercise of due care if anything duty is reinforced.

Cooke J at p 379 said:

> As to (ii), a mere request, however pressing does not necessarily amount to giving information, opinion or advice. The same is true of a mere promise or assurance of future action. But that is not the end of the matter. I think that there can be occasions when a reasonable person on receiving such a request, promise or assurance from someone acting within the particular sphere of his authority, is entitled to assume the speaker has taken and will take reasonable care to safeguard the interests of the person he has sought to influence, if that person acts as suggested. And if the speaker in authority has indicated that certain assistance or other benefits will follow, he will be bound to do what is reasonably within his power, consistently with his other responsibilities, to bring about that result. This is not an absolute duty or a guarantee, which belongs to the realm of contract. It depends simply on what a reasonable man would regard as his duty to his neighbour.

It is apparently these passages in the judgment that are considered heretical. The black letter lawyers claim that this represents a blurring of the field between contract and tort. Again it is claimed that this will result in an erosion of the doctrine of consideration.

The writer does not wish to intrude too fully into this debate, but would point out, at the risk of over-citation that the views of *R Meagher, Gummow & Lehane "Equity Doctrines & Remedies"* at para 1709 and 1710 would appear to considerably support the Court of Appeal. These paragraphs show that the thinking of the Court could well offer a path through the common law wilderness created by such cases as *Low v Bouverie* [1891] 3 Ch 82 and *Derry v Peek* (1889) 14 App Cas 337 Brief excerpts from *Meagher* para 1710 are set out hereunder:

> As has been noted above, *Burrowes v Lock* and the cases applying the same principle (with the exception of *Slim v Croucher*) were not overruled in *Low v Bouverie* and in *Nocton v Lord Ashburton*, Lord Haldane LC treated the jurisdiction in proprietary estoppel as still alive. But if taken to its logical conclusion this jurisdiction would have had momentous results. The remedies given by the Common Law in the nineteenth century were defective in cases of honest but careless representations inducing plaintiffs to act to their loss. In tort, this did not give rise to an action in deceit; *Derry v Peek* (1889) 14 App Cas 337, and an action in negligence was not treated as worth undertaking after *Derry v Peek*. This was despite the decision of Chitty J in *Cann v Willson* (1888) 39 Ch D 39 which,

before *Derry v Peek* reached the House of Lords held in favour of the plaintiff in negligence as well as deceit against careless real estate valuers. . . . Further there could be no damages in contract without consideration. Hence the equitable principle described by Lord Selborne offered a path leading out of the barren wilderness. But it was not followed and *Derry v Peek* and *Low v Bouverie* seem to have been taken together as denying any remedy outside contract in cases of honest representations of the kind submitted in *Burrowes v Lock*. In *Nocton v Lord Ashburton* [1914] AC 932 the House of Lords held that there was no question of estoppel on the facts, but reasserted another head of relief in equity not overborne by *Derry v Peek*, namely fraudulent abuse of a fiduciary obligation. However, this was not followed by any attempt to revive the nineteenth century jurisdiction in estoppel; surprisingly the inquiries of Lord Denning did not lead him into this field rather than into development of negligence in *Candler v Crane, Christmas & Co* [1951] 2 KB 164. . . . But the principles in equity remain and there is something to be said for Professor Allan's view put in (1963) 79 LQR 246, that they mean "a gratuitous promise acted upon with acquiesence of the promisor as binding upon the promisor not just as a defence to the assertion of legal rights but to the extent of permitting a promisee to enforce it".

This view has been referred to in a recent article by Francis Dawson entitled "Making Representations Good" in (1982) 1 Canta ER where the history is traced of an old line of equity authority which gives relief for a promise or an assurance that has been made and acted upon. The nineteenth century would have enforced such promise or assurance. The scope of the modern duty of care in tort has clearly now provided similar relief. Hence it can be said the modern role of negligence has broken the shackles of its common law constraints and merged with equitable considerations of fairness.

There may be little practical or theoretical difference between a fiduciary duty and a duty to take

Particular cases or general principle?

In 1932 the law on civil liability for carelessness was in a chaotic state, a fair example of what Tennyson meant when he wrote of

> That codeless myriad of precedent,
> That wilderness of single instances,
> Through which a few by wit or fortune led,
> May beat a pathway out to wealth and fame.

As Lord Macmillan acknowledged after summarising the earlier cases, "the current of authority has by no means always set in the same direction". In effect there was no single tort of negligence, but instead a number of separate torts each with its own rules; and the conservatives among the Judiciary treated the categories as closed. The owner of something inherently dangerous, a gun or a horse, was bound to be careful how he used it or let it be used by others, and he could be made liable for injury caused by his carelessness. Or the owner of premises that were dangerous had to take care that those who were permitted or invited to come on to the premises were not injured. Or liability could be founded on contract, so that a seller might be liable to his buyer for want of reasonable care about the thing being sold. But there was no general duty on a man to take care that his acts or omissions should not injure those whom he ought to have in mind. In some earlier cases statements of general principle had been attempted, but they had never been accepted as authoritative.

So as the law stood, a baker who allowed arsenic to be mixed with a batch of his bread might have been guilty of a crime, but it was at best doubtful whether someone who was poisoned through buying the bread from a shop which in turn had bought it from the baker could obtain redress from the criminally careless baker. *Donoghue v Stevenson* was a comparable case. . . .

The revolution brought about by *Donoghue v Stevenson* was so quiet that it passed completely unnoticed by the general public who were so closely affected by it; and its true nature was perhaps not fully understood even by the profession until Lord Devlin's speech in 1963 in the *Hedley Byrne* Case. The general conception of neighbourly duty was not a proposition which had been stated too widely. It was a statement which called the law of negligence into existence as a separate civil wrong, and enabled that branch of the law to develop on common sense lines so as to become the most important and far-reaching of all civil wrongs. In the 50 years which have passed since the decision it has renewed itself again and again, and has demonstrated its usefulness in all manner of circumstances. There is no sign that its power of adaptability is waning, nor is there any reason why it should. This power is due more than anything else to the moral spirit which animated Lord Atkin's speech, an object lesson, as Lord Wright said, of liberal thought in the handling of principles which has influenced the common law in all its branches.

Atkin and his colleagues found a tangled mass of old decisions but no decision of the House directly in point. The step which they took to bring order to the chaos was one which was impelled by the ordinary needs of British society and the assumptions which it made about right and wrong. They were doing something which every legal system requires of its law makers, parliamentary or judicial, that of constantly relating the law to the tacitly accepted moral principles of their own society.

In retrospect the decision now seems so clearly right and just that it makes one marvel at the state of the law before 1932; but the increasing certainty which time brings that an important decision is right is the highest tribute that can be accorded to the judgment of those who made it.

— **Lord Atkin**

By Geoffrey Lewis
(Butterworths 1983)

reasonable care in common law; as Cooke J said in *Coleman v Myers* [1977] 2 NZLR 225, 340:

> For this reason I think that in the end in this case little turns, except perhaps as to remedy, on whether one approaches the duty as fiduciary or simply as a duty to take reasonable care in making a recommendation.

Finally *Meates* gave the death blow to the constraints placed upon the *Hedley Byrne* principle by *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (supra). The Court had little difficulty in factually distinguishing *MLC v Evatt*. The duty of care is now approached on the two stage test as predicated by *Anns*. As Cooke J said in *Meates* p 378:

> As to (i), it is well-known that the restriction adopted in the majority judgment of the Privy Council in the Australian *MLC* case has not been followed in England or Australia, although paradoxically it might (on one view) be binding in New Zealand. But the political field is remote from the subject-matter of that case.

Conclusion

It should not be thought that because the Courts have laid down a wider approach to the general duty of care "the floodgates" of negligence liability will become an instrument of oppression rather than fairness. Rather the emphasis as to controlling responsibility will arise out of the factual situation pertaining from the particular case. Five examples are given:

1 *Proximity*

First, it has been held, that there is not sufficient proximity to impose liability on an adjacent property owner, where thieves had used such property to make a hole in a common wall and thereby burgle the plaintiff's premises. Even though the defendant's premises had been unoccupied and unsecured and there had been complaints of lack of security. The general rule is that no man is under a duty of controlling another (over whom he has no control) to prevent his doing damage to a third party. Liability in such a situation "requires a very high degree of foreseeability" as was said in *P Perl (Exporters) Ltd v Camden London Borough Council* [1983] 3 All ER 161.

2 *Policy*

Second, policy considerations have precluded setting up a duty of care to a person who complains, that his contractors have not been prevented or policed by a local authority from complying with the conditions laid down by such local authority. Policy requires that a person should not be able to claim on an allegation of failing to be stopped from acting unlawfully to his own detriment: see for instance *Governors of Teabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1983] 3 All ER 417.

3 *Reliance*

Third in most cases the Courts will insist that the plaintiff show "a real and substantial reliance" on the defendant.[5]

4 *Proof and Pleadings*

Fourth that it is at the breach stage that the Court will focus its attention. The facts alleging negligence will have to be strictly proved.[6] The negligence complained of will have to be precisely pleaded. The role of pleadings has cardinal importance in order that the party meeting the allegation can do so with certainty.[7] In the recent case of *Brown v Heathcote County Council (No 2)* [1982] 2 NZLR 618, the defence of contributory negligence was shut out because it was not pleaded.

5 *Positive Defences*

Fifth, it is becoming apparent that the Courts are similarly looking at positive defences on a more circumstantial basis as applying between the parties. Thus recently in considering the defence of "volenti non fit injuria" in *Titchener v British Railways Board* [1983] 3 All ER 770, the House of Lords' approach was to a consideration of the actual facts pertaining in the circumstances, rather than to a minute analysis of the defence on a precedent by precedent basis.

It is the opinion of the writer that the Courts have acted responsibly in developing "negligence" as an effective method of enabling fairness to be attained on a more particularised factual basis case by case. The role of modern "negligence" in pursuit of fairness meets the requirements of Cooke J where he said in *Hayward v Giordani* (supra) at p 148.

> But a function of the Courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, not to frustrate them. □

1 See D F Dugdale: *Judicial empire building* [1984] NZLJ 57.

2 See "Making Representations Good" – F Dawson (1982) LR 329.

3 *Estoppel Cases: Crabb v Arun District Council* [1976] Ch 179; *Evenden v Guildford* City AFC [1975] QB 917; *Pascoe v Turner* [1979] 1 WLR 431; *Greasley v Cooke* (1980) 1 WLR 1306; *Amalgamated Investments & Pty Co v Texas Commerce Int Bank* [1982] QB 84; *Taylors Fashions Ltd v Liverpool Victoria Trustees* [1982] QB 133N; *Keen v Holland* [1984] 1 WLR 251.

4 See in New Zealand for confidential information: *AB Consolidated v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515.

5 *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583, and Lord Roskill in *Junior Books Limited v Veitchi Co Ltd* [1982] 3 All ER 201 at 214:

> The concept of proximity must always involve at least in most cases, some degree of reliance; . . . These words seem to me to be an echo, be it conscious or unconscious, of the language of s 24(1) of the Sale of Goods Act 1893.

6 An error of judgment is not negligent unless such an error would not have been made by a reasonable man. Contrast *Walker v Collins* [1984] BCL 448 with *Marshall v Osmond* [1983] 2 All ER 225.

7 *See:* The exhaustive canvass of the pleadings in *Meates v AG* (supra) at pp 336 to 338 Woodhouse P and Ongley J and pp 380 to 384 Cooke J.

What's in the bottle?

A news report in *The Dominion* of 20 March 1984 reads:

> MAKERS of home-made wine managed to include a moth in their vintage only once this year at the Methven Show.
>
> Judge Stuart Bryant found only one moth in the bottles of wine submitted for judging.
>
> This was an improvement on previous years.
>
> "Have care please in cleaning bottles particularly inside. Only one moth this year – but a happy moth," Mr Bryant told the amateur wine makers.

Mr Bryant certainly appears to be one "Judge" prepared to take a large, liberal and neighbourly view of the obligations placed on bottlers by *Donaghue v Stevenson*. It seems that Mr Bryant must be a lepidopterist and not a snail watcher. □

Pirating of work and the Copyright Act 1962: A Problem

By Rupert Granville Glover, Barrister and Solicitor, Lecturer in Law, University of Canterbury.

The idea of intellectual property is one that is today of growing legal significance. Copyright is one aspect of this more general legal category. In this article Rupert Glover looks at s 62 of the Copyright Act in respect of a particular problem, and suggests that an amendment of the Act is called for.

Section 62 of the Copyright Act 1962 deals with false attribution of authorship. Basically it provides that no one shall attribute to another person a work of which that other person is not the author. The person responsible for such a false attribution is liable, even if he believed his representation as to authorship to be accurate.[1] However, the wording of s 62 appears to preclude its being applied to a situation where one person appends his own name to the work of another. Normally such action would constitute a clear breach of copyright and the offended true author would have a number of remedies under the Act. However the present writer was recently consulted on an unusual set of facts in which the availability of a remedy is not so clear.

It involved a person who had been employed as a writer on the staff of a publishing company. The person concerned had a contract of service with the company, as opposed to a contract for services. In such circumstances, s 9(2) vests the copyright of work produced in the course of employment in the employer rather than the employee. In the present case the writer in question resigned from his job to take employment elsewhere. After he had left the company, however, he continued to write for them, without remuneration or any other form of reward, because he wanted to complete some projects he had embarked upon before his resignation. He was under no obligation to finish this work, but wished to do so for reasons of personal satisfaction. He conceded that the copyright of this work would belong to his former employers.

As explained above, s 62 of the Copyright Act, because of its wording, seems to have no application in the present case. The material part of s 62(2) states that a person contravenes the section:

> . . . if, without the license of that other person, . . . he (a) Inserts or affixes that other person's name in or on a work of which that person is not the author. . . .

The rest of the section elaborates on this. Nowhere, however, does it state that it is an offence to put one's name to someone else's work, presumably because s 9(2), which vests copyright in the author or his employer, as the case may be, would normally cover the situation. Here, however, there is the unusual twist that the copyright in the work concerned belongs neither to its true nor to its pretended author, but rather to the employer company, which has discharged its duty by paying its respective employees for their services.

There is nevertheless a limit to the scope of s 9(2). The employer's copyright only extends to work produed for publication in a newspaper, magazine or similar periodical, or for broadcasting. In all other respects "the author shall be entitled to any copyright subsisting in the work. . .". This produces the paradox that the offended author whose work is published under the name of another employee of the same company has no remedy under the Copyright Act when his work is pirated in this way within the scope of his employment, but retains a remedy if the same work is used in another context (for example, in an anthology of that kind of writing) with a false attribution of authorship.

When the work was published, the writer was surprised and distressed to see that it appeared under the name of the person who had been appointed to his job after he had left the firm. He sought the advice of the present writer as to whether he had any protection in law against this kind of false attribution.

True or pretended author

Professor Burrows describes the purpose of copyright law as being:

> basically . . . to preserve to an author the fruits of his efforts, and to ensure that no one else makes a profit from his work without his permission, for to do so amounts to something rather like theft.[2]

So it is difficult to believe that Parliament could have intended to leave this loophole in the legislation, even though circumstances such as those described here could be expected to occur only rarely.

Yet it is simply not possible to interpret s 62 so that it extends to cover an inverse situation. And since Parliament has laid down in s 5(1) that there shall be no protection of copyright outside the Act, it seems that any remedy available to an aggrieved author in these circumstances will have to be sought elsewhere.

Will the law of torts come to the aid of this author? The first tort that might suggest itself is injurious

falsehood. The main elements of the tort as it has developed in modern times are, first, that the tortfeasor must know he is making a false statement, or at least be reckless as to its truth or falsity; secondly, that he must intend to injure; and thirdly, in terms of the Defamation Act 1954 s 5(1), that the falsehood is "calculated to cause pecuniary damage to the plaintiff".

In the present fact situation, it would seem that only the first element could be said with any certainty to have been satisfied. The pirating writer must have known that he did not write the work in question. However he may not have intended to injure the real author, and in this case, since no money or copyright was involved (copyright being a saleable asset), his action could not have been calculated to cause pecuniary damage to the plaintiff. As Fleming says, "the action cannot be used merely for the purpose of vindicating one's title to or the quality of one's possessions. . .".[3] This remains true in New Zealand, even though the special damage requirement, which is essential in this tort in most other jurisdictions, has been largely removed by s 5(1) Defamation Act 1954. In the present situation, then, the tort of injurious falsehood seems to be excluded as a remedy for the aggrieved author.

Passing off

The next tort which might provide a remedy is the old common law action of passing off. *Halsbury's Laws of England* 4th ed, vol 9 para 806, states that:

> apart from statute, an action will lie for the passing off of a work as the work of the plaintiff, if its title or appearance is such as to lead the public to believe that they are purchasing, or using, a work of the plaintiff and injury is likely to accrue to the plaintiff.

This appears to place the tort on all fours with s 62 of the Copyright Act. That is, it seems only to cover the situation where one person passes off his own work as being that of someone else.

That this is the main thrust of the tort is borne out by numerous judicial dicta, such as that of Romer LJ in *Clock Ltd v Clockhouse Hotel Ltd* (1936) 53 RPC 269, where His Lordship stated at p 275 that:

> the principle is this, that no man is entitled to carry on his business in such a way or by such a name as to lead to the belief that he is carrying on the business of another man or lead to the belief that the business which he is carrying on has any connexion with the business carried on by another man.

It is clear that the tort extends beyond mere commercial activities. In *Radio Corporation Pty Ltd v Henderson* [1960] NSWR 279, in a joint judgment, Evatt CJ and Myers J held at p 285 that:

> the wrongful appropriation of another's professional or business reputation is an injury in itself, no less, in our opinion, than the appropriation of his goods or money.

It is also clear from the cases that a passing off action does not necessarily fail for want of pecuniary loss by the plaintiff. In *British Medical Association Ltd v Marsh* (1931) 48 RPC 565, Maugham J stated that:

> what is necessary in such a case to prove is, either positive injury, or in a *quia timet* action, a reasonable probability of injury.[4]

Thus, as was said by Goddard LJ in *Draper v Trist* [1939] 3 All ER 513, 526:

> the law assumes, or presumes, that, if the goodwill of a man's business has been interfered with by the passing off of goods, damage results therefrom. He need not wait to show that damage has resulted. He can bring his action as soon as he can prove the passing off, because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage.

This tort, then, appears to come closer to providing a remedy for the writer whose work has been appropriated than injurious falsehood. However, according to Fleming:[5]

> the tort does not embrace what is sometimes called "inverse" passing off, ie, appropriating the product of another's labour and palming it off as one's own. . . . [T]o grant protection against such practices would be to elevate the plaintiff's claim to a protected right of property in the product in question: such monopolies in intangibles are not granted as a matter of legal policy except upon the terms defined by legislation relating to copyright, industrial design or patent.

But the aggrieved author in this case is afforded no protection by the copyright legislation, so another of his possible remedies falls by the wayside, unless, of course, the Courts were prepared to extend the scope of this tort to cover the present situation.

Negligence

Extension of a tort might also be involved if the plaintiff in this case sought to bring an action in negligence. It seems quite reasonable to assert that there is, in the fact situation involved, sufficient proximity between the potential plaintiff and defendant for a duty of care to exist. The defendant might have a duty to ensure that the plaintiff's work was not published under the wrong name.

Such a duty of care would be novel, because the situation would normally be covered by the Copyright Act. But in this unusual inversion the Act avails the plaintiff nothing. The gist of a negligence action is damage. But in the present circumstances there is no physical injury to the author, nor is there any pecuniary loss. For a negligence action to succeed, therefore, the Court would have to be prepared to hold that the aggrieved author suffered damage by being deprived of the opportunity to enhance his professional reputation by publishing his work with the proper attribution.

A possible parallel is to be found in the mental health cases, where negligent detention of a plaintiff has been held compensable in damages, although no physical or pecuniary harm was inflicted.[6] But these cases relate to statutory powers and their proper or improper exercise, and may therefore be distinguishable. All in all, the availability of a remedy in negligence in the present circumstances is at best uncertain, although, if the Courts were to accept the analogy with damages in the mental health cases, liability for

breach of the duty of care might extend to the publishers.

Judicial declaration

The final possible remedy which might be open to the aggrieved author in the present circumstances could be to seek a judicial declaration as to his rights. In England such declarations have been made in situations where no other cause of action lay against the defendant.[7] In New Zealand these declarations have a statutory basis. Section 2 of the Declaratory Judgments Act 1908 governs the situation and is in terms virtually identical to the English rule (see fn 7). Section 11 reiterates that the Court's jurisdiction shall not be excluded simply because the Court has no power to grant relief.

It is well established that no declaration will be made if the matter in question is purely hypothetical. In *Turner v Pickering* [1976] 1 NZLR 129, at p 141 Casey J said:

> . . . the power of the Court to make a declaratory order is discretionary, and this discretion will not be exercised in a plaintiff's favour unless the declaration may be of some utility.

In the present case, a declaration would be of more than academic interest, since the residual copyright in the work in question is, in terms of s 9(2) of the Copyright Act, still vested in the author. Thus there are real, although perhaps remote, legal rights at issue, and a declaration as to these could be of some use to the author.

The present examination of what must be an unusual, but by no means unique, fact situation in relation to the law of copyright has shown a curious gap in the copyright legislation. It seems strange that, in some circumstances, an author can have his work pirated by another, yet find himself without a remedy, even at common law. It would not be difficult to amend s 62 to deal with this, and such an amendment might perhaps be considered next time a law reform committee turns its attention to the Copyright Act. A useful model could be s 190 of the Australian Copyright Act 1968-1973, which is drafted in such a way that the present problem could not occur in Australia. The section reads, in the material part:

> 1 A person (in this sub-section referred to as "the offender") is by virtue of this section, under a duty to the author of a work not to –
> (a) insert or affix another person's name in or on the work, or in or on a reproduction of the work, in such a way as to imply that the other person is the author of the work.

This is wide enough to cover the "inverse passing off" situation of this case, and an amendment to the New Zealand section along these lines is probably desirable. □

Legal creativity

English law has not progressed at a regular speed throughout its history. It has had its creative periods, and its periods of quiescence and consolidation. In part, its creativity has been due to bold strokes of imagination by creative and original judges, like Lord Mansfield, Lord Blackburn, Lord Atkin, or, in our own time, amongst others by Lords Reid and Denning. In part it has been due to external forces like the original thinking of Jeremy Bentham or the social and political activity of Parliament. The two sources are complementary and interacting, and in more recent years have been rendered more fruitful and effective by the labours of such bodies as the two Law Commissions, the Law Reform Committee and the Criminal Law Revision Committee.

My father's professional and political life was spent very largely in a period of consolidation. If I were asked to put a term to it I would begin at 1900 and continue it until and including the decisions in *Liversidge v Anderson* and *Duncan v Cammell Laird*. During that period, and despite the occasional landmark decision like *Donoghue v Stevenson* and some remarkable individual judgments, it almost looked as if the common law had run out of steam. Contrast this, for instance, with the creativity shown by Lord Reid alone in the single twelve-month period covered by [1964] Appeal Cases. I would mark my new period as beginning in 1946 with the decision of Denning J (as he then was) in the *High Trees* case and as continuing until the present day. In part, of course, the period of creativity has been brought about by the pressure upon the Judiciary of constantly changing social circumstances, and the totally different relationship between authority and the individual, and between the individual and various types of independent corporations or associations like trade unions. In part it has been brought about by the vastly increasing body of legislation, primary and secondary, and the need in every case to interpret it and apply it to individual cases.

— **Lord Hailsham**
in *Hamlyn Revisited*

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1 The scope of the section is well-explained by Professor J F Burrows in "News Media Law in New Zealand", 2nd ed 1980, 168-70.

2 Burrows, op cit 104.

3 "The Law of Torts", Fleming, 6th ed p 671.

4 Ibid at 574. *Quia timet* actions were explained by Cozens-Hardy MR in *Royal Insurance Co Ltd v Midland Insurance Co Ltd* (1908) 26 RPC 95, 97: ". . . in a *quia timet* action you have to satisfy the Court that what the defendant is doing will prove an imminent and substantial damage to the plaintiff's property, or his business whatever it may be".

5 Fleming, op cit supra fn 3, at 677.

6 See, for example. *De Freville v Dill* (1927) 96 LJKB 1056.

7 Ord XXV, r 5 states: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not". See also *Louden v Ryder (No 2)* [1953] Ch 423. In *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536, the headnote summarises thus: ". . . the Court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant; and . . . the rule so construed is merely an extention of the practice and procedure of the Court, and is not ultra vires".

Conscientious Objection

By J S O'Neill, a Dunedin practitioner

The Contraception, Sterilisation and Abortion Act 1977 contains a conscience clause in respect of abortions. The author is well known for the interest he has taken in the question of abortion. In this paper, which is based on a practical issue that was raised with him, he considers the extent of the protection afforded to nurses, doctors and others.

The material words of s 46 of the Contraception, Sterilisation and Abortion Act 1977 are as follows:

> . . . no registered medical practitioner, registered nurse, or other person shall be under any obligation – (a) to perform or assist in the performance of an abortion . . . if he objects to doing so on grounds of conscience.

The question arises as to the scope of application of this section and in particular as to whether registered medical practitioners may be required to perform or assist in the performance of duties relating to the woman or girl, who intends to have an abortion, between her admission to hospital and the time when she is taken into the operating theatre, for example, if the abortion is to be performed there.

The duties that come to mind are those relating to admission, taking of patient's history, taking of routine tests, examination to see whether the patient is fit to be operated on, examination by the anaesthetist, the taking of blood by the technician, the analysing of the blood by the laboratory assistant. As I understand it all of these procedures would be essential preliminaries to the performance of the operation.

The next points of consideration are the types of abortion. These are commonly referred to as follows:

Dilatation and Curettage;
Suction Curettage;
Prostiglandin;
Hysterectomy;
Saline Abortion;
Menstrual Extraction.

At first sight it may appear that the exemption granted by this section is of very restricted application if one looks simply at the words "in the performance of an abortion". If the word "ABORTION" were not defined in the statute it may be strongly argued that this shows that the exception relates specifically to the performance of the operation.

One notes however that in regard to the operation for rendering the patient sterile the words used are "any operation undertaken *or to be undertaken*".

One looks then to the definition of abortion and it is immediately apparent why in s 46(1)(a) the words "or to be undertaken" have been used in relation to the sterilising operation but not in relation to the performance of an abortion. This is because abortion is defined as "medical or surgical procedure carried out or to be carried out", etc.

The exception granted by the section therefore relates not only to the performance of the operation, but to those matters which need to be done in assisting in the preparation for the operation from the very time that the patient enters the hospital.

Confirmation of this interpretation is strengthened by reference to other subsections in s 46. For example in subs (2)(a) the words used are "to do any act referred to in subs (1) of this section". These words are undoubtedly intended to cover of course registered nurses and other persons as well as registered medical practitioners; and not only to cover performance of abortion but the sterilising operation and also the acts covered by subs (1)(b). It will be noted that under the subs (1)(b) the exception covers not only physical participation but the offering or giving of advice relating to contraception. It may be argued however that subs (1)(a) must have a more restrictive interpretation in regard to abortion and even sterilisation in that it does not appear to exclude the offering or giving of advice in relation thereto. Such an interpretation would be based on the invalid presumption that the performance of the abortion or sterilisation is inevitable. A medical practitioner with conscientious objections to these operations would have no difficulty whatever in giving his advice to a patient regarding the advisability of such operations, and the section has left him free to do so if he chooses which is entirely constitutionally and professionally appropriate.

In regard to contraception however hospitals are required under the Hospitals Act 1957, s 64C to provide confidential advice on contraception, sterilisation and other family planning matters. The requirement is a mandatory one and while some registered medical practitioners with conscientious objections to contraception might be prepared to give their advice in such units this would not appear to be in accordance with the spirit of the section and clearly gives rise to the exception as to offering or giving of advice contained in s 46(1)(b).

Again in subs (2)(b) of s 46 the words used are "to do anything referred to in that subsection". Furthermore, having regard to the scheme of the Contraception, Sterilisation and Abortion Act 1977 the woman or girl on admission to hospital for an abortion has, we presume, been through the procedures of referral and examination of her case by certifying consultants and from the time of her entry into the hospital for the purposes of the operation everything done towards that end surely falls into the definition "medical or surgical procedure carried out or to be carried out for the purposes of procuring (a) the destruction or death of an embryo or foetus after implantation or (b) the premature expulsion or removal of an embryo or foetus after implantation". The provision made by s 46 for conscientious objection would indeed be defective if it were capable of being interpreted so as to be restricted solely to the performance of the operation.

This is not an admissible interpretation on the specific wording of the section.

It is evident also from the description of the types of abortion procedure given above that abortion is not always performed within the operating theatre, and as shown by the wording of the section itself not only registered medical practitioners but registered nurses and other persons are also excused. Many of these will have their area of duties outside of the specific boundaries of the performance of the operation.

Crimes Act provision

Down to the present I have been considering the question on the construction of s 46 of the Contraception, Sterilisation and Abortion Act 1977. I will now proceed to examine the section and the conclusion given above from other directions for the purpose first of testing the conclusion and secondly of considering matters which may weigh in attempting to read s 46 more narrowly. That is, reading subs (1)(a) as granting an exception but only in respect to the physical acts of the abortion operation itself.

In the course of this approach it is proper to start "by considering what was the state of the law relating to abortion before the passing of the Contraception, Sterilisation and Abortion Act and the amendments to the Crimes Act in 1977, what was the mischief that required amendment, and in what respects was the existing Law unclear" (the words quoted are from the judgment of Lord Diplock in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545, 546).

Prior to 1938 the unborn child was protected by the criminal law. In England this was done by ss 58 and 59, of the Offences Against the Person Act 1861 "Such a child was protected by the criminal law almost to the same extent as a new-born baby. If anyone terminated the pregnancy, and thus destroyed the unborn child, he or she was guilty of a felony and was liable to be kept in penal servitude for life, (see the Offences Against the Person Act 1861) unless it was done to save the life of the mother (see *R v Bourne* [1938] 3 All ER 615, [1939] 1 KB 687). Likewise anyone who assisted or participated in the abortion was guilty, including the mother herself. (Lord Denning MR – *Royal College of Nursing v DHSS*, supra at p 554.)

In New Zealand the law protecting the unborn child was contained in ss 220 to 223 of the Crimes Act 1908. Of these four sections two related to procurement of miscarriage, namely s 221 for unlawfully administering any poison or other noxious thing or unlawfully using any instrument with intent to procure a miscarriage whether the woman or girl be with child nor not (maximum penalty imprisonment with hard labour for life). Section 222 provided a maximum penalty of seven years imprisonment with hard labour for every woman or girl for unlawfully administering to herself as above or permitting any instrument to be used with intent to procure a miscarriage whether she be with child or not. This section differed from the 1861 English provision which required in this case that the woman or girl have knowledge of her pregnancy. The English provision had been followed in New Zealand in 1866 but by 1908 the law had become stricter in regard to the woman or girl herself. Section 223 provided a penalty of three years imprisonment with hard labour for unlawfully supplying or procuring poisons or instruments, etc, knowing the same to be intended to be unlawfully used or employed with intent to procure miscarriage of any woman or girl whether with child or not.

The three sections referred to, ss 221, 222 and 223 related to abortional *acts*. These were the sections commonly used for prosecution in abortion cases, no doubt because of the facility for prosecution where it was only necessary to prove the acts done and the intent and not necessarily to show that the women or girl had been pregnant which would in many cases have been very difficult to prove.

Section 220 however had been introduced into the New Zealand Criminal Code in 1893 and related to the causing of death of a child which has not become a human being in such a manner that the person would have been guilty of murder if such child had been born.

This section contained the following proviso:

> (2) No-one is guilty of any crime who, by means employed in good faith for the preservation of the life of the mother of the child, causes the death of such child before or during its birth.

While the law in England and in New Zealand differed therefore in some respects in the early part of this century protection under the law was undoubtedly supplied by the provisions of the English Act of 1861 and the New Zealand Crimes Act of 1908. There was however a hiatus in that although the laws against abortion provided protection for the child while in the womb and the laws against infanticide and homicide provided protection after birth it had been shown that there was no protection for the child while in the course of being born; and in 1929 in England the Infant Life (Preservation) Act was passed instituting the offence of child destruction. It provided that:

> any person who with intent to destroy the life of a child capable of being born alive by any wilful act causes a child to die before it has an existence independent of its mother shall be guilty of felony to wit of child destruction and shall be liable on conviction thereof on indictment to penal servitude for life.

It contained the following proviso:

> provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only for preserving the life of the mother.

There was also a provision that evidence that a woman had at any material time been pregnant:

> for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.

There was apparently at the time some opposition to this provision on the grounds that it provided double protection for unborn children in the later weeks of pregnancy and it was feared that this would in time lead to an attenuation of the understanding of the previous law as to the protection of unborn children from conception to 28 weeks of gestation. It appears that these fears were in fact confirmed by subsequent events.

In 1938 Mr Justice Macnaghten in the *Bourne* case referred to above in his direction to the jury presented the law as follows:

> . . . it permits the termination of pregnancy for the purpose of preserving the life of the mother.

In brief, Mr Justice Macnaghten reached his conclusions regarding the law by reference to the proviso to the Infant Life Preservation Act 1929 (a proviso that was not contained in the statute that Dr Bourne was charged under (namely the Offences Against the Person Act 1861)) and by relying strangely on the word "unlawfully" in the 1861 statute.

It was presumed that the word "unlawfully" was not a meaningless word and that therefore there must be provision for lawful abortions under the law. There was no indication in the section of course as to what situations would give rise to these lawful abortions. In my book *Foetus-in-Law* I have shown (ch VII) that the word "unlawfully" was not redundant but was used to distinguish not lawful abortion but *lawful uses of an instrument* from the criminal situation proscribed by the statute.

The *Encyclopaedia of the Laws of England* (vol I p 33) gives the following definition of miscarriage:

> Abortion, or miscarriage, as a legal term, means expulsion of the contents of the womb of a pregnant woman at any period of gestation short of the full term.

In my book I give several examples of the lawful uses of instruments and of drugs. This interpretation has, I believe, been supported by the definition of abortion contained in the Contraception, Sterilisation and Abortion Act 1977 where the definition includes premature expulsion or removal of an embryo or foetus after implantation *otherwise than for the purpose of inducing the birth of a foetus believed to be viable or removing a foetus that has died.*

In England there were movements in the law by further judicial legislation at approximately ten-year intervals after *Bourne's* case. First, it was confirmed that the preservation of life included the preservation of health and secondly in 1958 in *R v Newton and Stungo* [1958] Crim LR 469) Ashworth J directed the jury that:

> such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman. When I say health I mean not only her physical health but also her mental health.

Approximately ten years later again the Abortion Act 1967 legalised the termination of pregnancy by a registered medical practitioner if done in a hospital on the certificate of two doctors.

The grounds were as follows:

(a) That the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman, or any existing children of her family, greater than if the pregnancy were terminated.
(b) That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Lord Denning MR in his judgment in *Royal College of Nursing v DHSS* (supra) stated:

> This has been interpreted by some medical practitioners so loosely that abortion has become obtainable virtually on demand.

In New Zealand the Crimes Act was consolidated and amended in 1961 and the law on abortion was then contained within six sections namely, ss 182 to 187 of the Crimes Act 1961. Substantially the law was expressed as it had been in the previous 1908 statute but the interpretation of it as generally understood was undoubtedly being influenced by the English Court decisions.

In 1962 there were 38 induced miscarriages reported in the Public Hospital Statistics and 1967 the era of the English Abortion Act this number rose to 95. Thereafter the controversy about abortion intensified and in May 1974 an Abortion Clinic was opened in Auckland by an organisation calling itself the Auckland Medical Aid Trust. Thereafter the numbers of abortions sharply increased and an attempt was made to control the matter by legislation.

The Hospitals Amendment Act 1975 was eventually passed on 28 May 1975 and came into force on 1 September 1975. It provided that therapeutic abortions were to be carried out only in institutions under the control of the Hospital Board or in any licensed hospital that may be approved for the purposes by the Director-General of Health. The Director-General of Health, Dr H J H Hiddleston immediately approved the Aotea Hospital which had been at the centre of the controversy and had been closed prior to the passing of the Hospitals Amendment Act. When this led to further public debate and controversy it was claimed that the statute did not empower the Director-General of Health to withdraw his approval and the Abortion Clinic continued in existence until the passing of the Contraception, Sterilisation and Abortion Act 1977 and the amendment to the Crimes Act 1961 which was passed in conjunction with it. This latter amendment contained eleven words which had been introduced by Dr G A Wall MP. These were as follows and it was to them that Dr Rex Hunton the spokesman for the Aotea Clinic attributed the closure of the Clinic on the passing of the Crimes Amendment Act on 16 December 1977. The words were attached to the definition of the meaning of "unlawfully" in s 187A of the Crimes Act 1961 (this whole section being inserted in 1977):

> . . . and that the danger cannot be averted by any other means.

These words were removed from the statute the following year and Abortion Clinics have been operating in Auckland again since 1978 and subsequently in Wellington. There has been pressure for the opening of an Abortion Clinic in Christchurch for some time.

A Royal Commission was set up in 1975 and in its report issued in 1977 it described the situation at the Aotea Clinic in Auckland as being virtually abortion on request.

Dr James Woolnough who was carrying out the abortions at the Aotea Clinic was prosecuted in 1975 and acquitted on 12 charges. This was appealed by the Crown and the Court of Appeal heard the matter on 12 April 1976 and delivered its judgment on 22 July 1976. In this case of course the Court dealt with the provisions of the Crimes Act 1961 as they were passed in 1961 and the President of

the Court, Sir Clifford Richmond in his judgment said that s 182(2) of the Crimes Act 1961 showed that the legislation was positively of the view that a bona fide intention to preserve the life of the mother in the late stages of pregnancy would justify the procurement of her miscarriage. He said:

> The narrow question then is whether the Courts ought not, in the case of early pregnancy at least, to extend that concept to include a bona fide intention to preserve the health of the mother from serious harm.

It was not stated in the judgment of the learned President how the Courts could so extend this concept, the Courts task being to interpret the statute not to legislate judicially. The President then said:

> I can see no sufficient reason why this should not be done.

The learned President relied on the fact that Ashworth J's direction in *Newton and Stungo* (supra) had been reported prior to the amendment of the Crimes Act in 1961 and this was an indication that:

> Our legislature was content to accept the developing view of the English Judges as applicable in this country.

The learned President was supported by the judgment of Sir Owen Woodhouse but the third Judge on the Court, namely, Sir Richard Wild, the Chief Justice, said that the facts in the Woolnough charges were "a very far cry from the facts in *Bourne*" and if the test of lawfulness was to be enlarged to cover such cases he considered it to be the function of the legislature and not of the Courts to enlarge it.

The law in New Zealand has been further considered by the Court of Appeal in the case of *Wall v Livingston* [1982] NZLR 734. The Court adopted the substance of a judgment on the Abortion Act 1967 in England where it was stated that though the Act renders lawful abortions that before its enactment would have been unlawful it does not depart from the basic principle of the common law as declared in *R v Bourne*, namely that the legality of an abortion depends on the opinion of the doctor. That judgment, *R v Smith (John)* [1973] 1 WLR 1510, and 1512, stated that the Act in England has introduced the safeguard of two opinions but if they are formed in good faith by the time the operation is undertaken the abortion is lawful, thus a great social responsibility is firmly placed by the law on the shoulders of the medical profession.

The unborn child has been served badly by the Courts and by the medical profession. Even if the Courts, with respect, had no business to extend provisions of a criminal statute in the way that was done the medical profession had ethical standards which should have protected unborn children and women. I can appreciate the difficulty for the medical profession where it has been let down by the Courts in the way that has happened, in that as Lord Denning MR has stated:

> Whenever a woman has an unwanted pregnancy, there are doctors who will say it involves a risk to her mental health.

In that event the medical profession has to face the claim of the doctor so acting that he is doing so within the law. The answer however would appear to be that the medical profession should be bringing to the notice of the Courts its concern about the matter. There has not, so far as I am aware, been any evidence of this having been done.

Relevance of the Crimes Act provisions

The relevance of the Crimes Act provisions to the interpretation of the conscience clause is that as shown above the amendments to the law have rendered lawful what would previously have been unlawful. Certainly there was a change in the understanding of the provisions of the Crimes Act 1961 as applied in 1962, when there were 38 induced miscarriages reported, and the same Act when it came before the Court of Appeal in 1976. The amendments to the Crimes Act in 1977 gave statutory form to the enlargements of the law which had been brought about. The Contraception, Sterilisation and Abortion Act 1977 made provision for the authorisation of abortions after having full regard to the rights of the unborn child where there had of course been no previous statutory provision for the authorisation of abortions.

The conscience clause (s 46 Contraception, Sterilisation and Abortion Act 1977) must therefore be read within this context and against the history of the law as briefly stated above. The mischief which Parliament intended to deal with was undoubtedly the situation described by the Royal Commission as "virtual abortion on request". Section 187A of the Crimes Act as inserted in 1977, was intended to make more specific the circumstances in which abortions might be carried out. As stated in several of the judgments in the *Royal College of Nursing v DHSS* case (supra) abortion is a contraversial subject and the diversity of views is apodictic. In these circumstances therefore is it likely that Parliament intended s 46 to be interpreted narrowly so that those with views opposed to the changes in the law might be required to carry out the duties preliminary to the performance of abortions?

It must be remembered that the sections on abortions as they appeared in the statute immediately prior to the enactment of s 46 were on the literal reading expressed to cover not only the performance of the abortion itself but many matters somewhat removed from that, such as supplying and procuring. Section 66 of the Crimes Act 1961 also provided and still provides against offences by aiders and abettors. Through s 66 the arm of the law reaches a long way from the abortion operation itself. Prior to the changes in the law those involved in the chain of events leading to the abortion operation would have been parties to the offence. This situation is commented on at length in the *Royal College of Nursing v DHSS* (supra) case. It is there said that it is not a case of all those preliminary acts being unlawful, and then retrospectively rendered lawful when the termination of pregnancy is finally effected by a medical practitioner. Those situations are all covered and rendered lawful by the provisions of the Abortion Act 1967. What is clear however is that the judgments accept that all those preliminary steps are part of the abortion treatment and procedure.

All of this is confirmatory only. The question must in the end be answered on the terms of the section itself, ie, s 46 and I return to my comments in the early part of this article drawing attention to the word "abortion" in s 46(1)(a) and the

definition of abortion in s 2 of the Contraception, Sterilisation and Abortion Act 1977, ie, a medical or surgical procedure carried out or to be carried out. . . . The excursion which I have taken through the history of the matter and the reference to the provisions of the Crimes Act regarding abortion are entirely proper steps in confirmation of that interpretation.

Obligation

It is interesting to note the distinction between s 46 and the provision for conscientious objection in the Abortion Act 1967 (UK). Section 4 of the Abortion Act 1967 is as follows:

> **4 Conscientious objection to participation in treatment**
> (1) Subject to subsection (2) of this section, no person shall be under any duty whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:
> Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.
> (2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.
> (3) (Applies to Scotland).

This section was commented on in the *Royal College of Nursing* case and it was there stated that one could not be under a duty to do something unlawful – that case concerned a disagreement as to whether a new method of medical induction introduced in 1972, and therefore not contemplated in 1967, could be performed by nurses and midwives as distinct from registered medical practitioners. In reference to the conscience clause it was stated that no-one can be under a duty to do something which is unlawful. It was held eventually by a majority in the House of Lords that the provisions of the 1967 Act could be interpreted so as to render the acts being performed by the members of the College of Nursing over the lengthy period of the induction and in the absence of the medical practitioner lawful.

The Judge at first instance, Woolf J said:

> Nor does any issue arise as to any conscientious objection which a nurse may have to being involved in the process. The right of conscientious objection is fully recognised in s 4 of the 1967 Act which provides that (apart from cases of necessity) no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by the Act to which he has a conscientious objection.

The word used in s 46 is much stronger than in the English clause and further supports the interpretation which I have given.

> . . . no registered medical practitioner, registered nurse, or other persons shall be under *any obligation*. . . .

None of the persons referred to therefore in s 46 is obliged to perform or assist in the performance of an abortion, ie, a medical or surgical procedure carried out or to be carried out for that purpose and this includes freedom from the obligation to be involved in any way throughout the pursuit of that purpose.

It will be noted further that the English conscience clause is more restrictive in respect to proof of conscientious objection in regard to subs (2) thereof.

Application for licences

There appears to be a misunderstanding abroad that hospitals are under an obligation to provide an "abortion service". This is not so. Hospitals *may* apply for a licence as shown in s 20 of the Contraception, Sterilisation and Abortion Act 1977. They are not under an obligation to have a licence and one public hospital at least has relinquished its licence. I believe that this situation reinforces the above opinion in that if a hospital is not under an obligation to provide an abortion service, unless it applies for a licence, then it is not surprising that the conscience clause is also similarly framed in regard to the obligation of individuals. Where the hospital obtains a licence of course it must maintain adequate facilities for the performance of abortions. This is not to be confused with providing an "Abortion Service". □

Clear language

More of that frothy bureaucratic language which makes your eyes water and your head swim. The following is the DHSS definition of whether or not a person is to be regarded as capable of walking – sent to a disabled tenant in Liverpool:

"A person shall not be treated as suffering from physical disablement such that he is either unable to walk or virtually unable to do so if he is not unable or virtually unable to walk with a prothesis or an artificial aid which he habitually wears or uses or if he would not be unable or virtually unable to walk if he habitually wore or used a prothesis or an artificial aid which is suitable in his case."

– *The Guardian*, 3 April 1983

Not development

Among the many words which, in the decline of our language, have come to be abused and misapplied "development" is prominent. Properly speaking, a development is a coherent and organic unfolding or revelation of inherent characteristics hitherto hidden, the growth of a flower or an oak tree from a seed or an acorn, the unfolding of a theme in a musical composition, the development of an argument, as distinct from a burst of unco-ordinated rhetoric, the coherent development of the plot of a play, as distinct from a jumble of unrelated situations.

Development is a steady and consistently achieved fulfilment. There is something reassuring about the idea of development in its secure consistency with what has gone before, its continuity. That is why the speculators and the property investors who convert fertile fields into concrete jungles, flatten the homes of the poor to make sites for "luxury" offices and flats, or grind graceful and historic buildings to dust to make spaces for tower blocks, call this conversion of English earth and history to the uses of their own personal profit "development". They are just about as much developers in the true sense as a burglar is an inheritor of the property he appropriates. In both cases there is a clean break with the past.

— Richard Roe

[1983] *Solicitors Journal* 321

In Praise of Simplicity

By Irving Younger, who will occupy the Marvin J Sonosky Chair of Law at the University of Minnesota in 1984-85

This is a slightly condensed version of remarks delivered at a luncheon held in connection with the 18th Annual Southern Methodist University Air Law Symposium, March 1984, Dallas, Texas. Mr J G Dillon of Hamilton, now a newly elected Member of Parliament, was present at the Symposium at which he gave a paper and he approached Professor Younger as to the possibility of the address being published here in New Zealand. Mr Dillon comments that though the address, he feels, is excellent to read it loses something of its impact without the resonance, pitch, pause and pace which enthralled the listeners at the luncheon.

I shall talk about virtue. Not moral virtue, for with respect to moral virtue — reverence, self-control, chastity — each one of you is beyond improvement. Rather, I shall talk about intellectual virtue, a quality of thought that distinguishes mind from caprice or appetite. With an eye on the clock, I shall talk about only one aspect of intellectual virtue, an aspect particularly in want of a champion among lawyers and Judges. That aspect is simplicity, and I entitle this paper — an ill-favoured thing but mine own — "In Praise of Simplicity".

It has long been understood by practitioners of disciplines other than the law that simplicity marks the master. Simplicity walks hand in hand with high seriousness, not as a child better left behind, but as the very herald of large intention and great accomplishment.

Examples

Some examples to support my text. First, from literature. Here are three celebrated passages from the most celebrated writer who ever lived. The beginning of the Eighteenth Sonnet:

> Shall I compare thee to a summer's day?
> Thou art more lovely and more temperate:
> Rough winds do shake the darling buds of May,
> And summer's lease hath all too short a date.

Hamlet's soliloquy on death:

> To be, or not to be: that is the question:
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles,
> And by opposing end them?

Prospero's farewell, from *The Tempest*

> Our revels now are ended. These our actors,
> As I foretold you, were all spirits and
> Are melted into air, into thin air;
> And, like the baseless fabric of this vision,
> The cloud-capp'd towers, the gorgeous palaces,
> The solemn temples, the great globe itself,
> Yea, all which it inherit, shall dissolve;
> And, like this insubstantial pageant faded,
> Leave not a rack behind. We are such stuff
> As dreams are made on, and our little life
> Is rounded with a sleep.

These three passages in all use 153 words, not one of which might not be spoken in ordinary conversation. Only one word of the 153 contains four syllables, 5 contain three syllables, 35 contain two syllables, and 112 are words of one syllable. Simplicity indeed.

Second, from pictorial art. On the ceiling of the Sistine chapel, Michelangelo painted a picture of God transmitting the spark of life to Adam and fashioned an image of awesome power. What is it? Simply God's finger touching Adam's. A six-year-old can understand it. Only Michelangelo could create it.

Third, from music. Some of you may have a recording at home of Beethoven's Piano Sonata opus 111, no 32. Remember the second movement, a theme and variations. It is one of the profoundest things music has to offer; yet Beethoven made it of a theme consisting in the simple interval of a fourth and variations woven of trills, simple trills.

Last, from science. The deepest scientific mind of the twentieth century was Albert Einstein's, his most famous work, the special theory of relativity. Without the language of higher mathematics, we cannot follow Einstein as he reasons to his conclusions, but the conclusions are simplicity itself. Many of you are the parents of junior high school students. Is there a seventh grader who cannot understand $E = mc^2$?

Simplicity and the law

But enough of art and science. Let us turn now to that curious mixture of both and exemplar of neither, our infinitely demanding and infinitely fascinating mistress, the law. How stands simplicity with her? Not well, I fear. Walk through the Courthouse library and observe the shelves bulging with treatises, statutes, law reviews, regulations, digests, and case reports. Whatever its other charms and virtues, the law is hardly simple.

Worse, the law has made of simplicity a vice, the shameful badge of a mind too lazy or too weak to be suitably complicated. Who doesn't recall a professor at law school saying. "Really, that won't do, it's just too simple"? Or an appellate Court saying. "The Judge below apparently failed to grasp the complexity of the problem"? Or a Judge saying to a lawyer, perhaps to you, "Counselor, isn't your argument far too simple?"'

Ladies and gentlemen, I am here to speak up for simplicity. I lament the law's lack of it. I condemn the perversion that turns it into a sin. I preach the faith that simplicity is good in itself. I assert, moreover, that were lawyers, Judges, legislators, and law professors only brave enough to be simple, the law would be improved in five ways.

Lucidity

First, lucidity. Much of what lawyers and Judges say is incomprehensible. Here is an example drawn from a

recent issue of a leading law review. One of our most distinguished professors writes an article about entrapment, from which I quote a footnote:

> However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what might constitute appropriate police conduct.

What does this mean? One can discover the author's thought only by shoveling away the rubbish of complexity, and that, I say, is an undesirable state of affairs. A legal system, like any system of thought, should be clear. We lawyers and Judges have an obligation to those we serve, the public at large, to speak lucidly about the law. We owe it to them to practise simplicity of language.

Candour

Second, candour. Lawyers and Judges should call things by their right name and state the real reasons for what they do. Only then will it be possible to analyse and criticise intelligently, thereby exposing and correcting error, eliminating irrationality, and transmitting to our successors a body of law better and more coherent than the one we received from our predecessors. Yet many of us have fallen into a habit that dishonours candor. We call things not by their right name but by elaborate wrong names. We explain our decisions, not as what they are, but as something else, always more complicated than the truth.

One example from the Supreme Court's decisions of last year: In *Warth v Seldin*, 422 US 490 (1975), various petitioners sued the town of Penfield, a suburb of Rochester, New York, claiming that Penfield's zoning ordinance unlawfully operated to exclude people of low and moderate income from living in the town. The Supreme Court dismissed for lack of standing. Go and read the majority opinion. When you are done with it, ask yourself whether standing is really the problem. I think you will say no, the real problem is that the petitioners raised enormously sensitive issues of race and economic class that the Court was unwilling to face. It chose to avoid them by adding some complicated wrinkles to the already vexed law of standing.

But would it not have been better for the Court to say straight out that some issues can be decided only when the time is right and that the time was not right for the issues in this case? The simple approach serves where the disingenuous fails. Candour is appreciated in judicial opinions, as elsewhere.

Aesthetics

Third, aesthetics. Beauty may exist in a saltcellar by Celini and in a legal system. I make no utilitarian argument for it. I suggest only that we should seek beauty everywhere and take pleasure in it wherever we find it, even in a statute. Take section 2-302(1) of the Uniform Commercial Code:

> If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

I would call that statute a thing of beauty. Now contrast it with the Internal Revenue Code. The aesthetic pleasure we take in our profession would be vastly increased were some district Judge one fine morning to announce the following opinion (which I freely give to any Judge who wishes to use it):

> This is a class action in which the plaintiff-taxpayer, on behalf of himself and all others similarly situated (which includes, I suppose, roughly 100 percent of the population of the United States), sues for a judgment declaring the Internal Revenue Code unconstitutional. His argument is (1) that he does not understand it, (2) that no one can understand it, and hence (3) that it is invalid. The theory is novel to be sure, but not for that reason necessarily wrong,
>
> Let us examine the code.
>
> Item: I doubt that the ordinary citizen can grasp the meaning of a sentence more than fifty words long. The code contains sentences of 385 words [s 6651(a)], of 379 words [s 170(b)(1)(A)], and of 506 words [s 7701(a)(19)].
>
> Item: Apart from mere length, I doubt that the ordinary citizen can grasp the meaning of a sentence that does not run more or less in a straight line from beginning to middle to end. What then is one to make of the last sentence of s 509(a)?
>
> For purposes of para (3), an organisation described in para (2) shall be deemed to include an organisation described in s 501(c)(4), (5) or (6) which would be described in para (2) if it were an organisation described in s 501(c)(3).
>
> Item: One of the great achievements of our technological society is an arithmetic based on units of ten, thus permitting the easy manipulation of decimals. Yet the code fixes the accumulated earnings credit for certain groups of commonly controlled corporations at $83,333 for 1970 and $66,667 for 1971. It fixes the multiple surtax exemption at $20,833 for 1970 and $16,667 for 1971. It fixes the retirement income credit for years before 1969 at 15 percent of $1,524.
>
> Item: A statute should be at least moderately straightforward. The code, however, sets up no fewer than fourteen categories of charitable foundations subject to thirty-four different benefits and burdens, for a total of 476 separate combinations.
>
> I do not wish to expand this opinion unduly, and so, for additional illustrations, I refer interested people to any page of the Internal Revenue Code selected at random.
>
> The due process clause means many things. One of them, assuredly, is that the enactments of Congress, whatever their subject matter, should be comprehensible to a citizen of average intelligence applying reasonable diligence. I find that the Internal Revenue Code does not meet that standard.
>
> This may be the first case holding a statute void for rampant complexity. I hope it will not be the last. The Internal Revenue Code is declared unconstitutional under the due process clause.

Efficacy

Fourth, efficacy. Much of the law would work better were it simpler, and here is a sketch of the reason.

There are two kinds of legal rule.

One kind speaks primarily to lawyers. For example, the rule against perpetuities governs lawyers sitting at their desks calmly drafting wills or trust indentures. It tells them what they may do and what not; and it affects the conduct of lay persons only from a distance, through its effect on the conduct of lawyers.

The other kind of rule speaks primarily to lay people, telling them directly what they may do in their own lives. *Mapp v Ohio* is an example of such a rule. It excludes in a criminal case evidence obtained by police officers in violation of the Fourth Amendment rights of the defendant. At first glance, this might seem a rule of the first kind, telling lawyers and Judges what evidence is admissible or inadmissible at trial. But really it is a rule of the second kind. Assuming that the purpose of the rule is deterrence – to deprive law enforcement officers of the advantage of illegal searches and seizures and hence to deter them from committing illegal searches and seizures – we see that the rule's primary concern is to regulate the conduct of police officers on the street, not of lawyers and Judges in the Courtroom. Then shouldn't the rule be simple? If a police officer cannot understand it or with certainty apply it in the hectic circumstances of an arrest, he or she will ignore it – not out of malice, but because it's human nature to ignore the inexplicable. And when the police officer ignores that rule, constitutional violations will occur.

Now look at the exclusionary rule and see how it measures up. The rule excludes illegally obtained evidence. But when is evidence illegally obtained? That is the real question, and to it, as we all know, the Supreme Court has given answers so numerous, so inconsistent, and so complicated that no lawyer, and certainly no police officer, can understand them. Take *Coolidge v New Hampshire*, 403 US 443 (1971), a case involving run-of-the-mill police conduct. The nine justices produced five opinions and a proliferation of explanations that make it impossible to state the holding of the case. With search-and-seizure law come to such a pass, can we say that the exclusionary rule deters? It can't be understood. Hence it can't deter. I should think that we would want it to deter.

Then we must change the rule so that it works, and the way to change it is to make it simple. Instead of a tangle of exceptions, qualifications, exceptions to the qualifications, and qualifications of the exceptions, we need a rule something like this: No search is good unless supported by a search warrant; no arrest is good unless supported by an arrest warrant; only where there is insufficient time to secure one will the requirement of a warrant be excused; where the requirement of a warrant is excused, the test of legality is the police officer's good faith. That, I submit, is a better rule than the rat's nest the Supreme Court has given us. Police officers will comply with it, and it's the job of a moment for a Judge to apply it. The source of these benefits is simplicity. A simple rule – at least one of the second kind, speaking primarily to nonlawyers – is more effective than a complicated rule. It simply works better.

Elegance

Fifth, elegance. Six-and-a-half centuries ago, William of Occam wrote, "Pluralities non est ponenda sine necessitate". We know this as Occam's Razor: Given two ways of saying or doing or explaining something, one simpler than the other, always choose the simpler. This is an axiom of all intellectual work. The simple is more likely than the complex to be "true", and if "truth" is too complex a measure, then put it that the simple is more elegant than the complex.

I draw my example here from the field in which I specialise: evidence. The keystone rule in the law of evidence is the rule against hearsay. Hearsay is not admissible, with exceptions, of course. In the Federal Rules of Evidence, there are twenty-seven specific exceptions and a catchall, essentially for any other hearsay as good as that which the rules specifically make admissible. Now that is complicated, and because it is complicated, it is inelegant. I would reformulate the rule to say that hearsay is admissible unless the trial Judge in his or her sound discretion thinks it fair to exclude it. That is the rule every Judge applies anyway. It is as much as any appellate Court can do with hearsay. And it turns a clumsy contraption of exception piled on exception into an object of plain and simple elegance.

There, ladies and gentlemen, you have my praise of simplicity. It is a virtue in itself, as artists and scientists have long known. It would make our craft and mystery more lucid, candid, beautiful, effective, and elegant. I want simplicity for the law because I love the law, and if this my praise seems to you overly fond and very foolish, call it lover's folly, I pray you, and be patient with me for my love's sake. □

Splitting that infinitive

After expressing his support for the rule against split infinitives Sir Ernest Gowers acknowledges the strong views of some "rebels" — including George Bernard Shaw — to the contrary. But he finishes up with a legal example to end all examples.

But the most vigorous rebel could hardly condone splitting so resolute as the crescendo of this lease.

The tenant hereby agrees:

(i) to pay the said rent;
(ii) to properly clean all the windows;
(iii) to at all times properly empty all closets;
(iv) to immediately any litter or disorder shall have been made by him or for his purpose on the staircase or landings or any other part of the said building or garden remove the same.

— **Sir Ernest Gowers**
The Complete Plain Words

Progressive judicial exasperation

"Section 322(2) gives rise to certain difficulties of interpretation" – The Number One Division of the Planning Tribunal in *Corbett v Takapuna City Council*, 26 October 1982.

"The structure of [s 322(2)] is execrable; and to say that it gives rise to certain difficulties of interpretation is a gross understatement" – The Number One Division of the Planning Tribunal in *Windsor Newton Ltd v Tauranga City Council*, 23 January 1983.

Commonwealth Lawyers' Association

New Commonwealth body seeks to improve legal services

By Asif Khan, London

Lawyers in Commonwealth countries will soon be receiving the first issue of a new publication which aims to increase the flow of information about professional developments in member states.

The Commonwealth Lawyer is the official journal of the newly formed Commonwealth Lawyers' Association whose membership consists of individual lawyers together with law societies and bar associations in Commonwealth countries. The journal, to be published six monthly by the London-based association, is intended for lawyers, both in private practice and government service.

"Fundamental to the rule of law is an independent and honourable legal profession, and it is this independence and this honour that the journal hopes to assert and sustain," says Mr Laurie Southwick QC, president of the association, in the journal's first issue published in January.

Mr Southwick, a New Zealander who practises in Auckland, adds:

> Throughout the Commonwealth, lawyers are heirs to a great tradition, one which itself is founded on individual and collective responsibilities buttressed by common ideals and shared experience.
>
> It is our hope that this journal can contribute on a Commonwealth-wide basis, not simply to sustain the interests of lawyers but to promote a wider exchange of experience in the interests too of the 1,000 million people of the Commonwealth.

The journal contains articles by Commonwealth Secretary-General Shridath Ramphal, himself a QC and former Minister of Justice of Guyana, and Lord Hailsham, who, as Lord Chancellor, is the senior law officer of England and Wales.

It carries reports on latest legislation and judicial decisions in several Commonwealth countries. These range from the Community Legal Services Act of Barbados and the Legal Services Corporation Act of Zambia to the right of barristers in the Bahamas to represent a foreign government in Court proceedings and negligence by a solicitor in his duties to his client, in Victoria, Australia.

Elsewhere, the journal reports on how a former Judge of Appeal in Ghana, Mr Austin Amissah, won the 1983 Noma Award worth US$3,000 for his work "Criminal Procedure in Ghana". The book was one of 87 entries in 14 languages from 39 publishers in 16 African countries. This annual African prize, sponsored by Shoichi Noma of the Japanese publishing firm Kodansha, is awarded to the author of an outstanding new book of scholarly or literary merit.

Recalling that a paper entitled "The decision to prosecute" by Mr Amissah was discussed by the Commonwealth Law Ministers meeting in Colombo, Sri Lanka, in February 1983, the journal comments:

> The general public has, for so long, complained about the jargon of lawyers and incomprehensible language used in legal documents that no one could seriously imagine a legal textbook ever winning a prize for its author in open competition against highly-talented novelists and poets.

The decision to form the Commonwealth Lawyers' Association was taken at the seventh Commonwealth Law Conference held recently in Hong Kong and attended by more than 2,000 lawyers from every branch of the profession throughout the Commonwealth.

It aims to promote and maintain the rule of law by doing all it can to ensure that the people of the Commonwealth are served by an independent and efficient legal profession. The association will not compete with other international legal organisations such as the International Bar Association and the International Association of Women Lawyers. It will work with them.

A 12-member council, headed by Mr Southwick, will be responsible for the work of the association. Other council members come from Australia, Canada, Fiji, Hong Kong,

India, Jamaica, Kenya, Nigeria, Scotland, Sri Lanka and the United Kingdom (Scotland, though a part of the UK, is regarded in this case as a separate country because of its own independent legal system and profession).

The Commonwealth Law Association will be responsible for overseeing future Commonwealth law conferences, held every three years. The next conference will take place in Jamaica in 1986.

Continuing education of lawyers will be a major concern of the association which believes that there is need for lawyers to keep up to date with rapid changes in the law. It will encourage the establishment or expansion of legal aid schemes in Commonwealth countries and greater involvement of lawyers in voluntary legal services.

Welcoming the establishment of the association, Jeremy Pope of New Zealand, director of the Commonwealth Secretariat's Legal Division, said:

> Virtually every Commonwealth jurisdiction organises its legal profession in a similar way. They all have similar codes of ethics and they all have similar problems. Experience of one country can be highly relevant to the experience of another, so that, among other things, the CLA can act as an early warning system.

Mr Pope, a former editor of the *New Zealand Law Journal* published from Wellington, added:

> The legal profession has much more in common than any other profession in the Commonwealth.
>
> The formation of the CLA was long overdue. It is most welcome. The Secretariat will co-operate with it to the greatest extent possible, always recognising that it is an association of independent, practising lawyers while the Secretariat is an inter-governmental body.
>
> Governments will be expecting the CLA to keep them on their toes, but also have a keen interest in seeing that their peoples are served by an efficient, effective and well-disciplined legal profession □

Social Security — Is It Either?

By Gray Williams, Wisconsin, United States of America

One of my favourite clients is a Mrs J. She is a feisty woman who has had her share of the legal and social systems. Her problems are not that she has committed a criminal act, nor has she fallen foul of some remote statute; she has caused neither harm nor damage to any man. It is nothing as simple as that. No, Mrs J called my office originally because she had, or so it seemed, fallen in the cracks that our legal systems sometimes leave uncovered.

Several years ago Mrs J developed respiratory problems that were severe enough to prevent her working and to qualify her as "disabled". She applied for disability payments which are paid through the Social Security Administration (SSA), a federal agency. The SSA agreed that she was disabled – the medical evidence was incontrovertible – and began making monthly payment to her. This may sound simple but of course it is not. Mrs J had met with the SSA several times, reams of paperwork, including medical reports, had been filed and investigations had been made. However, disability is a status event – if you are disabled you receive payments, if not, you don't – and Mrs J began receiving her monthly disability cheques.

The SSA administers another payment as well which is called Supplemental Security Income (SSI). SSI is a welfare payment available to the aged, blind and disabled who are in need of support. It involves stringent financial eligibility tests. For example, an individual who has more than $1,500 in resources cannot receive SSI – the value of a house, a car up to $4,500, and household goods up to $2,000 are not included as resources. It is no use getting rid of resources to qualify for SSI as the proceeds, or the fair market value of the disposed of assets, may be included as resources. Mrs J's disability meant that she might be eligible for SSI and as her resources were within the limits, she began receiving SSI payments each month along with her disability cheque.

It begins now to get a little complex. Because Mrs J was disabled (Title II of the Social Security Act) she was entitled to "Medicare" (Title XVIII of the Social Security Act). And because Mrs J qualified for SSI this made her eligible for "Medical Assistance" (also known as Medicaid or Title XIX). I will explain these terms later; for the present we can note that because Mrs J received both Medicare and Medical Assistance almost all of her medical costs – hospitals, doctors, prescriptions – were paid for. Mrs J's medical costs are very high and to have them all paid is of tremendous importance to her both financially and psychologically.

It is probably becoming clear to the reader that there are several agencies involved in the payments Mrs J receives and the payments themselves are often part federal and part state. For the recipients the system, involving so many agencies and payments – the system is so complex that few can compute what their benefits should be – and so many different tests, is almost incomprehensible. If we look at the development of the social security system we may see how it became so complex and confusing.

The Social Security Act became law in 1935. It was established to provide monthly benefits to retired people. A tax was imposed on earnings up to $3,000 and employers and employees each paid 1 percent of the amount earned up to $3,000. It was assumed that each worker would receive in benefits at least as much as he had contributed to the system. At its inception therefore, the system was rather like a private insurance fund but it soon changed from an individual equity system to a more general welfare system. In 1939 dependants and survivors of workers were included as beneficiaries and in 1954 the disabled were included as beneficiaries. Thus, by 1984 the system covered retirees, survivors and dependants of retirees and the disabled. These are the Title II

recipients. It remained financed by payroll taxes but the taxes imposed have increased dramatically to where, in 1984, the tax to the employer and employee is 7 percent on maximum taxable wages of $37,500. Note that it is not an elective system – employers and employees pay the tax regardless of whether the employee wants to belong to the retirement plan.

There have been two further major additions to the system: In 1965 Congress introduced a medical care system for the aged called "Medicare" or Title XVIII and in 1972 SSI was introduced to make cash payments to the elderly, blind and disabled. The combined effect of these changes is roughly as follows: Medicare is automatically available to those over 65 who are entitled to Title II and to the disabled who are entitled to Title II. It involves two parts, "A" and "B". Part "A" is received automatically with Title II benefits and covers hospital costs. Part "B" is a voluntary system of medical insurance and covers medical expenses beyond hospitalisation costs. For part "B" the recipient pays a mothly amount ($15.30 in 1984) and most (approximately 80 percent) of his medical costs will be paid. Medical Assistance (Title XIX) is a health care programme for the needy – it is available to the aged, blind or disabled who are also of low income. In general it pays what is not covered under Medicare and, in Wisconsin at least, the state also pays the $15.30 monthly premium required under Medicare's part "B".

To finance the system three trust funds have been set up from which payments are made, an elderly and survivors fund, a disabled fund and a medical/hospitalisation fund. Financial problems abound within the system. Medicare, which is funded by a 0.70 percent tax on wages, now pays medical expenses for 26 million elderly and 3 million disabled people. Since 1970 federal outlays for Medicare have risen 18 percent to an annual amount of $60 billion in 1983. The best guess is that the Medicare trust fund will run out of money in 1990. The other trust funds have fared no better; the SSA now sends pensions and disability payments to 36 million recipients (one in six Americans). In 1970 social security benefits amounted to $33.8 billion, in 1983 the amount was $217 billion which is one-quarter of all federal spending. In 1982 the elderly and survivors trust fund had to borrow $12.4 billion; without the loan there would have been no monthly payments to those entitled to receive them.

The causes of the financial shortfalls are many: medical costs have risen dramatically, higher unemployment has meant that fewer people are paying into the system, inflation has increased at a higher rate than expected and there are now simply not enough working people to support the system (in the 1940s 100 workers were paying into the system to support each retiree, in 1980 there were three workers for each retiree – the birthrate has dropped and people are living longer).

While the social security system as a whole was languishing, Mrs J was having her own problems with the system. Her mother had at times helped her out financially. Mrs J considered the money a gift; SSA considered it income. The money she received put her over the financial limits for SSI and she was ruled ineligible for SSI. The loss to Mrs J is about $80 a month, galling enough, but there is more. Because she is ineligible for SSI the state does not pay her Medicare part "B" premium. Mrs J has to pay the $15.30 per month premium and her medical coverage is not as good as it was – for example she now has to pay prescription costs. Worse followed: as the SSA determined that Mrs J received more money than she was entitled to (ie, she received SSI when her gift money meant she shouldn't have), they now are seeking to have that money refunded to them. In Mrs J's eyes the system was beginning to look anything but benevolent.

We have already appealed the loss of Medical Assistance, early next week we have a hearing on the reduced medications Mrs J now receives. And later this month we will ask for a reconsideration of the decision that she refund the overpayment. For that we will seek, through negotiations and conferences with the SSA, to have them decide that she need not repay the money. We will argue that Mrs J was "without fault" and to require a repayment would defeat the purpose of the system, we will argue further that she is unable financially to make any repayment. We will cajole and plead and if we fail we will appeal the decision to an Administrative Law Judge.

We have a reasonable chance of success on the repayment issue but probably Mrs J will no longer be eligible for SSI. What is certain is that for all the agencies involved we will have to provide more information, answer more forms and attend more hearings. For the cutting edge in all this is not that the system is uncaring or unhelpful, quite the contrary as most of those we have dealt with within the system have been concerned and helpful, it is that the imposing number of conferences, redeterminations and appeals and the sheer, immeasurable weight of the correspondences and forms are enough to dampen the spirit of any recipient. □

In proper form and manner

Men living in democratic centuries do not readily understand the utility of forms; they feel an instinctive contempt for them. . . . Forms arouse their disdain and often their hatred. As they usually aspire to none but facile and immediate enjoyments, they rush impetuously toward the object of each of their desires, and the least delays exasperate them. This temperament, which they transport into political life, disposes them against the forms which daily hold them up or prevent them in one or another of their designs.

Yet it is this inconvenience, which men of democracies find in forms, that makes them so useful to liberty, their principal merit being to serve as a barrier between the strong and the weak, the government and the governed. Thus democratic peoples naturally have more need of forms than other peoples, and naturally respect them less.

– Tocqueville, *Democracy in America*

Custom and law in Malaita

By Marion Allardice

The author is at present serving as Public Solicitor for the Malaita Province, Solomon Islands, a post she has held since January 1983. She comes from Otaki; and was recruited for this post by Volunteer Service Abroad (Inc).

In custom, when a Malaita man marries, he, with the help of his line or group, makes a brideprice payment to the woman's line. The form and value of the brideprice are a matter settled by negotiation. Usually the handing over of a six-fathom long, ten-string wide belt of shell money, worth approximately $SI1,000 confirms the marriage contract.

Custom varies between the islands which make up Solomon Islands, and between the different language and descent groups on those islands. A Malaita man, for example, working on Vella Lavella in the Western Solomons, will soon find out what the price is in custom, if he meddles with a dusky Western girl! The Seventh Day Adventist Church discourages its adherents from being involved in custom transactions.

Book on local custom

In 1981, a book entitled "Are Are Customary Law", containing one hundred and twelve specific offences against south Malaita custom, was published. The book is believed to be the first by local chiefs recording their local custom. Interestingly, the Are Are people, many of whom have had a high degree of exposure to European ways, compared, for example to the Kwaio of the eastern bush area of Malaita, express great pride in "our custom way", as do the Kwaio.

A number of statutes which were enacted in the United Kingdom prior to 1961, continue to apply in Solomon Islands today. Customary law, the common law, equity and the doctrine of judicial precedent have their place in the Solomon Islands legal system. (s 76 of the Constitution). Except to the extent that customary law is inconsistent with the Constitution, or with an existing Act of Parliament, "Parliament is to have regard to the customs of the people", (s 75(2)) and with more specific wording, s 75(1) states that "Parliament shall make provision for the application of laws, including customary laws".

Land law

One example of legislated application of customary law, is in the area of land law. Section 220 of the Land and Titles Act provides that "every transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned".

Approximately 90 percent of land in Solomon Islands is held in customary tenure. Land may be registered as held on customary tenure; land can also be registered in the names of the leaders of the land owning group so that these men are trustees.

There are Solomon Islanders who are recognised as authorities on matters of custom. If a dispute arises in a village, it is often settled by the parties submitting to an arbitration by village elders. Local councils of chiefs, or area councils also settle various disputes by reference to custom.

Minor criminal matters, land, and many civil disputes, are at first instance within the jurisdiction of the local Court. Decisions are based on relevant local custom, the atmosphere is informal and the parties do not have a lawyer speak for them. Judgments and orders made by the local Courts are enforceable by ordinary Court process.

Land litigants have a final appeal from the local Court on questions of custom, to a Customary Land Appeal Court.

Proof of title

There are basically four ways in which primary right in custom to land is established. Each side presents its genealogy to show it has the superior claim by virtue of discovery of the land, long unchallenged occupation, acquisition by conquest in battle, by gift as a reward for help as an ally, or by gift from the male side to a female line.

The ability to name landmarks and recount stories about events of long ago, without challenge, together with the showing of tambu sites complete with the bones of ancestors at places of worship from pre-Christian times, are significance to the Customary Land Appeal Court survey party. There is a right of appeal on questions of law and procedure only, to the High Court. Because land is of fundamental importance to the people for several reasons including economic survival, an unsuccessful litigating side will try every appeal avenue open to it. A final decision against the land claim of a particular line or kin group, is binding on all the members for all time. However a different group can make its claim to the land, against the successful line, setting in train, another round of litigation. The process almost equals in intensity of emotion and longevity, the pay-back killings of the last century on Malaita.

In Malaita custom, land passes through the male line. In other parts of the Solomon Islands the system of land inheritance is matrilineal. Some groups have very strict rules about the contact which is permitted between

brothers and sisters, stemming from the inheritance system. This is the case in parts of Guadalcanal today. By contrast, in Malaita, brothers and sisters are allowed to remain in the same room, and to talk together.

However, contact between boys and girls in the village setting, is prescribed. A boy should be careful about the way he holds hands with a girl. Any show of informality or special friendliness is grounds for relatives of the girl to demand compensation by the boy's side. It is, however, very normal to see boys and men holding hands.

The payment of brideprice gave the man's side rights over the labour and children of the woman who marries in. Brideprice is still significant today, especially in the event of marriage breakdown. The principles expressed as those which must guide the Court in determining custody of children in the Affiliation, Separation and Maintenance Act 1971, are difficult to explain to people, when the custody of their children is in issue.

Children

In custom, the father's side has first right to the children. This argument is invariably raised by men during the Court hearing. The welfare of the children is, however, what the enquiry is required to be directed at.

The size of compensation and of brideprice have apparently inflated in recent years. Tafuliae, which are a type of shell money consisting of beads strung on long strands, are commonly used to make compensation payments. Tafuliae worth $500 are often given for having sexual intercourse with an unmarried girl for her first time, but the amount declines thereafter.

In one incest case, an elderly father served a prison sentence for incest with his daughter, and had to pay compensation which would have been close to $800 before he could return to his village. Compensation had to be paid to his wife's side because it was an insult to his wife, and to his son, because the brideprice of the daughter when she married would be lower, and the son was entitled to share in the brideprice for his sister, to help pay for his own marriage.

Settlement by compensation

In custom, payment of compensation is a very satisfactory way of smoothing over disputes and re-establishing relationships. Today, payment of compensation in civil cases is encouraged by the Courts. Magistrates have jurisdiction to attempt to settle disputes in civil cases by approving a payment of compensation. This power is given in a statute enacted pre-independence: the Magistrates' Courts Act.

The power to order compensation and thereby reconcile a victim who does not want to pursue the case through prosecution, with the defendant, is exercised by Magistrates in minor criminal cases of a personal nature. Magistrates also have a general power to order compensation in criminal and civil cases. (s 27 of the Penal Code).

Changes

In the cosmopolitan capital of Honiara, and even the smaller centres and government stations, like Auki, on Malaita, custom ways are, of necessity breaking down or undergoing change. Often customary ways are at odds with development and environmental conservation.

In custom, women do not enjoy the same independence and decision-making power as men. The Constitution states that women are entitled to the same rights and freedoms as men. Many more positive steps will be needed before women will participate fully in education, employment beyond the home and garden, and in the political life of Solomon Islands.

There is legislation now to protect the largest marine turtle; the Leatherback. I learnt from one recent specimen, the subject of a prosecution, that the Leatherback is a very tasty meal. Whenever it does make one of its rare appearances ashore for egg-laying, custom dictates a feast.

One thing is certain, the customary law text will need constant up-dating. Evidence is that custom continues to play its lively role in Solomon Islands. So, stranger, beware! □

The Paradox of a Bill of Rights

A society so riven that the spirit of moderation is gone, no Court can save; a society where that spirit flourishes, no Court need save; in a society which evades its responsibilities by thrusting upon the Courts the nurture of that spirit, that spirit will in the end perish.

—Judge Learned Hand

The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics.

— Lord Bryce

In political institutions, almost everything we call an abuse was once a remedy.

—Joseph Joubert (1813)

Palm-tree justice

Mr B S Barry SM (Wanganui): "I welcome this Act, [the Matrimonial Property Amendment Act 1968] because it will enable me, in some small measure, to do what I have done for many years in the DP Court and that is totally disregard the law. In the DP Court one is dealing with human beings and human problems. Frankly, I have never considered the finer points of the law in trying to solve those problems. I regard myself as a real expert in being able to forget whether the principle in *Hunt v Hunt* was ever decided, and I think that procedure has been successful. In my 10 years on the bench I have had one appeal from the DP Court, and that was when two practitioners from neighbouring districts chose my forum because they had heard of my palm-tree justice. However unlike my own boys, they did not like it and promptly appealed."

— Law Conference 1969

Wealth without conflict:

Reconsideration of the employment contract

By M D Malloy, an Auckland practitioner

This article looks at the issues studied by Marx and Engels in a different way. Instead of concentrating on economic speculation and inter-group conflict associated with the employment contract, it looks at the contract itself, with particular reference to bias, its methods of distributing reward, and implications for conflict. It is suggested that the standard form of the contract is flawed and should be replaced. The substitute suggested is the inter-corporate partnership. Its attributes and implications at the individual, economic and political levels are discussed. Possible changes in business groupings influencing patterns of co-operation and competition are suggested. At the productive stage, implications for independence, prevention of conflict, innovation, new enterprises and efficiency are considered.

Background

The world economy is a bit like a large block wall showing cracks. Inquiry into the origins of the cracks would, logically, start with the base layer and investigate design, engineering and stress tolerance. The thesis of this paper is that a near-universal social institution, the employment contract, is the economic equivalent of base blocks in a cracked wall, is flawed, and requires fundamental modification if we wish to prevent the cracks from widening and from bringing down the whole edifice.

All geographic groups of humans are honeycombed, but only group members can see and understand the cell topography. The individual characteristics of members in part derive from that topography. The identity of each individual is established by the reference groups to which he or she belongs. The dividing lines between groups make up a rich mosaic of invisible lines. Some, such as age, sex, class, religion, and pigmentation are fixed more or less by birth. Others, such as service clubs, religious groups, sports clubs, occupations and organisations are chosen by individuals. Some divisional lines can be manipulated, some cannot. Some can be varied, but only with difficulty. While the lines are, in essence, anonymous, their influence is pervasive in terms of self percepts, stereotypes, attitudes and learning sets. They provide the dynamic framework for much of tragedy and comedy. They also pose enormous threats, for they underlie ideological differences, class conflict, economic dislocation and the threat of major war. Emanating from the employment contract, we find groups of employees sharing:

(a) Fixed wages; and
(b) Craft skills (trade union) *or* a common employer (house union).

If humans are to survive in the nuclear age, they cannot rely indefinitely on a calculus of terror. To attempt to do so means that we bet on reason as the dominant influence of every decision-maker in any position of confrontation which involves at least one state with nuclear weaponry. As nuclear proliferation increases, and as time goes on, betting on sanity becomes an increasingly risky gamble.

Dividing the superpowers are a number of issues, stereotypes, alliance patterns, gamesmanship, political methods, social structure and ideology (directly linked to the employment contract). It is impossible to disentangle the relative importance of divisive issues. Nevertheless, we can take a harder look at the issue of ideology, because we possess the capacity to manipulate certain aspects of working relationships. Any breakthrough in this area *might* help to trigger a break in the log jam of international conflict.

Social Principles

For all industries using large-scale organisations, familiarity with the market place must tend to promote efficient working methods. However, some information inputs are more effective than others. The most direct method, and the one with the greatest impact, is knowledge of results for an individual's own working group – in other words, feedback information. In the absence of extraneous factors such as internal conflict, it seems safe to predict that the more a working group exposes its members to group feedback information, the greater the solidarity and motivation of that group and the greater its sensitivity to

the dynamism of consumer needs and the availability of supply. Anyone seeking to engineer society showing economic growth must give careful attention to the design and installation of static-free, feedback loops.

Impact can be assured by designing the loops so that the information to each individual passes through his pocket. If his income fluctuates directly with market acceptance of his group's products, the message is likely to get through. If not, not. This, then, is the first law of organisation design, based on inferences from the research work of B F Skinner and his disciples: to be efficient, an industrial organisation must ensure that each person making a significant contribution to its output learns, through income fluctuations, the fluctuating fortunes of the organisation's products or services in the market place.

The second law relates to an issue studied by Margaret Mead about a half century ago. She was interested in the then current ideological dispute on co-operation and competition, and studied these contrasting working patterns in a wide range of primitive communities. As we would now expect, she found no characteristic pattern. Clearly, both styles are within the normal working repertoire of humans. Anthropology and social psychology suggest that, on this topic, we must ask somewhat subtle questions.

For instance, under what circumstances does co-operation or competition serve the needs of humans as consumers? Or as producers? Are these circumstances related to the size of the producer organisation? To what extent can cultural habits be modified? If both patterns are desirable within a working group, how do we set the bias? Does a given setting tend to promote production at the expense of safety? In a broader national context, what is the price that must be paid for expansion? Is it possible to produce a design for an expansionist pattern which avoids, for example, heavy human or environmental costs? (This latter issue crops up in almost all land use discussions). The second law of organisational design goes something like this: an effective working group is one which provides an optimum mix of co-operation and competition for that particular group, operating in its working environment. By expressing the principle in this way, we emphasise differences between groups and the possibility of finding an optimum setting of the bias by an experimental approach.

Culture

Through recorded history, humans have managed to get others to work for them. Slaves and servants, men-at-arms and peasants make up the backdrop of history, literature and art. Servitude may relate to an early, practical assessment of energy needs. In an age when technology had harnessed the wind and domestic animals, supplementing such sources of power with human muscle and brain power may have been a simple and logical extension of a line of thought. Pursuing this reasoning further, it seems possible that the 19th century moves against bond servants and slavery may have owed their inspiration and, even more, their success, as much to coal technology (John Nef's thesis) as to a refined moral sensibility.

Like climate, culture (meaning patterns of behaviour common to large groups) changes slowly. There is security in cultural guidance. There are also dangers inherent in an introspective interest in cultural heritage. It may be that a great deal of interest in the deeds and percepts of ancestors tends to reduce activity and innovation. Moreover, an excessive interest in the past may be associated with one of the worst aspects of the human condition: boredom. In individual terms, culture provides us with a springboard of knowledge, a structure facilitating decisons, the anatomy of communication, social behaviour, and organisational patterns, and a systematic shaping of our mental sets. While we need it, we must beware of its potential for smothering adaptive behaviour.

The fundamental law of biology is that organisms must learn to adapt to their environment — or perish. The same principle applies to culture. As the world changes, so must cultures. Major events such as climatic change, population change, the disappearance of an energy source, the pollution of the atmosphere, all demand appropriate cultural responses. At such times, the innovative capacity of humans becomes of critical importance. Those cultures which tend to put excessive emphasis on the value of previous learning will tend to suppress or ignore innovative proposals and produce a dangerous lag in their response to change, thus threatening their own existence.

This kind of issue confronts us all. From the Euro-Asian cultures we have inherited a conventional picture of working relationships which puts the employment contract in centre stage. Not, however, the centre occupied by the leading actors. The centre stage for working relationships is an unchanging backdrop. The employment contract shapes class concepts. It provides the major source of income for most people. It establishes a nexus without which house and craft unions could not exist. Statistically, it serves as a barometer of economic health. To businessmen, industrialists and economists it is one of the building blocks for organisations, for risk-taking ventures, and for concept formation. It is as basic as grain crops — and taken for granted in the same way.

It is the thesis of this paper that the employment contract has outlived its usefulness. It resembles an old sweater — comfortable but full of holes and overdue for the trash can of history. Its associated crimes include the following:

(a) The employment contract defines the lines for major we-they groupings between the givers and receivers of money for job-time. The relationship is chronically unstable. Disputes between employers and organised employees, and between different craft unions whose members share a common employer, produce work disruption, wastage, inconvenience for the consumer and a consistent source of income for the news media.

(b) Employment creates a master-servant relationship. Decisions on how the employee does his job, and control of the marketing process, are retained by the employer. This creates a dependent relationship between the two, because the employee lacks market feedback. In an age of increasing education, this enforced dependency is increasingly anomalous. Employment helps to maintain a dominance hierarchy within society and in this way provides a social structure favouring the

development of authoritarian, manipulative personalities. It runs counter to the tolerant, self-reliant, democratic values supposedly held by some non-communist states.

(c) Class lines are supported by the employment contract. Associated with this in some states is a chronic lowering of self-percepts and acceptance of limited responsibility by the employed. (Kafka captured the feeling of system direction neatly.)

(d) Whatever between-group conflict tendencies exist because of the nature of the employment contract tend to become more severe as the scale of operations increases. Management quality and degree of decentralisation also affect the probability of conflict. Nevertheless, it seems likely that feelings of anonymity and lack of responsibility increase with size.

(e) The unequal division of wealth has been the traditional complaint of socialists and communists but it is unclear whether income or capital or both provide the primary focus of attention. A great deal of rhetoric is centred on wage rates when other indices are at least partially in contemplation. Nevertheless, this obscure issue has led to different patterns of ownership of the means of production in difference states. In spite of this, the employment contract remains, regardless of whether productive tools are owned by individuals, joint stock companies or the state. To the employees of big undertakings, ideological arguments lack meaning. (It makes no difference to a wage earner if his employer is Royal Dutch/Shell or a Soviet corporation – he knows that he cannot influence the course of events in any way.) Whether such arguments play a significant role in big power disputes is doubtful. Other likely candidates include communication difficulties, gamesmanship and the propriety of arbitrary rule.

(f) One of the most basic characteristics of humans is their innovative capacity. This has been the most important quality enabling dominance of the species, their modification of the physical world and the current level of the human population. Both cultural drag and the pattern of industrial organisation act to inhibit its sphere of operation. Inasmuch as the employment contract, in part, determines industrial organisation, it acts as a clog on the capacity of humans to adapt and change in a changing world.

(g) Competition is usually described as the industrial and commercial pattern which will create a reasonable market situation for the consumer. However, craft unions cut across competitive lines. Uniform wage rates and wage increases mean that each employer in a given industry carries a similar wage overhead and this inhibits the capacity of entrepreneurs to offer variation in their prices. The consequents of employment make nonsense of the competitive theory.

(h) The justification for general wage increases is usually the magnitude of price increases. The chicken and egg aspect of wage-price spiralling is not of current concern, but the central role of the employment contract is. Without it, the acceptance of standardised wages and wage increases would be impossible.

(i) Union pressure on wage rates have an important effect on new business ventures. Because the wage component of predicted overheads is so high, it limits and inhibits risk-taking ventures in marginally profitable enterprises. What looks like a floor to would-be employees can look like an impossible hurdle to would-be entrepreneurs.

(j) Individuals differ in many ways. These include emotionality, sociability, interests, aptitudes, strength, energy, intelligence and decision capacity. Standardised wage rates operating through the employment contract ignore such differences. They convert the rich tapestry of humanity into an apparently single-hue carpet. Conversion provides economists with easy-to-handle new data and ensures that their predictions are at no better than the chance level.

Also embedded in the structures of Euro-Asian cultures are two other commercial contracts: the sale of goods and the lending of money. On the whole, the standard contract for the sale of goods has stood the test of time well. Contrary to the expectations of 18th-century mercantilists, who regarded bullion as wealth, it has evolved as a social tool encouraging the development of inter-party trust and long-term business relationships with major advantages to each side. Typically, it has not survived merely as a zero-sum game, although many attempts have been made to obtain unilateral advantage through a variety of strategems, foremost of which is leverage.

The money-lending contract has a different recent history. By its conventional reliance on collateral security, its form encourages leverage. The usual contract involves the lending of dollars by A to B and the repayment by B of the same number of dollars with interest. One problem arises from inflation. Its effect is that the dollar repaid is not equivalent in value to the dollar lent. Hence, the common response of the lender is to guess at the magnitude of expected inflation and to set the interest rate at a level which will cover both inflationary loss of capital and an income return to the lender. This response has a major weakness. Commonly, governments do not recognise the capital loss component of interest, and charge tax on the interest received, including the component representing capital loss. Hence, the lender is forced to pay tax on his capital and typically faces a show erosion of life savings. In this way, the traditional form of money-lending contract does not meet the needs of modern society. Further, borrowers as a group are motivated to increase the rate of inflation, because, as the inflation rate increases, the ability of a borrower to repay both principal and interest with ease increases.

The sale of goods contract conventionally contains no in-built preferences or biases favouring, or capable of favouring, one party. The employment and money-lending contracts do. It is noteworthy that the two forms incorporating structural bias chronically produce undesirable side effects.

In brief, the employment contract represents a habit deeply embedded in the cultures of the civilised world. It functions like a Mafia godfather – at the heart of a heap of misdemeanours but not directly involved. If this diagnosis is reasonably accurate, we should probe the contract a little further. It would be useful to consider in what ways it differs from other working relationships, and the context within which it operates.

Anatomy

Almost anybody and any organisation can be an employer. Individual businessmen, housewives, companies, charities, departments of state, local bodies all fill this role. By contrast, an employee is nearly always an individual, and hired individually. This is a curious situation. How does it come about that in an age when the use of corporate entities is common practice for a wide range of associations and activities, the device has scarcely been used for those contracting to do work? We routinely use corporate methods for state undertakings, boards of trustees, friendly societies, business undertakings, voluntary associations, mutual self-help associations, clubs, provident societies and trade unions. It may be that the prevalence of trade unions, and their adopted role, have tended to inhibit innovative thinking on the possibility of using the corporate device in a working relationship.

The parties to the employment contract expect to receive different types of reward. The employee contracts for a fixed reward which will be paid regardless of the success or lack of success of the venture. The business employer expects to receive a reward when all overhead costs (including wages) have been covered – his profit. It is impossible for an employer to predict the magnitude of his reward with accuracy. Thus, while the employee's reward is fixed, that of the employer is variable. This major difference in reward distribution defines the we-they groupings with which we are so familiar. Moreover, unless suppressed by the state, these groupings will arise regardless of whether the employer is a capitalist corporation or a communist state corporation.

Business ventures both succeed and fail. One consequence of groupings established on employment lines is a lack of understanding by employees of risks, of factors leading to business failure, and of the employer's rewards expressed as a return on capital. Too often, industrial action is initiated by people who seem unable to understand that they are recommending a form of suicide. The pattern of organisation of employees, which ensures that employees have no first-hand knowledge of the undertaking's results through impact on their incomes, is probably the major factor responsible for what otherwise appears to be a form of lunacy.

Employees have traditionally organised themselves into two kinds of unions. The first (the house unions) embraces all employees of a given organisation. This mode is favoured in Japan. The second (the craft or trade union) cuts across employers and embraces groups of employees carrying on a similar occupation. It is the mode favoured in Europe. On the whole, the house union tends to maintain inter-house competition and diminish employer-employee conflict. The trade union tends to reduce inter-house competition and to promote both employer-employee and inter-craft conflict. The house union pattern seems to render inflation less probable than does the trade union system.

When individuals enter into an employment contract they share a common goal: to produce something of benefit to third persons. It is essentially a collaborative relationship. Motivating each of them is the presumed belief that, through collaboration, they can achieve their common goal more effectively than they could do if acting separately.

To achieve the presumed goal, two roles are discernible, although each can be filled by the same person. The first role is to provide work tools. This may be in the form of a factory, office, shop, machinery, equipment work tools or anything needed to provide the proposed benefit for third persons. The second role is that of tool user-the operators. They are presumed to have the capacity to use the relevant tools.

Given this separation of rules, we can think of the population of individuals collaborating in a given undertaking as capitalists (who supply the tools) and operators (who use them). The populations may be inclusive, overlapping or separate as shown in Fig 1.

Considering only decision-making and the flow of information within

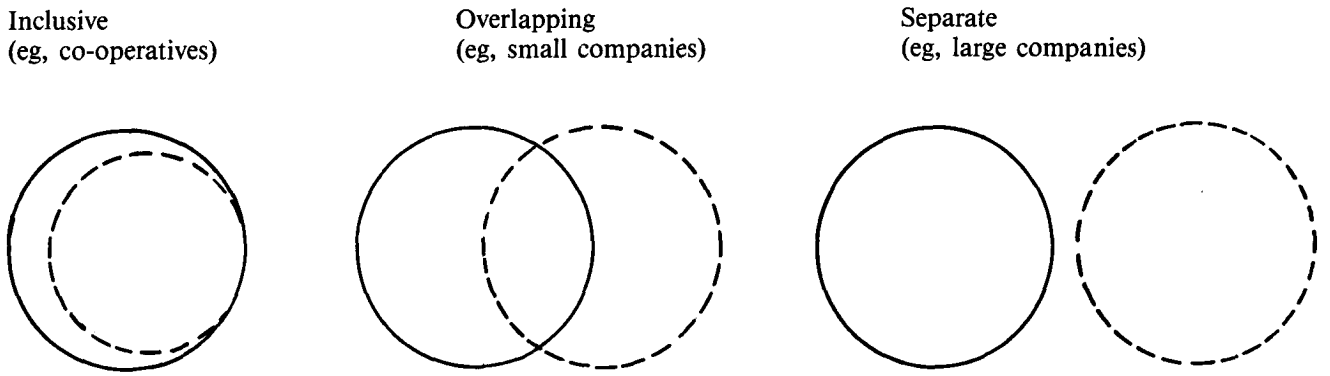

Fig Hypothetical relationships between capitalists and operators in different organizational patterns. (Capitalists ____, operators .....)

large commercial organisations, the typical pattern may be something like that shown in Fig 2. It is notable that the position of the managing director is critical in power and information terms. To him is entrusted broad discretionary powers by the shareholders and by sub-delegation from the directors. Beneath him are executives, subordinate decision-makers and workers. Their tasks may involve different degrees of managerial responsibility depending on placement in the organisational hierarchy. The reporting system is designed to supply all information available to the organisation through ascending levels to the managing director and, through him, to the directors and shareholders. Hence, any weakness in the functioning of a single man can be critical to the success or failure of the whole organisation. In real life, a number of examples of spectacular business failures associated with this situation can be quoted.

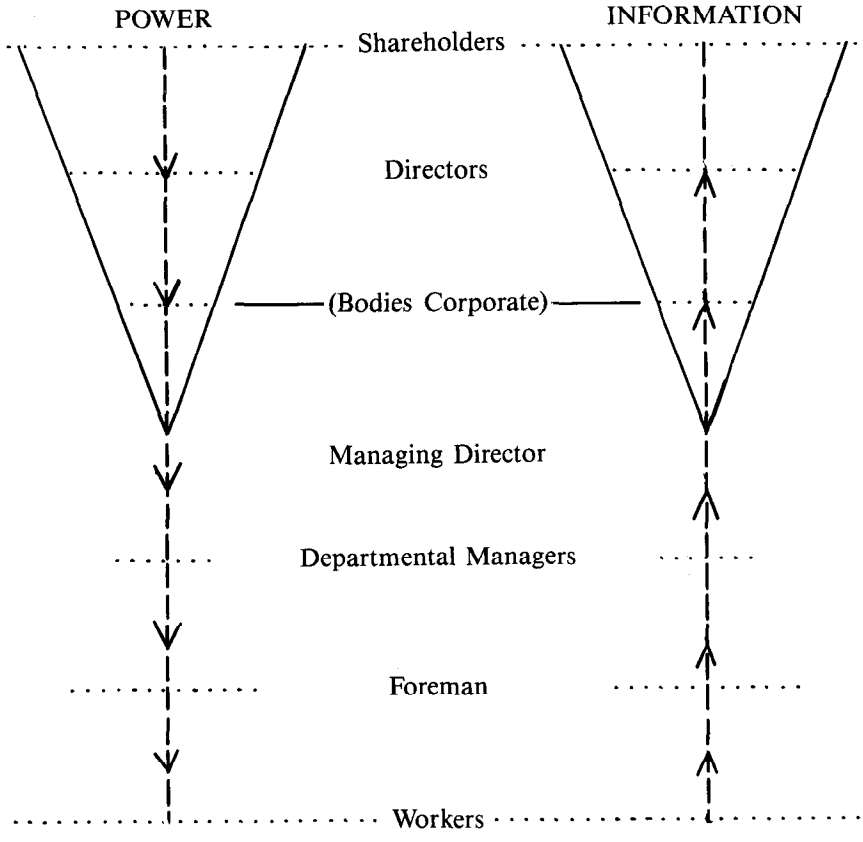

Fig 2 Hypothetical flow chart of power and information in typical large company.

Alternative

There are a number of possible alternatives to the conventional organisational pattern described above. The one chosen for discussion here is merely the best looking model at this stage. It can be described as the inter-corporate (IC) partnership. Its major features are that both capitalists and operators are separately incorporated because of their different roles. Each body corporate then contracts with the other to undertake attainment of a common objective on an income-sharing basis. Each body is thus involved in equity investment (money on one side, effort on the other) and neither party holds a position of advantage or privilege.

An IC partnership avoids the employment contract in its wage payment, individual contracting, and master and servant aspects. It does not render a dual role per individual (capitalist and operator) difficult. On the contrary, it will tend to foster it, by promoting modified percepts of the working environment and modified work methods on the part of operators.

The sharing of income must be judged equitable by both capitalists (organised as a conventional company) and operators (incorporated, say, as a provident society). If company members do not judge their share as equitable they will not subscribe further money for expansion purposes. This is likely to inhibit progress by the joint venture. Similarly, society members must judge the IC division of income as equitable if the society is to attract the most desirable new members. Hence, the negotiating skills of both potential partners must aim at the creation of a working relationship which will be seen as advantageous by both parties. Negatively, the goal is to exclude concepts such as the zero-sum game, the bullion model of the mercantilists, and the exploitation model of Marx. Positively, the goal is to engineer Sherif's solution to inter-group conflict: to create a situation in which both capitalists and operators can attain their goal of serving the public if, and only if, they work together.

IC partnerships are seen as a way of teaching new percepts of within-group relations and of external (ie, public) relations. Internally, dependence is that of equals, because neither party can function without the other. Learning about the big wide world of the market place is engineered by the working situation rather than taught by a senior member of a dominance hierarchy.

Externally, because each party (and its members) receives a variable reward, fluctuating directly with public acceptance, knowledge of results is a necessary corollary of the organisational pattern. It is expected that direct knowledge of market-place activity and results will lead to improved percepts, attitudes and self-confidence, especially on the part of operators.

Within each body corporate, some changes would be necessary: minor for companies and major for societies. A three-tier structure is envisaged for companies: members, directors and chairman. Basic responsibility for negotiating with societies (one per physical centre) would rest with the chairman. His role would thus be a critical one. The cosmetic appointment of a chairman must cease if the company is to negotiate successfully with its operators. As previously, power would devolve from members through directors to the chairman.

The same pattern would exist in the society. Power would be delegated from members to sub-managers or foremen, to vice-presidents, to president. The managerial role of the present executive would remain, but would stem from a different power base — that of operator members. The identity of the president would

be extremely important because his ability to negotiate an equitable deal with a company chairman would be critical to the success of the society.

Compared with the conventional structure, the flow of information would be similar but the devolution of power would not. Relations between the groups would shift from dominance to equality. Compared with historic feudal and tribal patterns, relations would tend to shift from status to contract. For each undertaking, a settling down period should be arranged, so that new patterns of interaction can be developed and accepted with confidence. Initially, therefore, a partnership contract between the company and society should not be for more than one year. At the end of that period, the relationship can be either terminated or extended in the light of experience.

Among other issues, the partnership contract must establish mechanisms for the flow of information between the two partners. The primary nexus for this flow would be between company chairman and society president but this may need supplementing in other ways. The most important contractual provisions would relate to the definition of the goal object, the recording of operating methods within policy guidelines, the flow of information internally, the basic roles of each party, and the division of income between the parties.

For society members, one novel aspect of the contract would be the corporate implications. Because in law the society would represent a person, distinct from the personality of its members, its contractual obligations would remain regardless of membership. Hence, members could die or retire, and new members join the society, without the IC contract being affected in any way.

Internally, the organisational pattern for a society would be democratic. Power comes from the grassroots of membership. The exercise of this power will be critical to the survival and success of the group. If effective managers are put into positions of responsibility and the president possesses adequate skills in negotiating with the company chairman, in human relationships, in management and in overall vision, the undertaking as a whole and the society in particular are likely to survive and prosper. Any failure in this area would be just as serious as it would be in the conventional corporate structure of today.

A corollary of selecting effective managers is their reward. Extra responsibility must be recognised with additional reward if suitable people are to undertake it. Hence, the setting of a scale of internal reward fractions, which are seen as providing equitable rewards for responsibility, is a critical issue for societies.

Not all undertakings can be expected to operate on the basis of a division among members of a single income. Some, such as large retail stores, will have different profit-centres correlated with different activities. This type of structure may require the establishment of teams of operators (one per service) with individual sub-managers and a fixed proportion of income being set aside for overall administration. Situations of this type require carefully drawn rules to reconcile the operations and management of the teams with overall operation and management.

Important aspects of the employment contract relate to budgeting and time. Fixed weekly payments are fine for short-term goals and for budgeting. Long-term, they are not so good. The variable reward of the IC partnership is fine for long-term purposes, but not convenient for short-term needs and budgeting. This problem can be handled in two ways.

Computers make it possible for commercial dealings, overheads, stock inventories and plant dealings to be handled with speed and accuracy. This enables monthly accounts to be prepared shortly after the end of each month. If, therefore, an IC partnership contracts for a monthly division of net income, computers render this both practicable and rapid as between the contracting parties and within each body corporate. While it is expected that a company would stick to the standard half-yearly and yearly divisions of income, the society would be expected to divide monthly income among members when available subject only to taxation and superannuation deductions. (Tax deductions are envisaged as an arrangement administered by the society for the convenience and security of members.) Nevertheless, weekly drawings on account of monthly divisions can also be arranged. Such drawings should satisfy short-term needs. In time, the pattern of monthly income, reflecting seasonal variation, should be established empirically and thus enable budgeting to be done.

Experience to date tells us that societies will take individual form as a function of objectives, methods, differences among members, their complementarity, the previous experience of members, and the outcome of internal discussions. Rules should then be framed to fit the circumstances rather than treated as a rigid framework within which individuals must be compelled to operate.

To succeed, a business organisation needs to have available to it a number of basic skills: typically, innovation, production, marketing, finance and management.

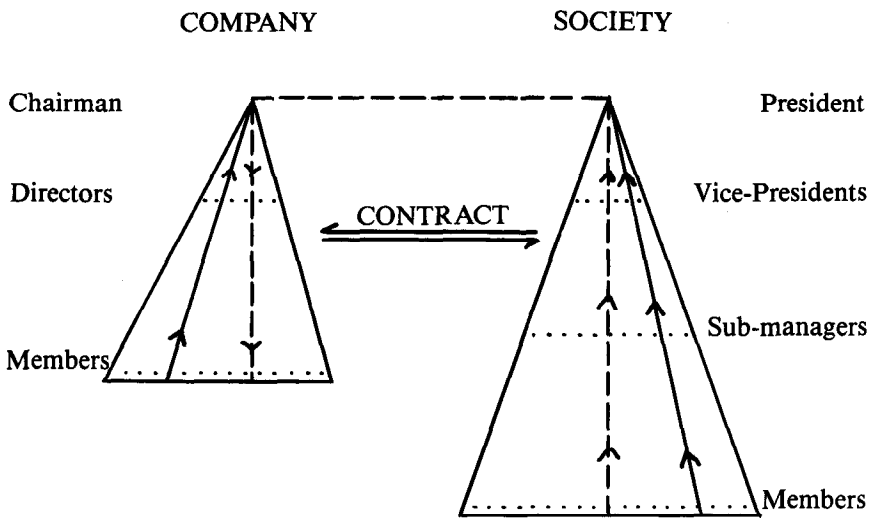

Fig 3 Relation between inter-corporate partners in a business venture with flow of information and devolution of power incorporated. (Power ____, information ____)

Also typically, such skills will not be found in the same individual. A society will, therefore, tend to succeed or fail depending on its success in putting together a basket of skills fitting its particular needs, and on the pattern of interaction of individuals possessing those different skills.

Schematically, the relation between IC partners, the flow of information, and the devolution of power is recorded in Fig 3. The society pattern shown is appropriate to, say, a single manufacturing venture and would not apply to a society incorporating different profit centres.

Implications

For the parties, an IC partnership provides an opportunity for a high-risk venture to get off the ground. It enables a slow start enterprise to be considered in circumstances when a long time gap between start-up and the commencement of profit earning would otherwise render the undertaking impractical. In both cases, it is the lack of a wage-floor which makes the critical difference. The use of the IC partnership can thus be expected to provide a stimulus to new entrepreneurial undertakings. If we regard lack of productive work opportunities as the critical problem in unemployment, IC partnerships should provide at least a partial solution.

Overmanning is a chronic problem in a number of old-established industries. The practice is defended by entrenched trade unions. Such a practice would be virtually impossible in an IC partnership because the body corporate receives income as a fixed share of a variable reward. Each individual in a society is thus motivated to keep members at a minimum because this maintains his or her income at a high level. For the same reason, new technology with reduced manpower would tend to be actively sought and introduced by society members. In these ways, the design of the IC partnership is such that it provides powerful support for efficiency.

It seems likely, however, that the major difference between the IC partnership and the employment contract will be found in innovation. When all operators in a given undertaking are of necessity aware of marketing as an essential ingredient in the undertaking's success, the introduction of new products, processes and working methods should become an accepted part of operations. We can expect both formal (eg, R & D units) and informal (eg, members' ideas) proposals to be considered carefully and by a broad range of operators, including members and managers. At present, inventors find it difficult to convert ideas into goods. Patents are expensive to obtain and difficult to licence. The inventor who tries to go it alone commonly fails for want of back-up. If an inventor joins an organisation, he or she is commonly buried in a backwater or forced by the pattern of organisation of an R & D unit to attempt work which is not of interest. In many countries (but, notably, excluding Japan) it is normal for the innovator to experience frustration, with consequent wastage of the talent most characteristic of humans.

IC partnerships can be expected to be more adventurous, efficient and innovative than are existing business organisations. We can also expect them to have an influence on the tendency of employees to show authoritarian traits. As individuals, through direct market-place experience, shift social dependence from a narrow focus (the employer) to the population at large (the consumers), confidence and independence should increase and a sense of responsibility in work should improve. In time, this may have implications for the effectiveness of different managerial styles.

Group membership tends to correlate with group attitudes, prejudices and stereotypes. As capitalists and operators working together in an associated team tend to see each other as members of the same group, internal conflict lines will tend to dissolve as irrelevant percepts are extinguished. At the same time, inter-house competition will tend to introduce new forms of inter-group conflict, but of a kind which will not harm the consumer. Competition can be expected to provide further impetus towards efficiency and innovation.

For states with tax systems geared to weekly or monthly wage or salary payments, the variable reward per individual will probably require a longer period for income assessment and taxing — probably the tax year. This may make it desirable for societies to engage in some form of retention of tax payments, including the temporary investment of moneys withheld for tax purposes.

Based on existing experience, the reaction of trade union officials to the introduction of IC partnerships is likely to vary a great deal. Officials with a background of a university degree (coupled, say, with strong moral principles) are likely to react with enthusiasm to an update of the house union, because of its strong ethical base. On the other hand, those with a background of rising through the ranks are likely to view IC partnerships as a job threat, and react with antagonism.

Economics

As J K Galbraith has pointed out, the most obvious outcome of predictions by economists is that they are mostly wrong. This is not surprising. While the discipline claims to be a social "science", its only scientific method is the use of surveys. It cannot predict with confidence because its lack of experimental method means a lack of knowledge of fundamental cause-and-effect relationships.

The subject matter of economics is human behaviour. As humans interact with their environment and with each other, the whole gamut of behaviour patterns comes into play, but, except for anecdote and casual experience, is a closed book to economists. The workplace and market display includes conditions creating boredom, inter-and intra-group behaviour, individual differences, culture and status. The statistics and formulae of economists, and the methods of accountants and engineers, cannot take such factors into account, for they know nothing about them.

An alternative approach to the statistical model of the economist is to start with a key factor (in this case, social relationships) and follow through with tentative conclusions arising from current and hypothetical practice. Such a model can then be tested by way of real life experimentation.

Within a given state, we tend to find a characteristic pattern of co-operation and competition in the way humans provide goods and services for each other. In the communist states, the producer is king and, through state planners, sets out to provide what he thinks the consumers ought to have. In the market economies, the consumer is king, and producers must attempt to predict and satisfy consumer needs. Current

evidence points to the conclusion that market-place rule tends to produce a more dynamic, expansive economy. If a nation wants growth, then market rule provides the base condition. Among the family of nations, market rule has also been proposed as the guiding light which sets the national mood at some point on a continuum from optimism to pessimism. On the side of optimism, growth and market rule, according to this scenario, we find countries in the Asia-Pacific region such as South Korea, Japan, Taiwan, Hong Kong, Singapore and the western half of the United States. Setting the scene for pessimism and lack of growth are the senescent socialist states of Eastern Europe and their neighbours in Western Europe.

A national economy with industry restructured along IC lines would tend to increase dominance of the market place by the consumer. Increased inter-house competition would provide support for this trend. So would greater adventure in trying new enterprises. So would increased innovation.

By freeing operators from capitalist domination, work methods can be expected to change. Emphasis on job satisfaction is probable as an emerging trend. With the removal of inter-group dominance stemming from the employment contract, class differences should tend to blur, and ideological argument to diminish – or both. A more rapid rate of change in work methods, products and processes, should mean an increasingly stimulating environment *and* diminished boredom and aggression. A better harnessing of individual differences should mean diminished crime. Cultural change should tend to speed up, and this could have some negative side-effects (eg, stress associated with the more rapid rate.)

Removal of wage-push pressures and increasing dominance of the market place by consumers should diminish inflation. Economic prediction is not expected to improve because of the higher rate of product and service change. In turn, this should make it easy for governments to stay out of business and for intrusions to be tolerated less well.

Politics

The economic interpretation of history espoused by Marxists holds that the significant events of national and international history spring from and reflect inter-class conflict over the division of wealth. The "haves" and the "have-nots" are seen as locked in a never-ending struggle, the end of which is seen as the "victory" of the working class. Meantime, action and reaction within this gloomy scenario make up the stuff of political reality, international relations and a source of income for writers and media folk.

Well, maybe. If the thesis is even partly correct, it says little for the statesmanlike qualities of politicians over the last few centuries. If their only answer to class conflict is to join it rather than remove it, any claims to statesmanship must be dismissed as baseless.

In real life, the behaviour of politicians as they set out to represent and promote the interests of their reference groups looks more like simple gamesmanship than statesmanship. In both democracies and dictatorships, politicians cannot function without backup. The conflict of ideology is thus a factor in verbalising between-party issues, in appealing for support, in verbalising inter-group issues, and attracting votes. In other words, the gamesmanship of politics may well depend in part on class friction and social fracture. If we see little effort by politicians to resolve social conflict, it would be understandable if that conflict supplied some of their meal-tickets. Any widespread adoption of IC partnerships is likely to extinguish the class and ideological game. This may make their vote gathering task a tiny bit more difficult for the meal-ticket politicians.

Curiously, a major beneficiary of any large-scale adoption of IC methods is central government. Because of their role in initiating major public works, governments are intermittently faced with embarrassing problems such as delays and cost overruns. Commonly, such issues are associated with industrial conflict. Given a contract with an IC partnership, such side-effects are unlikely because of dual contracting and of payment being strictly related to work done.

Marx and Engels were well-meaning reformers who saw a problem and tackled it. They did a great deal of homework. It is a pity that it was the wrong homework. Their response to conflict was to study how one side could win it. They gave no attention to the problem of avoiding the conflict in the first place. It is a tragedy that so many of their followers have included philosophical polemicists, fanatics with guns and devotees of the nonsense labelled dialectical materialism. It is also a pity that very few other thinkers have addressed themselves to the central issue: how it might be possible to modify a contractual arrangement with an in-built bias. In this, as in so many areas of social life, we would all benefit from more light and less heat. □

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Costs for citizens

As overheads go up, so fee rates go up. The cost per hour, or per file, which includes the availability of the computer, the telex machine, the word processing and all the other necessary paraphernalia, may be perfectly reasonable for servicing the work of the bank or the brewery, but my concern is that it is going to be way out of the reach of the man in the street. He may have what for the multinational is a trivial problem, but for him it is the most important issue in his life at that moment.

We have to solve this conundrum, and we have to solve it largely ourselves, otherwise this vital part of the legal system, meeting the needs of the ordinary citizen, will cease to be the province of the legal profession.

J T Eichelbaum
Presidential Closing Address
Law Conference 1981