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Director's responsibility and liability

The former President of the American conglomerate ITT, wrote some articles last year in the magazine *Fortune*. In the course of the articles Mr Geneen commented that in his view most company directors were grossly overpaid for what they did, and grossly underpaid for what they should do. He seemed to suggest that the role of directors was underplayed by management as a matter of policy and by directors themselves as a protective device to avoid responsibility. This issue of the responsibility of directors is becoming ever more a legal rather than merely a moral one, and a legal responsibility carries with it by implication the risk of legal liability.

In a special way employees of a company can be said to have a justifiable expectation of responsible decision-making on the part of directors. Their jobs and wages depend on the viability and successful operation of the company. There are two other groups of people who look particularly to the directors of companies to act in an honest and responsible way. These are the shareholders and the creditors.

An interesting case dealing with the liabilities of directors to creditors was *Nicholson v Permakraft (NZ) Limited* (unreported CA 112/82, judgment 14/3/85, [1985] BCL 336). The company was formed in 1964 with a capital of $1,000 divided into 500 $2 shares which were owned by T L and J C Nicholson, husband and wife, in the ratio of 499 to 1. Subsequently in 1975 a holding company called Permakraft Holdings was incorporated with a capital of $160,000. There were now some five shareholders but T L Nicholson owned 87.5% of the shares in the holding company. Through a restructuring the holding company finished up owning over 99% of the original company. It also purchased land and buildings from the original company. A dividend of $148,323 was paid to the shareholders in the original company "out of the realised capital gain in the Capital Reserve Account arising from the sale of land and buildings".

This money then provided the capital of the holding company through the purchase of the shares allotted. In broad terms there was a transfer of assests from the original company to the holding company. This was done through the mechanism of the shareholders in the original company buying shares in the holding company with the money nominally paid by the holding company to purchase an asset of the original company which had passed it on in the form of a dividend.

It was this nominal dividend of $148,323 that was attacked by the receiver of the original company for the benefit of unsecured creditors when the original company was being wound up. Secured and preferential creditors could apparently be paid in full or virtually so. It was alleged against the directors that there had been a breach of duty on their part in relation to the declaration of the dividend from the Capital Reserve Account contrary to the interests of creditors.

There were various issues raised concerning the regularity of what had been done and the manner in which resolutions were entered in the minute book. The crucial question however was the responsibility of directors. In the High Court White J held that the persons concerned had to repay the amounts received with interest. All three Judges in the Court of Appeal however were of the view expressed by Cooke J that:

> . . . after thorough investigation the decisions of the directors and shareholders have in the end . . . emerged as reasonable at the time and not unfair to creditors.

Richardson J and Somers J were in agreement that the present case did not call for a full consideration of the controversial question of the nature and scope of the duties owed by directors and shareholders to creditors of a company. On this point Somers J commented on the High Court decision:

> The Judge's finding was perhaps intended to convey that no or no adequate consideration was given to the interests of the creditors of the company. It was at least part of the respondent's case in this Court that the directors were required to consider the interests of creditors and did not do so.
>
> In the case of an insolvent company, at least in the sense that its liabilities exceed its assets, directors in the management of a company must have regard to the interests of creditors. That is because according to the order of application of assets on a winding up they are trading with the creditors' money. It has been suggested that when the solvency of a company is doubtful or marginal it will be a misfeasance (probably not capable of being ratified or exonerated by shareholders) to enter into a transaction which directors ought to know is likely to cause a loss to creditors – see eg, *In re Horsley & Weight Ltd* [1982] 1 Ch 442, 455 per Cumming-Bruce LJ, and Templeman LJ. Whether that is so does not in my view fall to be decided now for in the instant case I am satisfied the company was solvent at the material times.

In a lengthy judgment Cooke J was prepared to go further. He has indicated the principles that he considers would be applicable in certain circumstances. His views stand as at least an argument to be developed and analysed by counsel in some future case. In particular the passage dealing with the duties of directors to creditors deserves to be noted. He said:

The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency.

The criterion should not be simply whether the step will leave a state of ultimate solvency according to the balance sheet, in that total assets will exceed total liabilities. nor should it be decisive that on the balance sheet the subscribed capital will remain intact, so that a capital dividend can be paid without returning capital to shareholders. Balance sheet solvency and the ability to pay a capital dividend are certainly important factors tending to justify proposed action. But as a matter of business ethics it is appropriate for directors to consider also whether what they do will prejudice their company's practical ability to discharge promptly debts owed to current and likely continuing trade creditors.

To translate this into a legal obligation accords with the new pervasive concepts of duty to a neighbour and the linking of power with obligatiion. It is also consistent with the spirit of what Lord Haldane said [in *Attorney-General for Canada v Standard Trust Company of New York* [1911] AC 498]. In a situation of marginal commercial solvency such creditors may fairly be seen as beneficially interested in the company or contingently so.

On the other hand, to make out a duty to future *new* creditors would be much more difficult. Those minded to commence trading with and give credit to a limited liability company do so on the footing that its subscribed capital has not been returned to the shareholders, but otherwise they must normally take the company as it is when they elect to do business with it. Short of fraud they must be the guardians of their own interests.

The judgments in the *Nicholson* case are probably more interesting for what they notice as an area of company law yet to be fully considered than for the particular decision. Certainly the judgment of Cooke J, in the passage quoted above and in others, is one that carries with it profound implications for those engaged in the world of commerce.

P J Downey

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Coping with stress
A process of self awareness

By P J Dewe, Senior Lecturer in Organisational Behaviour, Faculty of Business Studies, Massey University.

Pressure in work, particularly demanding intellectual work, is not new. A time honoured way of dealing with it has been the consumption of alcohol, which ironically has also been a recognised way of dealing with boredom resulting from dull routine or lack of pressure in work. The psychological factors in work pressure leading to stress are now better known. In this article P J Dewe looks at some of the research that has been done and makes some practical suggestions for coping with stress, but not of course for abolishing it altogether.

Every time we pick up a paper, journal or magazine someone appears to be talking about stress – the events which cause it, what it does to our health and, if the article is any good, how we can cope with it. The trouble with much of this information is that it never seems to put stress into perspective. We are left with the feeling that stress is at best harmful and at worst debilitating. It is no wonder that by the time we get to the end of such articles we feel that the whole problem has been either grossly exaggerated, or that because stress appears to be an inevitable feature of 20th century living it is not worth getting worried about.

The message we should be getting is that stress, when it does occur in our lives more often than not leaves us feeling emotionally drained and frequently more vulnerable to illness and disease. The real issue is not really one of whether there is too much or too little stress in our lives but one of whether we can be made more aware of those situations which for us cause stress, why we respond to those situations as we do, and what we can do about them. By a series of questions and answers this article hopes to develop the process of "self-awareness" and thus add to our understanding of the nature of stress.

What is stress?

The difficulty when talking about stress is that it means different things to different people, with the result that the term has taken on a variety of meanings. for example, some people when talking about stress talk about it in terms of some event or situation which stimulates or evokes some sort of disruptive response. If we think of stress in this way then a whole range of situations can be described as stressful. Included amongst these would, for example, be critical life events – death of a spouse, divorce, heavy financial commitment, illness in the family, redundancy, etc.

Quite obviously these sorts of situations have an impact which extends into all parts of our lives, yet for many people the situations which cause stress come, more frequently, from the hassles or annoyances of everyday life. These events (troublesome neighbours, misplacing things, decisions about children, home maintenance, housekeeping worries) frequently small in scale and embedded in daily living, cause us to fret, appear unrelenting and are frequently unrelieved.

To others stress is frequently discussed in terms of some response or reaction we go through which indicates that we are under stress. This way of looking at stress focuses on the fact that stress alerts, arouses and excites us and that some degree of physiological activity accompanies all stress.

Perhaps the most frequently discussed stress response is what is called the "flight or fight" response. In this case when confronted with a situation which appears threatening we automatically trigger off a number of physiological changes (increased oxygen consumption, elevated blood pressure, blood diverted to the muscles, rapid breathing) which prepares us to fight or flee the situation. Frequently associated with these changes are emotions such as fear or anger. However the problem is that because in many situations fighting or fleeing may not be an appropriate or acceptable form of behaviour the body is preparing us for something which doesn't happen consequently we do not return to normal functioning as rapidly and under prolonged conditions of fight or flight readiness individuals are more vulnerable to conditions that influence their health and wellbeing.

If you can imgaine the way in which you respond to stressful situations you will know that it is not only the flow of adrenalin which signals you are under stress. Each of us is aware of the many ways in which we can respond to a stressful situation and these include such reactions as nervousness, tension, anxiety, impatience, frustration, and depression on the one hand and anger, temper outbursts, impulsive behaviour, an inability to make decisions and concentrate on the other.

Yet perhaps the best way to think about stress is not just to see it as some situation or some type of response we make but better still to think of it as the way in which each of us adapts to and deals with different situations. In this way the emphasis is on coping and adjustment and stress then results from those situations which we perceive as threatening, which tax our resources and where we are required to initiate or withhold certain actions in an attempt to overcome, master, reduce or moderate the threatening circumstances or the accompanying emotional discomfort.

By thinking of stress in this way we cover not only the stimuli which causes the emotional or physical

response but also the way in which we cope. Stress does not reside entirely in the situation nor in some physical or emotional response but in how we can cope with or adapt to difficult, disruptive circumstances.

Is all stress bad?

Stress, quite obviously, is not a neutral word. We typically associate it with pressure, anxiety and tension. But all stress is not bad. Stress is a necessary part of everyday life. It helps to energise and motivate behaviour, to stimulate creativity and is essential to life and wellbeing. It is the way in which we adapt to and cope with events that determine whether stress for us will be harmful or beneficial. Thus depending on how we cope stress can be either disruptive or damaging (distress) or positive and productive (eustress). Eustress is the term first used by Selye (1977) and is derived from the Greek eu meaning positive. So the more contemporary approaches to stress emphasise the importance of recognising difficult situations, understanding the impact that these situations can have on us and developing effective means for coping with them.

Another point to keep in mind is that what is going to be stressful to one individual may in fact be the very challenge another individual needs. Stress is peculiar to each of us simply because we respond to difficult situations in different ways, the duration and intensity of the experience affects each of us in different ways and our physiological response patterns differ enormously.

Are stress and work related?

The answer is yes, but the important thing is to avoid a polerisation of views which either over-exaggerate the problem or suggest that there is no such evidence linking work and stress. It is best to view the relationship between work and stress cautiously, but in a way which reflects the general feeling expressed by a number of people that there is a good deal of evidence supporting the link between work and mental health.

Each of us have a set of ideas about how work and stress are related and in a way these constitute for each of us a theory. In most cases these ideas will be based on our own experiences and whether or not they are right or wrong they will influence our reactions to work situations and our attempts to cope with them. Yet the importance of any theory lies in the understanding it provides of why certain relationships exist. So in order to develop an understanding of why individuals become stressed at work and how they respond to these work situations requires some sort of model — a formal interpretation of the theory. What does the work stress model look like? The basic links are:

1 *the work situation* — which places certain demands on the individual;
2 *the personality* of the individual, which conditions his reponse to such demands; and
3 *the outcome* of such an interaction between the individual and the work situation which may result in ill health.

Remember that whether or not the demands of the workplace cause stress depends, of course, on how each of us interprets the situation and thus how we cope with it. Many factors may contribute to the way in which each of us respond and these include differences in personality, age, ability, the relevance and meaning we give to work, the desire to satisfy certain needs, midlife difficulties and our overall level of job satisfaction.

What causes stress of work?

The causes of stress at work are many and varied. A least one author (Cooper 1978) identifies six sources of work stress. These include the characteristics of the job itself, the role of the person in the organisation, relationships between colleagues, career development pressures, the climate and physical layout of the organisation and the interactions between the organisation and the outside world. At the more detailed level these would include the physical strains and conditions of work, long hours, excessive travel, too much work to do in the time available, the job becoming more and more sophisticated, conflicting work demands, a lack of information, not knowing how work performance is being judged, little participation in decision making and conflicts between home and work.

Let us just look in more detail at one of these sources of stress — your role in the organisation. Your duties and the responsibilities you have in carrying out your job may result in you being confronted with three different situations which have the potential for causing stress. These are role overload, role conflict and role ambiguity.

Role overload refers to those situations where you have too much work to do in the time available, where no matter how hard you work there always seems to be just as much to be done at the end of the day, having to sacrifice goals like quality to get the quantity of work done, having too many interruptions in your job — not being left to get on with the work, feeling that all tasks have a sense of urgency and being unable to keep on top of your job without difficulty. It also includes having to keep up with technical changes in your job and profession and finding it difficult to keep up with the readings and developments in your field.

Role conflict refers to those situations where you are responsible for tasks over which you have too little control, being given insufficient authority to do your job properly, having to work under guidelines and policies which conflict with each other, having to do things one way when you believe they could be better done another way, having to get the job done without sufficient manpower and having to do things which are apt to be accepted by one person and not accepted by others. Conflict also includes having aspects of the job which you are personally responsible for and where you have to depend too much on others for information, receiving incompatible requests and not always receiving a clear explanation of what has to be done.

Role ambiguity refers to those situations where you are not sure what your responsibilities are, not clear about the priorities in your job, do not have a clear idea about how much authority you have, not knowing how well you are doing in your job and not having a clear idea about how your performance is judged.

If these are the sorts of situations which cause stress at work or if you are interested in finding out about those situations that do, then why not work through the following steps. First of all, think of a time when you felt under stress. Write down what happened. Then ask youself how frequently that situation occurs for you. Now you are in a position to ask yourself why that situation occurs as frequently as it does, what it is about the situation that causes stress and

what if anything can you do about it.

This is all part of the "self awareness" process. If you recognise the situations which cause you stress and if you have some understanding of why they occur and what it is about them that causes the stress then you can decide whether there are any strategies you can adopt for dealing with them. It is important to take this last step because it may become apparent that there is in fact very little you can do to prevent some situations from occurring. Armed with this realisation you may be better able to put the situation into perspective or not let them get to you.

What sort of impact can work stress have?

Reactions to demanding work situations can be many and varied. The sorts of responses most frequently reported include physiological changes such as elevated blood pressure, increased heart rate, rapid breathing, sweating palms and increases in certain stress hormones. Also linked to different work situations are various behavioural responses including reduced performance, absenteeism, turnover, job dissatisfaction, anger, and boredom. Also included among the possible effects of work stress are feelings such as tension, anxiety, uneasiness, nervousness, impatience, tiredness, annoyances and irritations. Ask youself the following questions:

- How often do you feel worn out at the end of each day?
- How often are you restless – that is uneasy, nervous, impatient, etc, while you are at work?
- How often do you feel frustrated with what goes on at work?
- How often do problems associated with the job keep you awake at nights?
- How often does your job make you fidgety and irritable?
- How often do you wonder whether it is all worthwhile?

Right, let us ask some more questions. If some of the above feelings occur frequently or if your job creates different feelings for you ask yourself why do these feelings occur. What is it about different situations which make you respond in such a way. Why do you think you respond in such a way? What can you do to change the way in which you respond to such situations? Again, all this is part of the "self awareness" process. If you can get a better idea on why you respond to a particular situation in a certain way and what it is about the situation that causes you to respond in that way then you have some basis on which to consider changing that response or at least moderating your reactions to certain situations.

What can we do to cope?

Quite obviously coping is an integral part of the stress process. Yet very little attention has been directed towards developing a better understanding of the different coping strategies. One of the reasons I have been pressing this "self-awareness" process is simply because if we are sensitive to those situations which cause us stress and if we have a better understanding of why they provoke the sort of emotional and physical reaction that they do, then we are in a far better position to consider ways of dealing with the demands of the situation or the situation itself.

Write down your answers to these two questions. Think of a time when you felt under stress. Then write down how you coped with it. The second question is "if like most people you get tense or anxious with what goes on at work – how do you cope?" Now you can begin to look at the ways in which you cope and relate them back to the earlier questions and just check to see whether they do help to reduce the emotional discomfort that surrounds certain events or solve the problems that demanding situations generate.

Is there anything else you could do? More specifically though, it is possible to identify a number of strategies that may help you in coping with work stress or for that matter stress in general. I call these strategies "capacity techniques". Techniques which are not designed to specifically deal with stressful situations but which may give you a greater capacity to deal with stress should a stressful situation occur. These capacity techniques include exercise, relaxation, meditation, biofeedback and the philosophy of life approach. While most of us are aware of the benefits and know about exercise, relaxation and meditation, biofeedback is a technique designed to give each of us a better understanding of the signals our bodies send us when we are under stress.

The philosophy of life approach to stress simply argues that each of us ought attempt to put work into perspective. If we recognise that work is just one part of out total being and that lifestyles should not be determined solely by work activities then hopefully work will be seen as just one of a number of avenues through which we can grow and develop with the result that work problems that once assumed a level of importance far greater than they warranted will be put into perspective. Thus our capacity to deal with them will be enhanced.

Unfortunately most of these techniques are discussed by many authors as if they are all we need to do to cope with stress. So it is important to bear in mind a number of points when considering the merits of the different capacity techniques:

- They are not universal cures to stressful situations. The potential of each technique and its relevance, depends on our commitment to, and belief in the techique itself. What is going to be appropriate for one individual will be inappropriate for another so that each of us must decide which technique, if any, we feel comfortable with and which provides for us a way to develop our potential.
- They do not get rid of stress from our lives. All of us need to maintain a certain level of energy and activity and all these techniques are doing are providing us with a means whereby we can develop that inner sense of energy and wellbeing for dealing with, and building resistance to stress related difficulties.
- That each technique should be used in conjunction with more specific coping strategies and so through this supportive role they are just one part of a repertoire of coping. It is important not to lose sight of the fact that many of the techniques are advocating fundamental lifestyle changes and not simply suggesting that we "add on" an extra coping strategy.
- That every now and again we ought seriously consider why we use such a strategy. In some instances particularly with different forms of relaxation and meditation, they offer a means of escape from reality and so it becomes important to periodically consider the way in which we use

the different capacity techniques and the reason for using them.

Can we identify specific coping strategies?

Yes we can. It is important to remember that while capacity techniques are an important part of an individual's coping repertoire they really tell is very little about the specific behaviours which individuals use or would be encouraged to use to cope with work stress.

Two different types of coping strategies can be identified. The first – *called direction action techniques* – are primarily concerned with problem solving or altering the source of the emotional discomfort. Direct action techniques would include such strategies as:

- seeking out additional information about the situation;
- taking some immediate action on the basis of your present understanding of the situation;
- setting priorities;
- letting people know where they stand;
- not letting the people go until you have solved it or reconciled it satisfactorily;
- standing back and thinking through the situation;
- working harder and longer;
- shelving everything and concentrating on the problem.

As far as direct action strategies are concerned, in any work situation there may be a limited number of problem solving strategies that we can use and so we use them frequently. In many work situations though it may be possible to identify the problem but it may not be possible to solve it (eg, you may dislike your boss but you can't avoid working with him). On the other hand some work problems may be so complex that it is difficult to know how to solve them.

In these instances we can indentify the second type of coping strategy – *palliative techniques.* Palliative strategies are those where the primary concern is with reducing the emotional discomfort associated with a situation so that you can work in or tolerate such circumstances. Palliative strategies are aimed at reducing the emotional discomfort rather than altering or solving the problem or the source of the discomfort. They represent an important part of our coping repertoire and a number of different palliative strategies can be indentified.

One group include strategies for *letting off steam.* These include:

- expressing your feelings and frustrations to others so that you can think rationally about the problem;
- getting rid of the tension by expressing some irritability and frustration to yourself;
- expressing your irritation to others just to be able to let off steam;
- talk about the situation with someone else at work;
- leave your part of the office for a while;
- get angry – lose your temper – throw things – slam doors, etc.

Another group of palliatives are concerned with *taking action away from work to deal with work related stress.* Such actions include:

- trying to reduce the tension by physical exercise;
- leaving the problem and trying to solve it later by talking it through at home;
- becoming more involved in non-work activities – leisure, sports, hobbies, etc;
- distracting yourself with some fun or pleasurable activity;
- become more involved in family life – helping with the family, etc.

Finally palliatives also include strategies where we just *passively attempt to ride the situation.* These include:

- just let the feeling wear off;
- just drop what you are doing and take up something totally unrelated;
- move onto other work activities that you know you can get satisfaction from;
- think of all the good things that could happen in the future.

Do you recognise any of these sorts of strategies as ones you use? Can you think of the sorts of things you do to cope with the demands of difficult situations and the accompanying emotional discomfort. Have you any idea how effective they are? Why not go through some of the exercises I have suggested.

Identify the situations which place demands on you, consider how you respond to those situations, then ask yourself why are such situations demanding, why do you respond in the way that you do and what are you doing to cope. Then take the next step and ask yourself what is it about the situation what makes it a demanding one, why does it have an effect on you and what sort of things could you do to deal with it. Armed with this information you should be able to put things into perspective and although it may not prevent demanding situations from occurring, simply by having a better understanding of them and by viewing them differently you may react and respond differently and thus be better able to reduce the emotional discomfort or deal with the problem.

What can your organisation do to help?

The emphasis throughout this article has been on what you can do. Organisations have a role to play as well. Organisations can help by first of all developing a climate within which constructive coping can take place. It is no good each of us having a repertoire of coping activities if we can't use them because we perceive the "emotional climate" of the organisation to be restrained. What may create more stress for us is when we can see ways of solving the demands of different situations but cannot initiate the solution.

Organisations as much as individuals have a role to play in reducing work stress and ought to consider a number of interventional strategies. For example, in order to reduce conflict and ambiguity operational strategies such as performance reviews, professional counselling, appropriate training, the establishment of selection and promotion criteria, grievance procedures, job design, work flow procedures, job descriptions and specifications with explicit information as to responsibilities and authority all aid in helping to mitigate stressful situations.

It is not only the individual who needs "self awareness" guidance. Organisations too should initiate programmes which make them more aware of how policy and procedures are affecting employees. Some authors (Kets de Vries 1979) suggest stress audits which monitor the impact that various organisational structures (physical working conditions, technology, role pressures, interpersonal relationships, career issues) have on the individual and

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The legal control of secondary industrial action in England

By Andy N Khan, Industrial Studies Unit, the University of Leeds, England

The application of the law to industrial disputes has an involved history. Andy N Khan in this article looks at the current situation in Great Britain concerning industrial action seeking to involve others than those directly involved in the dispute. Secondary or sympathetic action of this sort has been a major policital issue. The article considers this aspect of the recent Miners' strike. The article is based on a paper given by Mr Khan to the annual Convention of the American Business Law Association in August 1984 at San Antonio, Texas.

One of the planks in the Conservative party election manifestos in the last two UK general elections was the "reform" of the law of collective labour relations, especially with a view to reduce, if not eliminate, some trade union "immunities". These immunities are a consequence of the historical absence of "positive rights" under British trade union law. The Trade Union and Labour Relations Act 1974 had re-enacted the "golden formula", which had been introduced by the Trade Disputes Act 1906 under which trade unions are protected from specified tortious liability for industrial action taken "in contemplation or furtherance of a trade dispute". The 1906 Act had been repealed and replaced by the Industrial Relations Act 1971 which in turn was repealed and replaced by the TULRA 1974. This has been amended by the TULR Amendment Act 1976, the Employment Acts 1980 and 1982. The golden formula immunity is now to be found in the amended section 13 of the 1974 Act.[1]

The passage of the Employment Acts 1980 and 1982 introduced many changes in line with the provisions of the previous Conservative labour legislation passed in 1971: the underlying philosophy being that trade unions should be subject to legal restraint. The Industrial Relations Act 1971, was derived from, and based upon, the USA and Swedish industrial relations systems. However, it "proved in the event to be an abortive attempt to encompass our collective labour relations within a positive framework of law against the background of certain general principles": Drake and Bercusson *The Employment Acts 1974-80 (1981).*[2]

According to the Conservative Government's Green Paper published in 1981:[3]

> The basic question to be considered is how far, if at all, the law should provide immunity for those organising secondary action. On the one hand trade union solidarity and assistance to fellow workers has long been a feature of industrial disputes in Great Britain. On the other hand those who are not parties to a dispute (including other workers) are entitled to protection from reckless and indiscriminate interference with their business and livelihood . . . the immunities now allow too wide a scope for industrial action without due regard to its consequences. No one in 1906 . . . could have foreseen how damaging the scope of organising secondary industrial action would become as a result of the

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then make use of this information to develop "problem solving systems" which not only deal with structuring organisational tasks and requirements but do it in a way which focuses on the needs of the individual who must carry out such tasks and, who has to meet such demands.

Work stress — Where do we go from here?

No matter what people say, or what you read there are no easy remedies when it comes to work stress. Nor do any of the different strategies offer you a stress-free life. What is clear though, is that what we do to cope and how effective our coping strategies are will influence not only our own wellbeing but also the well-being of others. So, the more we understand about the demands in our work lives and our reactions to them the better able we may be at handling such situations or dealing with the emotional discomfort.

All this article offers is some insight into how we may do this. It shares information, provides some ideas about how we may begin to develop our own awareness, and tries to avoid promoting a "one best way" approach. Indeed the whole aim has been to provide information on all the different aspects of stress so that you can make the choices you want, recognising that what is important is a responsible commitment, and the acceptance that the sorts of changes we may want to make occur slowly and are the result of lifelong learning, adapation and development. □

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> interdependence of modern industries and improved communication.[4]

Out of the many changes introduced by the 1980 and 1982 Acts, an important aspect has been the removal of immunity from certain "secondary" or "sympathetic" industrial action.[5] This was an attempt to stem the tide of widespread secondary pressure/action. In many cases, a union would endeavour to make the strike or industrial action successful and hope for an early resolution of the dispute by not restricting itself to primary action but also by involving other employers, trade unions, suppliers or customers in order to put indirect pressure on the employer with whom the industrial dispute exists. Miners in the 1972 strike had extensively and successfully blockaded the electricity generating power stations using coal/oil. The National Union of Mineworkers made the secondary and tertiary industrial action, including picketing, into a fine art. The present coal strike has also resulted in secondary, and unlawful, industrial action. But the employers (the National Coal Board) despite obtaining an interlocutary injunction drew back from enforcing it. Furthermore, secondary pressure or boycott sometimes is very useful to prevent the effects of primary pressure from being undermined.[6]

The existing law as amended by the 1980 and 1982 Employment Acts and interpreted by the Courts is analysed here.

Trade dispute

The protection given by law to "legitimate" industrial action is only where an act is done in contemplation or furtherance of a "trade dispute", the boundaries of immunities can be extended or narrowed. It has now become normal practice for the Labour Governments to widen, and for the Conservative Governments to limit, the definition. The Employment Acts of 1980 and 1982 have restricted the meanings of "trade dispute" with a view to weaken the unions and their legal freedom to strike.[7] This has been done in the following ways.

A trade dispute can only exist between workers and *their* employers, unlike, as previously, between workers and *an* employer. Disputes between workers and workers are also excluded. A dispute if raised by outside intervention without the participation of the employees who are involved in the dispute will not become a trade dispute. For example, intervention by the International Transport Workers Federation to raise the level of pay and other terms of conditions of Asian crew members employed on ships flying flags of convenience now would not be a trade dispute. For previous developments, see the House of Lords' decision in *NWL Ltd v Wood* [1979] 1 WLR 1294.[8]

The worker on strike must be employed by the employer. A worker seeking employment is a secondary party. If the union acts for itself rather than for the employees of the employer struck against, there is no trade dispute.[9]

The trade dispute previously had to be "connected with" one of the listed matters in s 29 of the 1974 Act – eg "terms and conditions of employment", "engagement or non-engagement of employment", "matters of discipline". But now the dispute must "relate wholly or mainly to" one of these matters. This has limited the scope of the definiton of trade dispute.[10]

According to Professor Lord Wedderburn of Charlton, these restructions placed on the central concept of trade union immunities are part of the scheme of legislation since 1979 to pursue step by logical step an attack upon the immunities. He has recently added:

> As it faces the power of capital organised in interlocking but legally separate corporate entities, labour is now cut up into atomised units of which the boundaries are by law counterminous with the employers' definitions of employment units in both private and public sectors. Trans-enterprise solidarity is no longer acceptable to the law.[11]

Associated Company

The most recent case to reach the House of Lords on secondary industrial action *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 151 has highlighted another implication which can have far-reaching consequences. In this case, a newspaper publisher (a well-known TV commentator) had a longstanding dispute with the National Union of Journalists. He owned two companies: one newspaper publishing company and one printing company. The union had blacked the publishing company as a result of a trade dispute and instructed its members to refuse to supply copy to the printers. The printing company sought and obtained an interlocutory injunction restraining the union from inducing its members to breach their contracts of employment and interfering with the printers' contracts with their advertisers and with the publishers. The union appealed, contending inter alia that the dispute was between workers and their employers relating wholly or mainly to terms and conditions of employment. The Court of Appeal, however, held that, while the dispute between the publishers and the workers was a trade dispute, industrial action taken against the printers was secondary industrial action, which was not protected: *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 117. The House of Lords confirmed the Court of Appeal's judgment. The consequence is that if an owner of a business chooses to operate through associated companies, the union and strikers are unprotected. Sir John Donaldson, MR, in the Court of Appeal added:

> It may strike some people as odd that the liability of the union should depend on what they may reasonably regard as being a matter of chance, namely whether the directors the [newspaper] group decided to arrange that one subsidary should employ journalists and another undertake printing as contrasted with deciding that one subsidiary should undertake both printing and journalism. Whether or not the Union would be right so to regard the position, that appears without doubt to be the law [after the 1980 and 1982 amendments].[12]

Permitted secondary action

Under the Employment Act 1980 three types of secondary action are

excluded, so that immunity is maintained even where action taken is secondary industrial action. These three exceptions to the rule are:

(i) If the purpose of the secondary action was directly to prevent or disrupt the supply during the dispute of goods and services between an employer who is a party to the dispute and the employer under the contract of employment to which the second action relates; and the secondary action was likely to achieve that purpose. Section 17(3) of the Employment Act 1980.

(ii) Where substitute goods or services are disrupted between any person and an associated employer of an employee who is a party to the dispute, and the secondary action was likely to achieve that purpose. Section 17(4) of the Employment Act 1980.

(iii) If a worker employed by a party to the dispute, or a trade union official whose attendance is lawful, attends for lawful picketing. As permitted by s 15 of the Trade Union and Labour Relations Act 1974.[13]

Three stages

As a result of amending the amendments, the statutory law on secondary industrial action has become uncomprehensible, muddled and complicated; so much so that even the highest Court in Britain has been confounded by the legislative maze of these provisions. Lord Denning, MR in *Hadmore Production Ltd v Hamilton* [1981] IRLR 210 in the Court of Appeal, stated that the provisions are exceedingly complex, described s 17 of the 1980 Act as "the most tortuous section I have ever come across". See also Brightman, LJ in *Marina Shipping Ltd v Laughton* [1982] QB 1127 at 1143. Lord Diplock in *Merkur Island Shipping Corp v Laughton* [1983] AC 570 said that the industrial relations law should be stated plainly. His lordship added:

> The statutory provisions which it became necessary to piece together into a coherent whole in order to decide [a point in that case] are drafted in a manner which, having regard to their subject matter and the persons who will be called on to apply them, can ... only be characterised as most regrettably lacking the requisite degree of clarity.

However, the Court of Appeal and the House of Lords, especially in *Merkur Island* (1983 supra) and *Dimbleby* (1984 supra) have extracted a multi-stage analysis of secondary industrial action:

- Stage 1 is to determine whether the plaintiff had established that what was done in the course of blacking would, in the absence of the 1974 Act, have given him a cause of action in tort under common law.
- Stage 2 is to determine whether that course of action had been removed by s 13 of the Trade Union and Labour Relations Act 1974.
- Stage 3 involves the determination whether s 17 of the Employment Act 1980 had restored that liability in case of secondary industrial action.[14]

Conclusion

Between 1979 and 1983 an unusual industrial calm prevailed in Britain. However, this could not totally be credited to the various measures taken by the incoming Thatcher Government in the field of legislative and regulative labour law. It was thought to be the result of high unemployment and recession. Nevertheless, some credit could go to the steps taken by the Government towards limiting union immunities as some employers were willing to utilise the new restrictions on secondary boycott – eg Eddie Shah's Court case against the National Graphical Association, the actions by Mercury Communications Ltd against the Post Office Engineers Union, or by David Dimbleby against the National Union of Journalists – all localised rather than national disputes.[15]

However, when the two big strikes, that is by miners and dockworkers, took place in 1984, neither the legislative amendments of 1980 and 1982 were used, nor would they have been of much use.

The Annual Report of the Advisory, Conciliation and Arbitration Service (ACAS) for 1983, it is fair to point out, says that:

> In 1983 the provisions set out in the 1980 and 1982 Employment Acts began to influence significantly the behaviour of managements and trade unions in some industries, particularly in the latter part of the year when a number of employers sought injunctions against trade unions whose members were engaged in secondary action or picketing (1984, para 1.11).

Thousands of Court cases generated by the miners' strike have been criminal Court cases, mostly resulting from mass-picketing. Whereas the civil law, which had seen so many changes to avoid such situations, stood idly and uselessly by. □

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1 See Lord Wedderburn, "Labour Law Now. A Hold and a Nudge" (1984) 13 ILJ 73; Simpson, "A not so golden formula: in contemplation or furtherance of a trade dispute after 1982" 46 MLR 463; Lewis & Simpson, "Disorganising industrial relations: an analysis of ss 2-8 and 10-14 of The Employment Act 1982" 11 ILJ 227; Carty and Evans, "Economic duress" [1983] JBL 218; Elias and Ewing, "Economic torts and labour law: old principles and new liabilities" [1982] CLJ 321; Khan, "Are trade union immunities special privileges?" (1982) 3 TULB 72; Ewing, "The golden formula: some recent developments" 8 ILJ 133; Davidson, "Trade disputes: the devaluation of the golden formula" [1979] SLT 208; Drake, "Old wine in new bottles – Trade Union and Labour Relations Act 1974" (1974) 3 ILJ 234; Wedderburn, "The Trade Union and Labour Relations Act 1984" (1974) 37 MLR 525.

2 See Garbarino, "The British experiment with industrial relations reform" (1973) 26 ILLR 793; Gould, "Taft-Hartley comes to Great Britain: observations on the Industrial Relations Act of 1971" (1972) Yale LJ 1421; Kahn-Freund, "The Industrial Relations Act 1971: Some retrospective reflections" (1974) 3 ILJ 186; Sir John Donaldson, "The role of labour Courts" (1975) 4 ILJ 63; Sir John Donaldson "Lessons from the industrial court" (1975) 91 LQR 181.

3 The Employment Act 1982 was based on this Green Paper *Trade Union Immunities* Cmnd. 8128/1981. See generally, Fosh and Littler, *Industrial Relations and the Law in 1980s* (1984). See also, *Royal Commission on Trade Union and Employers' Association 1965-68,* Chairman Lord Donovan (Cmnd 3623/1968). See Drake and Pitt, *Annotation* of the 1982 Act. See commentary on the Act: Craig (1983) 28 JLS 62, 113; Selwyn (1982) 3 BLR 360; Wilson-Ward (1983) 2 Lit 237; Benedictus and Newell (1982) 132 NLJ 1161, 1185; Khan (1982) 126 SJ 811, 829; Bowers [1983] LAG Bulletin 17.

4 See Davidson, "Industrial Action and Judges since the Employment Act" (1982) 27 JLS 381; Pitt, "The effect of the Employment Bill 1982 on trade union immunities" (1982) 3 TULB 108; Newell, "Will the Employment Bill 1982 make the

Continued on p 124

Law Journal's 60th anniversary

On 21 March 1985 a function was held by Butterworths to mark the 60th anniversary of the first publication of The New Zealand Law Journal *in March 1925. The function was held in the New Zealand Law Society Council Room in Wellington and was attended by a large gathering of Judges, Cabinet Ministers and a representative of the Opposition, academics, civil servants, representatives of the media and lawyers. At the function there were two brief speeches to mark the occasion. The first was by Mr Philip Kirk, the General Manager of Butterworths, and is published below in full. The second was by the Prime Minister and a report of his remarks is also published below.*

Speech by Mr Philip Kirk

It is my pleasant duty to extend a warm welcome to you all here tonight, on behalf of Butterworths as you join with us in observing *The New Zealand Law Journal's* 60th year of publication.

I believe this is an occasion of importance both to the profession and to ourselves as a company – and it is fitting that we should celebrate it together here in the Law Society's building.

The close relationship that has grown up over 60 years between the *Law Journal* and the profession is a unique and complementary one. So much so that I believe the profession – quite rightly – perceives the *Law Journal* as being to a large degree its own forum and opinion maker.

The *Journal* has over the years come to be seen as filling two most important roles. It has been, and will always remain, an important communicator of information and ideas within the legal community. But it has also come to fill a valuable role as a vehicle in which the profession can put forward substantive carefully weighed, comment on the wider legal issues of the day – in confidence that it will be published, read and appreciated in its proper light. In an age when the law has come increasingly to the forefront of public affairs, we believe that to be a facility of great value.

The close and complementary relationship between the profession and *Journal* is perhaps best expressed in the remarks of the retiring Law Society President, Mr

[TUESDAY, MARCH 3, 1925

Butterworth's
Fortnightly Notes

VOL. I. No. 1. WELLINGTON, N.Z.: MARCH 3, 1925.

ANNUAL SUBSCRIPTION £2 17/6. IN ADVANCE £2 7/6.] [Registered as a Newspaper at the General Post Office.

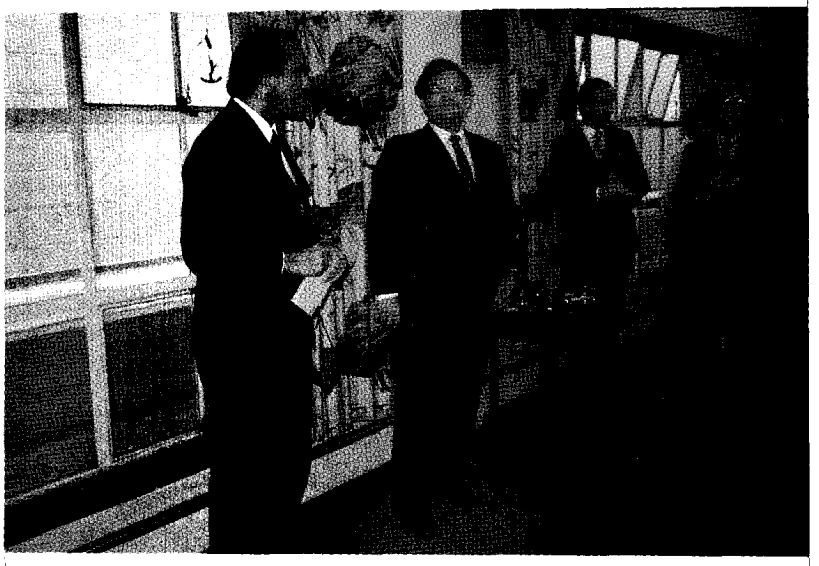
CONTENTS.

The front page of the first issue of *Butterworth's Fortnightly Notes* later to be renamed *The New Zealand Law Journal*

Bruce Slane. A prior commitment to the Sir David Beattie Journalism Awards in Auckland, prevents Mr Slane from being with us tonight, but he was kind enough to express his wishes to us in writing, and if I may, I will share those remarks with you now:

> I very much regret that I cannot be present due to a commitment to the Sir David Beattie Journalism Awards that evening in Auckland. I would however like to place on record the Law Society's acknowledgement of the role played by *The New Zealand Law Journal* over the long portion of the history of the legal profession in New Zealand.
>
> The *Law Journal* has assisted to maintain standards and over the years has provided a variety of services to the profession. The editors have become well known and respected, not only as editors but as writers and commentators on the law and legal matters.
>
> It will give you a great deal of satisfaction to celebrate this occasion and the New Zealand Law Society joins with you in acknowledging the role of *The New Zealand Law Journal* in new Zealand's legal history.

On behalf of Butterworths and all those people whose writings have appeared in the *Journal* over 60 years, and whose work it has been to edit those contributions — we are grateful for the President's remarks. I could not have said it better.



(l to r) Mr P Kirk, General Manager Butterworths (NZ) Ltd; the Prime Minister Hon David Lange; Mr C James a Wellington practitioner; Mr M Rogers, retiring General-Secretary NZ Law Society

I might say too, that we are equally proud of the contribution to journalism in this country that The *Law Journal* makes. Many times the *Journal's* weighty remarks and those of its contributors have alerted other branches of the media to important public legal questions which can easily be sped past in the daily hurly-burly of commercial news gathering.

The *Journal* first appeared in 1925 under the mast-head *Butterworths' Fortnightly Notes,* and Mr C A L Treadwell, then a young practitioner, was the first editor. By 1928 the paper became known as *The New Zealand Law Journal,* and down through the years it changed and evolved as did the profession itself, always in step, always in reflection. But if gradual change is a feature both of the *Law Journal* and the profession, it is worth noting that perhaps nothing is really new after all.

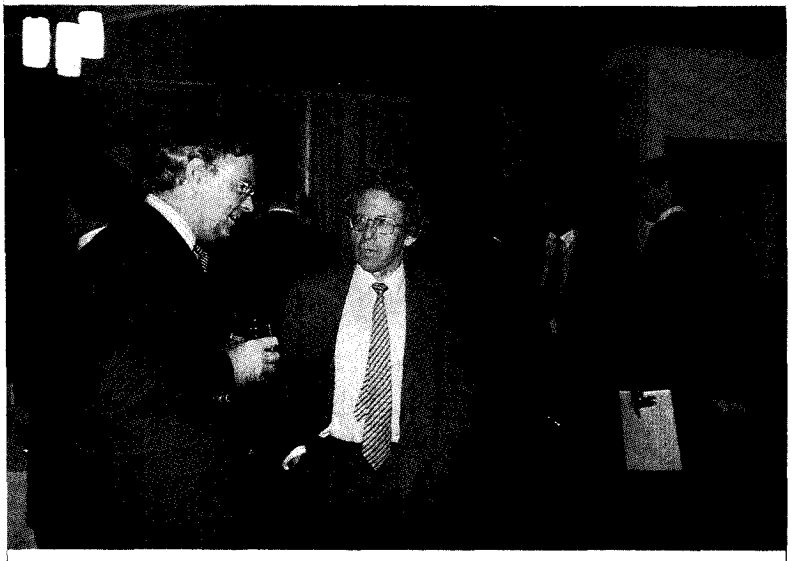
In 1962 the publishers announced more changes to the *Journal,* with these printed words:

> While these changes were under consideration the Publishers also thought it desirable to redesign the cover in order to give it a more modern and colourful appearance.

In 1980 a new and enthusiastic Butterworth Production Manager, known very well to the speaker as it happens, was full of reforming enthusiasm and wrote these words to his Managing Director:

> While these changes are under consideration I suggest it is desirable to redesign the cover in order to give it a more modern and colourful appearance.

I believe confidently that the *Law Journal* and the profession will



(l to r) Mr J Collinge, Chairman Commerce Commission; Professor Ken Keith, Victoria University; Mr D White, a Wellington practitioner

continue to grow, change and prosper together.

We are very proud indeed that the Prime Minister has given of his time to join us here tonight, and to speak as well.

In introducing to you the Prime Minister and inviting him to address you, I might perhaps be permitted to observe that there are two important events of a journalistic nature in the country tonight, and this is one of them; and that publishers and journalists even in this electronic age retain an obligation to value the printed word and not play lightly with its accuracy or meaning.

The *Law Journal,* in its own way, I believe meets that test admirably.

The gathering was then addressed briefly by the Prime Minister. A report of his remarks follows.

(l to r) Mr D White, a Wellington practitioner; Mr Paul East MP, Opposition spokesman on Justice; Miss Helen Cull, a Wellington practitioner; Rt Hon Sir Alexander Turner; Hon Mr Justice Cooke

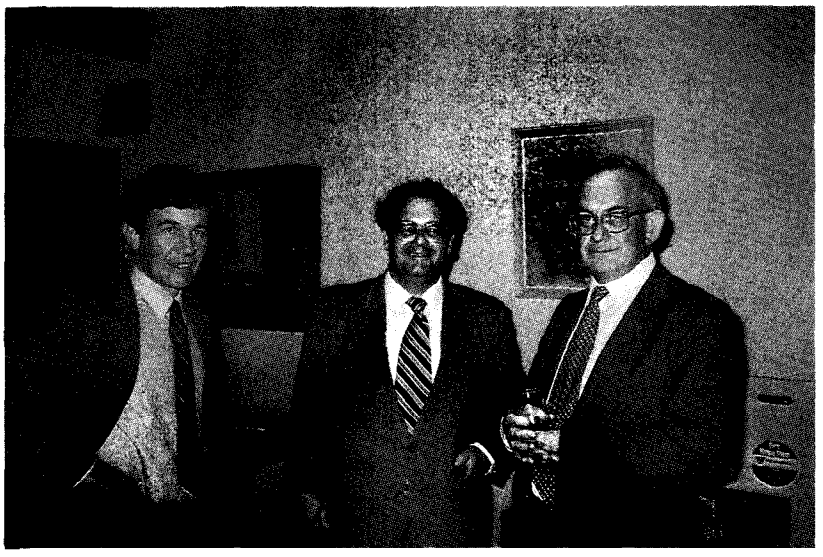
Report of speech by Prime Minister

In a warm and witty speech the Prime Minister, the Rt Hon David Lange, remarked that he could remember when Mr Slane made less complimentary comments about the *Law Journal,* which, he said, no doubt went to show the sense of responsibility that the attainment of high office brought with it!

He went on to suggest lightheartedly that one useful social function of *The New Zealand Law Journal* over the years was its value for senior practitioners who had unsuccessfully fought cases up to the Court of Appeal. His recollection from the past was that the *Journal* had provided a means by which such senior practitioners had been able to explain at length where the Court of Appeal had gone wrong. They could thus leave to a subsequent generation of Judges their erudite and carefully reasoned arguments of what the law should be, with the hope that this later generation would recognise the wisdom of counsel's contentions and reverse the errors of their judicial predecessors.

In doing this, the Prime Minister said, the *Law Journal* had provided over the years a safety valve which he was sure had saved many senior practitioners from becoming prematurely deranged. This, he suggested, could be seen as a valuable social function and a great contribution made by the *Law Journal* to the welfare of the legal profession.

On a somewhat more serious note the Prime Minister expressed his congratulations to Butterworths on *The New Zealand Law Journal* successfully surviving as a commercial undertaking for 60 years by a process of change and adaptation. This, he noted, had been done in the face of a variety of new specialist or sectional publications that now performed many of the functions that had historically been done by the *Law Journal.* On this occasion of the 60th anniversary of the publication, the Prime Minister said he offered his congratulations to all those who over the years had been involved in the publishing of the *Law Journal,* and he trusted it would have continued success. □

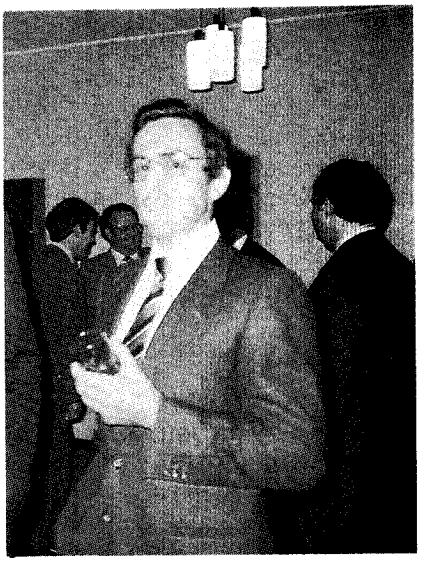


(l or r) Mr B Cathie, a Wellington practitioner; Mr Ross Elliot, Crown Counsel; Mr D P Neazor, Solicitor-General

The New Zealand Law Journal 60th Anniversary Function

(l to r) Mr Willes, Parliamentary Counsel; Mr C Patterson, Chairman Securities Commission; (back to camera) Mr M Dunphy, Treasurer NZ Law Society; Hon Mr Justice Cooke; Miss Frances Parker, retiring Secretary Wellington District Law Society; Mr J Upton, a Wellington practitioner

(l to r) Mr P Kirk, Butterworths; Rt Hon Sir Alexander Turner



Mr P A Black, a Wellington practitioner and a former editor of *The New Zealand Law Journal*

Hon Mr Justice Cooke; Miss Francis Parker, retiring Secretary Wellington District Law Society; and in the background Miss Moira Thompson (back to camera) and Miss Helen MacShane both of Butterworths; Mr T Gault QC, Mr R Crotty, and Mr I McKay Wellington practitioners

The High Court Rules I:

Some background comments on the new Code

By Gordon Cain of Wellington.

The new Code of Civil Procedure has been expected for some time. Although it may be still some time away it looks at last as though the Code will be in force within a matter of months instead of years. In this article the present editor of Sim and Cain's Practice and Procedure to the High Court and Court of Appeal *relates his personal experience in the drafting of the new rules. He comments on the genesis of the new Code and how the matter progressed through various stages of development. He explains the changes being made to* Sim and Cain *to provide for the new rules before these come into effect. In a subsequent article he wll describe some typical areas that illustrate how the procedures under the new rules will differ from current practice.*

Last year the new High Court Rules reached the House in the form of a Schedule to the Judicature Amendment Bill 1984, and passage of this Bill through Parliament will bring the rules into law. The Bill proposes that the date the new rules should come into force is 1 July 1985, but it seems probable that this date will have to be extended.

A sketch of the history of the High Court Rules may be of interest. Well before he became Chief Justice, Sir Richard Wild had a strong interest in the reform of the Code of Civil Procedure; he was convinced that this near-century old set of rules had not kept pace with modern conditions. In late 1969 the Rules Committee appointed a sub-committee, "the Supreme Court Procedure Revision Committee", to report to the Rules Committee on changes recommended to improve the efficient working of the Court; the Right Honourable Mr Justice McCarthy was chairman and other members were the Honourable Mr Justice Wilson, Mr J T Eichelbaum and Mr S C Ennor; Peter Cornford, of Crown Law, was secretary for most of the time. In 1973, Sir Richard Wild, on whose staff I had been when in Crown Law Office, invited me to act, through the Justice Department, as a part-time drafting and research assistant to the Committee. Mr Justice McCarthy retired from the Committee a little later, and Mr Justice Wilson was appointed as chairman and Mr Justice Beattie appointed a member. During the ensuing four years I was in close touch with Mr Justice Wilson, both by correspondence (almost on a conveyor-belt basis) and at meetings of the committee and its ad hoc subcommittees at which each new rule was the subject of anxious consideration. Perhaps I may here acknowledge, with respect, His Honour's deep legal knowledge and his unfailing courtesy.

In April 1978 the Revision Committee reported to the Rules Committee, with its draft rules, in the form of a book bound with pink covers which among familiars has become known as "the Pink Book". These draft rules form the basis of the High Court Rules now set out in the Judicature Amendment Bill 1984. Prior to the draft being settled, great efforts were made to obtain informed comment on them. Working drafts were supplied to each District Law Society, the Law Faculties of the Universities, and to the Justice Department. Seminars were held by several Law Societies, and the Standing Committees of the Auckland and Hamilton Societies commented. Many comments were received and carefully considered by the Committee. The following extract from the Committee's report expresses the principles it adopted:

> 4 From the outset the Revision Committee took the view that the procedure of the Court should, ideally, make it as simple and easy as possible for a person to secure justice in accordance with the substantive law. To this end procedural technicalities have been carefully examined and, wherever possible, eliminated; simplicity and clarity of language has been the objective; wherever practical, flexibity has been introduced; and no rule has been provided unless it has been seen to be necessary.

While the Pink Book draft was substantially acceptable, there were naturally some aspects that needed attention and decision, and in some areas alterations in the law made changes necessary. After settlement of these matters the draft was referred to Parliamentary Counsel for attention as to form. I have heard some criticism of this reference; "considered drafting by a group of eminent lawyers, members of a committee appointed for the purpose, could be relied upon to produce a satisfactory draft". However it must be borne in mind that it is official policy that proposed legislation and regulations should be approved by Parliamentary Counsel Office before steps in the House are taken on it; and in any case those Counsel, specialists in their field are likely to have valuable contributions as to wording and lay-out of the material.

At this point a few facts of life may be noted: The Parliamentary

Counsel Office is almost invariably working under great pressure and running short-staffed; its priorities are directed by the Government of the day. Unless tactically desirable, few Governments are willing to accord any particular urgency in the legislative programme for a bunch of rules for lawyers. In March 1980 Chief Parliamentary Counsel submitted to the Rules Commitee a draft of Part I of the rules and raised various aspects requiring consideration by the Rules committee; these aspects were duly settled and, after drafts on other parts, the Judicature Amendment Bill 1984 sets out the latest position. I am sure this draft will find ready acceptance by the profession as an attractive example of modern legislative drafting techniques.

I am sure that the profession as a whole will acknowledge the immense debt owed to the eminent lawyers sitting on the above committees for their long, arduous and complex task in producing a new set of High Court Rules.

The 11th edition in 1972 of the long established, and probably New Zealand's best known, text-book, *Practice and Procedure of the Supreme Court of New Zealand* was the last under the able editorship of Sir Wilfrid Sim. He died two years later in 1974. In 1978 Butterworths decided that a new edition was desirable, and invited me to edit it. It was thought better to drop the rather cumbersome two-volume treatment and also to bring the new edition into the loose leaf system. This was done not only the better to accommodate normal periodic updating, but also to prepare for the introduction of the new Code which was by then expected to become law quite shortly. Opportunity was taken to recast the Court of Appeal and Privy Council sections to facilitate quick and easy reference by the reader.

When the new rules do become law, all that present subscribers to the book and services will have to do is to lift out the Part dealing with the Code and replace it with the new Part dealing with the High Court Rules. A separate binder, coloured red, will be available from the publishers to hold the Code and comment, so that this material will be available for consultation pending the coming into force of the new rules, and no doubt later, when perhaps the wording of a Code rule is in issue or comment by previous editors on a rule is wanted. There will also, of necessity, be a number of changes in the text of other Parts of the Book consequent on the new rules coming into force, and these will be noted by normal Service sheets supplied at the same time. Thereafter the whole work will be kept up to date with the usual six-monthly services.

The new insert of the High Court Rules will include:

- a general introduction explaining in broad terms the principal changes effected by the new rules;
- the rules themselves, with complete redrafting of comments thereon;
- each group of the new rules dealing with a particular topic will be preceded by a note at commencement explaining briefly the effect of the new rules in the group; making any general comments thought desirable, and summarising changes made from the Code; and
- each individual rule will then be set out, with reference to its history, and then, as necessary, to various aspects of the rule and to relevant decided cases.

Over the years the text of editorial comments in the book has, in some areas, become a little disjointed. The new comments, while preserving citation of what are regarded as important cases in the area, will provide new comments arranged in an orderly and logical manner, thus facilitating ease of reference by the reader.

Two comparative tables will be provided — Rules of the Code compared with the High Court Rules, and vice versa. There will also be a new Table of Cases and a new Index for the whole book. □

Australian forensic style

Sydney barrister . . . has been found guilty of professional misconduct by the NSW Court of Appeal. However, the Court refused the Prothonotary's request to strike him off the roll.

The Court found that [the barrister] had over a number of incidents been insolent, insulting, arrogant, impatient and rude to Magistrates; loud, agitated and aggressive to potential opposing witnesses outside the Court; abusive, threatening, intemperate and improper to a crown prosecutor; unseemly, having an exaggerated sense of his importance as a defence counsel, and overbearing.

On various occasions [the barrister] had called his opponents turds, little twerp, liars, roosters, and had threatened to punch them.

The Court examined 12 incidents which the Prothonotary claimed illustrated that [the barrister] had been guilty of professional misconduct and was not a fit and proper person to remain on the roll . . . .

[Two Judges] said that the jurisdiction was protective not punitive, and they were not satisfied that the misconduct found against [the barrister] is of a character and frequency which establishes a condition of unfitness to remain a member of the Bar against which the public should be protected by an order for disbarment. They awarded the costs of the summons against [the barrister].

[The other Judge] said that there are positive aspects to [the barrister's] character. He is honest, he has not deliberately attempted to prefer his own interests to those of his clients. [The Judge] was not persuaded that the instances of professional misconduct, balanced with the desirable aspects of his character, show that he is unfit to practise.

- Justinian
22 February 1985

Ultra vires
Not quite the end

By Giora Shapira, Senior Lecturer in Law, University of Otago

The author considers in this article the background to the legal doctrine of ultra vires and the changes effected by the Companies Amendment Act 1983 (No 2). This statutory amendment purported to give companies the "rights powers and privileges" of a natural person. Leaving aside the somewhat ludicrous unreality of this presumption, the provision raises certain legal difficulties. Mr Shapira looks at some of these, including the point raised in earlier correspondence in this Journal at [1984] NZLJ 363 by Mr Maurice Joel of Dunedin.

Introduction

"I have just tied up a deal with KiwiCorp Ltd. Please make sure that everything is all right." Faced with such instructions the legal practitioner has to ensure, among other things, that KiwiCorp Ltd has the necessary *capacity* to make the contract. Like most companies registered before 1984, KiwiCorp's objects in its memorandum of association, which define its capacity, are likely to be all enbracing. They would allow it to deal in everything – from cereal to computers, regardless of the company's actual business of, say, ladies underwear. Most likely, therefore, the transaction in question – let is say the purchase of KiwiCorp of a quantity of plastic Christmas trees made in Taiwan, would come under one or another of its objects. This would take care of the question of "capacity".

At times, however, even the most elaborate objects might prove lacking. In one famous case *Re Introduction Ltd* [1968] 2 All ER 1221; affirmed sub nom *Introduction Ltd v National Provincial Bank* [1970] Ch 199. A company incorporated to provide tourists services eventually turned to pig breeding. It turned out to be the exception to its otherwise comprehensive objects. Consequently anyone who had supplied the company on credit or had lent it money, found himself with a void contract. The classical ultra vires principle *Ashbury Carriage and Iron Co v Riche* (1875) LR 7 HL 653 rendered transactions outside the company's objects null and void. They were unenforceable against the company or by it, and money or other property which could be traced into any particular asset was recoverable, even from third parties.

Origin of theory

Originally the ultra vires theory sought to ensure that shareholders' and creditors' contributions were used exclusively for the declared purposes of the company. It

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unions change their rules?" (1982) 3 TULB 101; Kidner, "Trade Union immunities – the Green Paper" 131 NLJ 220.

5 See Craig, "Liability for secondary industrial action" (1980) SLT 217; Bercusson, "Picketing, secondary picketing and secondary action" 9 ILJ 215; Lord Wedderburn, "Secondary action and gateway to legality" 10 ILJ 113; Creighton, "Secondary boycotts under attack – the Australian experience" 44 MLR 489; Khan, "Secondary industrial action" (1983) 127 SJ 794; Benedictus, "Collective labour law: Industrial Action" (1984) 134 NLJ 561.

6 See Rideout and Dyson *Rideout's Principles of Labour Law* (1983). For an example of such a pressure, see *United Biscuits (UK) Ltd v Fall* [1979] IRLR 110.

7 See generally Harvey on *Industrial Relations and Employment Law* (with 1984 supplements); Davies & Freedland *Kahn-Freund's Labour and the Law* (1983); Wedderburn & Murphy, *Labour Law and the Community* (1982); Wedderburn, Lewis & Clark, *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983); Davies & Freedland, *Labour Law: Text and Materials* (1984); Lewis and Simpson, *Striking a Balance* (1981); Bain, *Industrial Relations in Britain* (1983).

8 See also, *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570; *Camellia Tanker Ltd SA v ITF* [1976] ICR 247; *Universe Tankship Inc of Monrovia v ITF* [1982] 2 All ER 67; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

9 This has now been clarified and confirmed by the Court of Appeal in *Mercury Communications Ltd v Scott-Garner and the Post Office Engineering Union* [1984] 1 All ER 179. (For comments on this case see Ewing & Rees (1984) 13 ILJ 60). See also, *Dupport Steel Ltd v Sirs* [1980] 1 All ER 529; *Hadmor Production Ltd v Hamilton* [1983] 1 AC 101 reversing [1981] IRLR 210 (CA); *Express Newspapers Ltd v Keys* [1980] IRLR 247.

10 See *British Broadcasting Corporation v Herns* [1978] 1 All ER 111; *Mercury Communications Ltd v Scott-Garner and the Post Office Engineering Union* [1983] IRLR 494.

11 "Labour Law Now – A Hold and a Nudge" (1984) 13 ILJ 73 at 81. See also, Lord Wedderburn's analysis of the Courts' attitude, "Industrial Relations and the Courts" (1980) 9 ILJ 65.

12 For comment on the House of Lords' judgment, see (1984) 13 ILJ 107 by RWB[enedictus].

13 See Khan "Peaceful picketing" (1982) 126 SJ 844; Khan, "Picketing on Private Property" (1983) 128 SJ 91; Gillance and Khan, "The law of picketing" (1975) PJ 270; Bercusson, "Picketing, secondary picketing and secondary action" 9 ILJ 215; Evans, "The Labour injunctions revisited: picketing, employers and the Employment Act 1980 (1983) 12 ILJ 129; Newell, "The status of British and American trade unions as defendants in industrial dispute litigation" (1983) 32 ICLQ 380.

14 See Dias, *Clark and Lindsell on Tort* (1983); Smith and Wood, *Industrial Law* (1983); Drake, *Labour Law* (1982); Riddall, *The Law of Industrial Relations* (1981: 1982 supplement); (1982) 11 ILJ 111; (1983) 11 ILJ 111; (1983) 12 ILJ 166; (1983) 127 SJ 794.

15 See *Messenger Group Newspapers v National Graphical Association* [1984] 1 All ER 293, Court of Appeal, for the writ of sequestration against trade union funds and contempt by auditors under it. See also Benedictus and Newell, "Trade Union Law" (1984) 134 NLJ 594.

assumed a distinctive definition of the company's business in the objects, which had to be stated in the memorandum of association. In practice, however, no exhaustive definition of any line of business could be stated with certainty. Modern business dynamics have made it unrealistic to delineate the operation in advance. Technological changes, rationalisation, amalgamation, diversification, regulations, hedging, tax, mergers, conglomeration – are but a few of the factors that may force an unforeseen change in the business front. Though commercially and financially sound they may be difficult to accommodate, literally, as "reasonably indicental" to the historical definition of the business.[1]

The evidence is all around us. Consider, for example, conglomerate business which controls a large part of the economy. By definition, it is a combination of every kind of business under the same financial management. Conglomerates are not in steel, communication, transport or insurance – their motto is "business is our business". If this is characteristic of big business, let us look at the bottom of the scale. Why should the law take exception in principle (by expecting the company to distinctly define its business and stick with it) to the little incorporated grocer's buying half of the next-door bottle store?

Marketing revolution

To cite just two concrete examples: when the hazards of smoking became apparent in the late 60's, the large tobacco multinationals, concerned with the effect on their business, started buying heavily into food. Characteristically they sought to offset decline in their main line by diversification. New, including quite unrelated, lines might make good business sense; yet they fall foul of the theory underlying ultra vires. It (together with good many citizens), would rather have the tobacco companies wound up. But this is not the reality.

More humbly and closer to home – who could guess ten years ago that petrol stations in New Zealand would be selling Hot Burgers? Yet they sell them now up and down the country, together with frozen chickens, video cassettes, toys, instant coffee and just about everything else. The marketing revolution, bringing goods to the customer rather than the other way around, is swiftly changing the traditional nature of many retail outlets. Yet it might be extremely difficult to convince a Court, on the literal interpretation of the objects, that frozen chickens are "reasonably incidental" to the filling station business. . . .

Modern business can no longer be stratified in the manner envisaged by the ultra vires principle – a factor which knocked off the bottom of its rationale. The theory, though, has continued to dominate company law. The net results: an ungainly standard objects clause spelling out over a number of pages that which could be said by one sentence (namely that the company had full capacity to do everthing); and an occasional void transaction, allowing someone to wriggle out of an otherwise perfectly fair and valid contract.[2]

Despite sustained criticism and statutory reform everywhere else in the Commonwealth, ultra vires has survived in New Zealand with very little Parliamentary intervention. The main exception is the standard form Objects and Powers in the Second Schedule of the Companies Act 1955 which unless expressly excluded, give each company registered after 1 January 1956 extended powers, as "incidential and ancillary" to the objects stated in the memorandum. Comprehensive reform was eventually introduced in 1983 by the Companies Amendment Act 1983 (No 2) ss 4-6 and 8.

It is, perhaps, odd to start an article about law reform by arguing the case for change. After all, this should now be history. I found it necessary to restate what I consider the essential case against ultra vires because in my view the reform has gone nowhere far enough. We have had sufficient time to realise that ultra vires was obsolete. It should have been abolished. The simple solution was also the best one. Instead the solution we have adopted makes the weather map look simple. It leaves too much of the old law in place and at the same time creates original difficulties.

Changes

So, what is new?

Companies registered after 1 January 1984 (hereafter "new companies") are no longer required (though they still may) state their "objects". Instead, they are given the "rights, powers and privileges of a natural person". These provisions are contained in the new ss 14A and 15A Companies Act 1955. If no objects are mentioned the company is virtually free of the ultra vires rule. This is the high point of the reform – and its best feature. Other aspects are less fortunate. Hundreds of thousands of companies on the Register before 1984 are still bound by their objects,[3] as are new companies which have elected to specify their objects in their memoranda of association. It must be pointed out that the objects can now be omitted by a simple procedure;[4] and that the new law protects third parties against the consequences of ultra vires transactions in the new s 18A. However, where objects exist lack of capacity can still be pleaded by shareholders and debenture holders against the company and/or the directors. The problems associated with lack of corporate capacity are, therefore, far from over.

Under the new regime, the rules governing a company capacity are initially linked to its registration date. The inquiry into the issue of capacity must therefore begin by noting that date.

The following discussion of the new law is divided into two parts: the source and scope of the company's capacity; and the consequence of ultra vires transactions.

Capacity

Corporate capacity is now determined by (1) The Act – when no objects are stated (full capacity). (2) The objects – if stated in the memorandum of a company registered before 1984 (theoretically, restricted capacity) and (3) strangely enough – by both, for companies registered after 1 January 1984 *with* stated objects. (The problems involved are explained below.)

Classified for the source and scope of their capacity and the application of the statutory list of Objects and Powers (the Second Schedule) companies may now be divided into a number of categories. They are summarised in the following table:

Companies according to registration date, source and scope of capacity and Second Schedule powers

Registration date	Objects stated in Memorandum	"Rights, powers and privileges" of a natural person	Application of Second Schedule	Comments
1 Companies registered on or after 1 January 1984 (new companies)	No	Yes	No	Certain powers may be restricted (s 15A). No other restrictions are allowed in memorandum or articles. Practically free of ultra vires.
2 Companies registered before 1 January 1984 which resolved to omit objects (s 18(1)(a))	No	Yes	No	Certain powers may be restricted (s 15A). No other restrictions are allowed in memorandum or articles. Practically free or ultra vires.
3 Companies registered on or after 1 January 1984 with stated objects	Yes	Yes	No	Effect of objects unclear
4 Companies registered after 1 January 1956 and before 1 January 1984	Yes	No	Yes, unless expressly excluded	May convert to category 2 third parties and the company protected against nullity of ultra vires transactions (s 18A).
5 Companies registered before 1 January 1956	Yes – continue to determine the capacity of the company	No	No application	May convert to category 2 third parties and the company protected against nullity of ultra vires transactions (s 18A).

New Companies

Section 15A which brings in major innovations, grants the company "rights, powers and privileges of a natural person", then goes on to specify eight powers which the company has, "without limiting the generality of the foregoing". Four of those relate to different aspects of the issuing of securities. The others allow the company to distribute its property among the members; procure an overseas registration; pay compensation to employees upon cessation of the business, and do "any other act" that is authorised to do by law.

It must be assumed that the "rights, powers and privileges of a natural person" were intended to give the company the fullest possible capacity. If so, the choice of words is questionable. The difference between "rights" and "powers" is in jurisprudential debate, while the meaning of "privileges" in this context is rather mysterious. Again, why the trinity, when "full capacity of a natural person" is so much simpler and more effective?[5]

Even more puzzling is the role of the specific powers in s 15A(1). Why were they singled out? It has been suggested by Mark Russell [1984] NZLJ 132 that:

> the reason is simply that for the new law to equate the powers of a company with those of a natural person would not be enough, for there are some things which a company may do which are not possible for a natural person.

Surely, this cannot be the answer. First, the list is not exhaustive of unique corporate powers. No mention is made for example of the power to call meetings, appoint directors or go into liquidation, characteristic to a company but inapplicable to an individual. Secondly, the analogy to a natural person does not elimate inherent differences. Even possessed with the rights etc now given by the Act, a company cannot vote, wed, or make a will. Conversely, the natural person analogy does not deprive it of distinct corporate powers which have no application for an individual. The provision must be interpreted *mutatis mutandi.*

In my view, the real and only significance of the specific power listed in s 15A(1) is found in ss (3). It reads:

> The memorandum and articles of a company shall not contain any provision with respect to the rights, powers, and privileges of the company except a provision that restricts or prohibits the exercise by the company of any of the rights, powers, and privileges referred to in subs (1) of this section.

This subsection allows a company of full capacity to re-enter the ultra vires sphere by restricting, or excluding certain specific powers. The option is restricted in the above manner, presumably to minimise the reintroduction of ultra vires elements. This objective, however, is almost entirely lost, since the company can easily restrict *any* of its powers by stating its objects in the memorandum of association!

Provision in the *memorandum* restricting the specific powers in subs (1) may result in ultra vires transactions; but, that should not cause much trouble in practice. There appears to be little reason why a company should restrict its

capacity in such manner (these matters are much better dealt with in the articles), and I expect very few companies to adopt such provisions.

Much more troublesome is the reference in subs (3) to the articles. The articles do not *define* the powers of the company, they lay down procedures for their use. They contain numerous references to the powers and rights of the company, not necessarily restricting or prohibiting their exercise. Are we now to understand that the company's power to declare dividend, call meetings, capitalise profits, appoint directors, regulate share transfer, delegate management power to the directors etc etc must not be mentioned in the articles? Should the Registrar of Companies refuse to register any article referring to the powers of the company without prohibiting or restricting it? Surely such heavy handed intervention in the contents of the articles was not intended. It does not make any sense. Yet, upon plain reading, subss (3) and (1) of s 15A make many of the standard articles unsuitable for registration, and if registered, void!

Specified objects permissible?

The next problem is the position of companies registered after 1 January 1984 with specified objects. First, is this permissible? As we saw s 15A applies to all new companies. it gives them rights, powers and privileges of a natural person and subject to specified exceptions prohibits any reference to these matters in the memorandum and articles. Specified objects in a memorandum of a company to which s 15A applies are prima facie a breach of this provision, since the objects define, and thus restrict, the company's powers.

However, s 15A is "subject to this Act" and therefore subject to s 14 which clearly provides:

> The memorandum of a company may state but shall not be required to state the objects of a company.

This creates a remarkable contradiction. The company's capacity is determined, at once by the stated objects and by the Act. The objects define, and therefore, ex-hypothesise, restrict, the company's capacity. The Act confers full capacity. What is the combined effect? Is an act outside the stated objects ultra vires, irrespective of the statutory "rights, powers and privileges of a natural person"? If not, what is the effect of the objects?

Two answers, none too convincing, may be offered.

One is to say that where a company governed by s 15A has stated its objects, they define the capacity; otherwise they would be meaningless. The "rights, powers and privileges of a natural person", are, consequently "mere powers", namely, incidental and ancilliary to the attainment of the stated objects.

While resolving the contradiction, this approach has considerable drawbacks. It revives the "objects" as oposed to "powers" nomenclature which has bedevilled the common law.[6] Moreover, under this interpretation the same expression "rights, powers and privileges of a natural person" means different things for different companies. For those registered without objects, or which have deleted their objects, it means full, unbridled capacity. At the same time, when applied to companies which have stated their objects, it is reduced to the *necessary means* for attainment of *these* objects.

Alternatively, it may be argued that s 15A indeed prohibits new companies from stating their objects. This argument at once resolves the dilemma described above and is in line with the legislative intent to minimise the effect of ultra vires. On this basis, the permission in s 14A to state the objects in the memorandum should be read as applying only to companies registered before 1984. Attractive as it is, the argument is unlikely to get the ear of a Court. The plain language of s 14A mitigates against this. It also conflicts with the provision in s 18(1)(b) which allows a new company to re-introduce objects by amending its memorandum.

The registrar of companies, though aware of the problem, has not refused registration of new companies which had elected to state their objects. This is hardly surprising, in view of the prevailing ambiguity. The problem is an urgent one, and requires further Parliamentary clarification.

Empoyee benefits

Another of s 15A provisions worthy of note is subs (1)(g). It specifically empowers the company "to make provisions" in connection with the cessation of the business of the company, for the benefit of its employees and past employees. This power it is stated in subs (2) may be exercised "whether or not it is in the best interests of the company".

This is clearly designed to overrule *Park v Daily News Ltd* [1962] Ch 927. In that case Ploughman J held that a company which was going out of business had no legal power to pay gratuitous compensation to its employees for the loss of their jobs.

The decision in *Parke* must be understood against its common law background. It followed a line of cases[7] which established the gratuitous payments, including benefits to employees, were outside the powers of the company unless they were in its commercial interests. Gratuities to employees pay off by better industrial relations but this no longer applies where the company is going out of business.

The specific power to make such provisions is given by s 15A(1)(g) to companies with "powers, rights and privileges of a natural person". This distinguishes *Parke*, where the company was bound by its objects and traditional common law restrictions on its capacity to make gifts. Under s 15A the company need no longer justify gratuitous payment as being in its commercial interests. Like an individual, it now has the power to make gifts, including, of course benefits to employees, for any reason whatsoever. To that extent, the licence to exercise the power "not in the interest of the company" is superflous.

The problem that does arise concerns the duty of the *directors* to act in the best interests of the company as a whole. This is an altogether different test from the one applied to the scope of the company's powers,[8] and involves the good faith of the directors and their permissible consideration, when making gratuitous payment.

So far this problem did not receive much attention in the case law simply because the lack of power by the *company* to make such payments was sufficient to render them void. With this bar removed,

however, the powers of the directors become crucial. Prima facie, gratuities to employees or past employees in connection with the cessation of the business are not in the interests of the company as a whole. If such payments are to be legally possible — itself salutory the directors must be allowed to act irrespective of the interests of the company.

Is this achieved by subs (2)?

The subsection is badly placed for this purpose. Section 15A, of which it is a part, speaks exclusively of the powers of the *company.* On the other hand, there is nothing specific in the language of subs (2) to prevent it from applying to the exercise by the directors of their powers. It is hoped that the Courts would apply the provision in the context in which it really matters.

Finally on this — it should be noted that s (2) does not apply to companies registered before 1 January 1984 which have not omitted their objects. The power, in principle, of these companies to pay benefits to their employees upon cessation of the business (as indeed their power to make any gratuitous payment) is still determined by common law. It is submitted that there was no good reason, in principle, to distinguish between companies registered after 1 January 1984 and companies already registered on this date (and which do not, **therefore, come under s 15A)** for this purpose.

Consequences of ultra vires transactions

If the objects are stated the company is still capable of acting ultra vires. But such an act is not the nullity it used to be. Section 18A Companies Act 1955, now protects third parties, and the company itself, from the normal consequences of an ultra vires transaction:

> 18A(1) Nothing done by a company and no conveyance or transfer of any property, whether real or personal, to or by a company shall be invalid, void, or unenforceable by reason only of the fact that the company was without the capacity or power to do it, or to execute or give, or take such conveyance or transfer.

Certain classes of people in terms of s 18A(2) may still invoke the ultra vires principle. Members and shareholders can restrain the company from acting ultra vires on the ground that it was without capacity to act. The members and the company may also sue the directors for damages on the ground that the transaction was ultra vires. And the registrar of companies may apply for the winding up of the company on that ground.

When s 18A is considered alongside s 14A, the legislative design becomes apparent. The main objective is to eliminate ultra vires by giving companies, or allowing them to assume, full capacity. Balanced against this is the right of shareholders, if they so wish, to continue to define the scope of the company's business, as a measure of control over management. Third parties however, should not be put at risk. The nullity of an ultra vires transaction therefore, does not affect their position.

The absolute protection given to third parties should practically eliminate most ultra vires problems. However, the working of the section might be seriously impaired for the following reason. A transaction outside the objects of the company is not only without capacity of the company — against which the third parties are protected, but also without *authority of the company's agents* — against which they are not.[9] Clearly, the directors, or other company agents have no authority to act in matters outside the capacity of their principal. And since third parties dealing with the company are supposed to know the contents of its public documents, under the doctrine of constructive notice (*Ernst v Nicholls* (1957) 6 HL 401), they are deemed to have notice of this excess of powers by the agents. The result is that the transaction might still be invalid if not directly due to lack of company capacity, because of its effect on the agent's authority to bind the company.

It should be realised that if this argument is correct the statutory protection is greatly reduced, since all corporate transactions are done by agents. For this reason it may be argued that the words "by reason only that the company was without capacity" in s 18A(1) extend to lack of agent's authority caused exclusively by lack of corporate capacity. This, however is a dubious argument since the company capacity and agent's authority are altogether different concepts. There is also some English authority against such an interpretation.[10] The only safe way around the problem is the abolition by legislation, of the outdated constructive notice doctrine.[11] This would allow third parties to rely on the "apparent" or "usual" authority of the company's agent.[12]

Within their scope, the ultra vires actions allowed by s 18A preserve much of the old law's complexities. To decide whether an act was ultra vires in an action by a member or a debenture holder to restrain its commission or continuation, would require interpretation of the company's objects. This, and the ambit of the ultra vires principle, are matters which have troubled the Courts for over a hundred years. Particularly worrisome in this respect is the right of a member, or the company to sue a director for damages on the ground that the transaction was ultra vires under s 18(2)(b). This means that the operation of the doctrine should still have to be watched closely.

Such actions, especially by the liquidator, are much more likely to occur in practice, than actions by the members to restrain an ultra vires act, since the members hardly ever notice, or care, that the company had acted without capacity. It must be realised that an action against the directors on that ground does not require proof of negligence or lack of good faith. The very fact that the company had lacked capacity, and that it suffered financial loss, are sufficient to establish liability. Paradoxically, this makes the directors more vulnerable on what is in essence a technicality than in matters of greater substance. The standard of care and skill required of directors is notoriously light[13] and their lack of good faith is extremely difficult to prove.

A Hypothetical Case

Descending from the abstract, let us consider a hypothetical case. It illustrates many of the problems discussed above.

Tom, Dick and Harry are equal shareholders and the only directors of *New Leaf Ltd.* The company was incorporated on 1 February 1984 to take over and operate a bookshop in Dunedin. This is stated as its first

object, on the memorandum of association. There follow six other objects, all related to various aspects of the book and stationery business. The last subclause allows the company:

> to engage in any business which is reasonably incidential to the above business of the company, or which in the eyes of the directors is in the interests of the company.

Six months after incorporation Dick and Harry decide that there is more money in video cassettes than in books. Overriding Tom's opposition, they pass the necessary resolutions to turn the business into a video cassette library. They sell the books and purchase the basic stock of cassettes from *Video Supply Ltd.* Half of the total price of $10,000 is paid immediately, the remaining half to be paid on 1 July 1984. Unfortunately, the video market is saturated and after six months trading *New Leaf Ltd* is losing money.

At this stage, two separate actions are brought against the company:

(1) An action for breach of contract by *Video Supply Ltd,* for failure to pay the remaining $5,000.

(2) An action by Tom to restrain the company from paying the remaining $5,000 on the ground that the contract was outside the capacity of the company; and for compensation for financial loss against the directors, Dick and Harry, on the ground that the whole video business was ultra vires the company.

Action by Video Supply Ltd

The only defence put forward by the company is that since it lacked capacity to make the contract, it was outside the *authority of the directors,* and that this was within the constructive knowledge of Video Supply Ltd.

The first issue is the scope of *New Leaf's* capacity. This raises the question of a company with "rights, powers and privileges of a natural person", but which is also bound by its stated objects. If the decision is that the stated objects prevail they need to be interpreted. The last subclause, in particular presents notorious difficulties.

If the conclusion is that the purchase of the videos was outside the capacity of the company, the next question is whether the statutory protection of third parties by s 18A extends to the effect such lack of capacity on absence of agents authority caused by it.

Action by Tom

Again, the scope of the company's capacity would have to be determined according to the considerations outlined above.

If indeed the company lacked the capacity to make the contract and to enter the video business, Tom should be successful on both counts. This would also mean that a third party, *Video Supply Ltd,* would be deprived of the benefits of a contract, on the sole ground that it was outside the capacity of the company (the other party), irrespective of the protection of s 18A. (Although the Court has discretionary power to award restitution under subs (3) and (4)).

The simple facts instanced show the array of ultra vires problems which are still with us. For legislation designed primarily to eliminate such problems we have not done too well.

Conclusions

We could have done better with ultra vires.

The centrepiece of the new law — corporate capacity analogous to that of a natural person, seems to have been added to it in haste[14] (paradoxically, after all these years). It is so hedged as to greatly reduce its efficacy. Lingering ultra vires difficulties have been compounded by problems created by the legislation itself.

A good model we could follow is s 16 of the Canadian Business Corporation Act of 1975. It grants the company the capacity of a natural person and leaves all restrictions of its activities to the *articles.* Following this model, what, I would suggest, should have been done in New Zealand is:

* Granting the company capacity akin to that of a natural person:
* Leaving any restrictions on the company's activities to be dealt with by the *articles.* Objects of companies registered previously should be treated the same way — as if they were part of the articles. In that way, contravention of such restrictions is an internal corporate matter, governed by the rules regulating directors' and controllers' duties and the protection of the individual shareholders:[15]
* Providing that "No act of the company is invalid by reason only that the act is contrary to the articles".

This is not to say that out legislation has completely misfired. On the contrary, many of the most troublesome problems associated with ultra vires have been put to rest by the comprehensive protection of third parties. The point is, though, that with the increasing complexity of the law the opportunity to improve *and simplify* at the same time should not have been passed over. Some of the problems discussed are already troubling the profession as in the correspondence in [1984] NZLJ 363, and cause concern, I am told, to the Registrar of Companies. They will no doubt add to the costs of incorporation because of the extra drafting difficulties, and are likely to lead to costly litigation.

Ultra vires has been a suitable cause for reform in New Zealand for at least 30 years. Unfortunately, it still is. In my view, a *true* abolition of the doctrine is still a must. Better luck next time. □

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1 Compare the badly outdated statutory model in Companies Act 1955, Third Schedule, Table B. It states the object of the "Wellington Steamship Company Ltd" as "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing of all such things as are incidential or conductive to the attainment of the above objects". The company would be in serious ultra vires trouble if it extends into air freight, buys a hotel, or invests in an insurance company's shares.

2 See for example the scandalous result in the recent Court of Appeal decision *Cabaret Holding Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673; discussed in Shapira "Ultra Vires Redux" (1984) 100 LQR 469 at pp 490-492. It has now been overruled by the legislation discussed in the text below.

3 Section 15A does not apply to companies registered before 1 January 1984 — subs (4). (But see subs (5)).

4 Companies Act 1955, s 18(1)(a).
5 The same word combination is used in the recent Australian reform of ultra vires law. The source is apprently the Canada Business Corporations Act 1975, but note the difference: "a corporation has the capacity, and subject to this Act, the rights, powers and privileges of a natural person". (s 15(1)). That way makes it makes more sense.
6 See Shapira, supra n 2 at pp 468-471.
7 Eg *Hutton v West Cork Railway* (1885) 23 Ch D 654; *Re Lee, Behrnes & Co Ltd* [1932] 2 Ch 46; see *Shapira,* supra n 4A at pp 471-474.
8 See *Re Halt Garage Ltd* [1982] 3 All ER 1016, p 1035; *Shapira,* supra n 4A at pp 474-475.
9 The problem is discussed in Ford, *Principles of Company Law* 3 ed (1983) at pp 99-100, in the context of the then in force Australian legislation. It has now been amended by inter alia, the abolition of the constructive notice doctrine – Companies and Securities Legislation (Miscellanoous Amendments) Act 1983 (Commonwealth) s 68G.
10 *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551, p 570.
11 For criticism of the doctrine see Shapira "Rule in Turquand's Case Revisited" (1976) 7 NZULR 142 pp 161-165. The doctrine was abolished in the United Kingdom, Canada and Australia. Provisions abolishing constructive notice were contained in the (now lapsed) Companies Amendment Bill (No 3) (1983).
12 See *Freeman & Lockyer v Buckhurst Park Properties (Magnal Ltd)* [1964] 2 QB 480. Shapira, supra 27, at pp 147-149.
13 See Gower, "Principles of Company Law" 4 ed (1979) at pp 602-606.
14 The Macarthur Report (Wellington 1972) para 97 favoured an Australian provision (now substituted) which did not give the company full capacity, but protected third parties and the company against the consequences of ultra vires transactions. A similar provision appeared in the Companies Amendment Bill (No 2) (1982) cl 5. Only in the latest stage of the Bill did the provisions take its present shape.
15 The re-enacted s 209 of the Companies Act 1955 protection of minority shareholders against unfair prejudice, is particularly suitable for this purpose.

Correspondence

Dear Sir,

It warmed my heart to see the familiar name of the late A C Brassington in your December issue ([1984] NZLJ 406), quoting his concern at the lack of constitutional guarantees for what we like to think of as being New Zealanders' fundamental rights and freedoms.

It was the redoubtable, resolute "Brasso" who kept the flame of written guarantees burning through the dark years that followed the demise of the Constitution Society, and who did so with humour and tenacity. How his eyes would now be sparkling as we move towards a Bill of Rights!

"Brasso", too, served for years as the NZLJ's honorary author of obituaries and I will always remember with affection his regular visits to the Journal's offices. "Another one gone," he would say, with a grave shake of his head. "I fear I will outlive them all, and there will be no-one left to be my Boswell!"

Jeremy Pope

Books received from overseas

(Books listed may be reviewed later)

The Supreme Court Law Review, vol 5 (1983) Butterworths, Toronto.
Foreign Investment Review Law in Canada by James M Spence and William P Rosenfeld, Butterworths, Toronto.
Construction of Statutes 2nd ed, by E A Driedger, Butterworths, Toronto.
Canadian Business Organisations Law Case
The Law of Criminal Investigation by Peter Gillies, Law Book Co, Sydney, $A32.50.
Manual of Income Tax Aust by K W Ryan and G O'Grady, Law Book Co, Sydney.
Australian Family Property Law, by I J Hardingham and Neave, Law Book Co, Sydney.
Cases and Materials on Succession by Olive Wood and N C Hutley, Law Book Co, Sydney.
Australian Federal Constitutional Law by Colin Howard, Law Book Co, Sydney.
The Law of Fences by H K Insall, Law Book Co, Sydney, $A29.50.
Cases and Materials on Evidence by P K Waight and C R Williams, Law Book Co, Sydney.
An Introduction to Company Law by R Baxt, Law Book Co, Sydney.
Estate Agency Law in Queensland by W D Duncan, Law Book Co, Sydney, $A29.50.
Estate Agency Practice in NSW by A G Lang, Law Book Co, Sydney, $A30.00.
Annotated Trade Practices Act 1985, R V Miller, Law Book Co, Sydney, $A25.00.
Cases and Material on Real Property by G L Certoma, C M Sapideen, R T J Stein and P J Butt, Law Book Co, Sydney.
The Attorney-General, Politics and the Public Interest by John Ll J Edwards, Sweet and Maxwell, London, $30.00.
Corrections in Canada by John W Ekstedt and Curt T Griffiths, Butterworths, Toronto.
Current Issues in Juvenile Justice, edited by R R Corrode, M Le Blanc and J Trepaniet, Butterworths, Toronto.
A Guide to Construction Liens in Ontario by Harvey J Kirsh, Butterworths, Toronto.

Continuing legal education in Canada

By Elizabeth Longworth

The author of this article is a graduate of the Law School at Victoria University of Wellington. She was a member of the Bar in Wellington from 1979 to 1982. She is at present completing a Master of Laws degree in Commercial and information law at Osgoode Law School, Toronto, Canada. *In this article she describes the Canadian experience in promoting continuing legal education within the profession. She also considers the effects of adopting new technology for educational purposes, and discusses the relevance of the Canadian experience to New Zealand circumstances. With the growing attention being given by the New Zealand Law Society to this area of professional life this article is of particular interest.*

Introduction

As in New Zealand, it is the issues of competence and cast which have had the greatest impact on the development of Continuing Legal Education (CLE) in Canada.

Increasing public awareness of "rights (in an era of the Charter and Access to Information Law), demands for greater accountability, and the very complexity and proliferation of laws have all served to focus attention on the quality of legal services. Thus the central issue of any discussion on the future of CLE is the link with lawyers competence.

While it has now been well recognised that CLE is an essential means of maintaining and improving the competence of the legal profession, the constraint of cost has had a significant effect on the fullfilment of CLE aims.

Limited financial resources (and staff) constrain topic selection as CLE providers try to reconcile consumer needs with the necessity to offer remunerative programmes.

The adaption of new technology, such as video and satellite, is seen as the most efficient way of disseminating quality education over most distances, in a way which increases accessibility and is more equitable for city and rural lawyer alike. However, the cost of these innovations is proving prohibitive.

Dispite its problems, Canadian CLE has burgeoned over the past fifteen years with many new developments being implemented, to be discussed below in the context of these main issues.

Source of CLE

The main sources of CLE in Canada are the "non-profit" professional associations of the local law society and provincial branch of the Canadian Bar Association (CBA) Ontario, which has approximately 45% (1800 of 40,000) of Canada's practising lawyers, is unique in the Law Society of Upper Canada (LSUCO)[1] and the Canadian Bar Association-Ontario Branch (CBA-OB)[2] of the CLE.

Within a province, in addition to these two organisations, CLE may also be carried on by university extension departments, law schools (notably Dalhousie Law School in Nova Scotia), Young Lawyers Divisions and trial lawyers associations or other voluntary groups within the Bar.

The need to co-ordinate the work of these bodies (which generally serve the same market and draw on the same local pools of expertise for voluntary lectures) has been met in some provinces by the creation of centres or institutes with small permanent staffs under the general direction of a board or committee on which the various interested professional and university bodies are represented.[3] The British Columbia Continuing Legal Education Society is one such example.

On a national level the Federation of Law Societies plays a very limited role in CLE, as resources and energies are consumed on a provincial level. These are several private enterprise organisations offering CLE in Canada, but their programmes are mainly lucrative marketable topics (that is, those with a commercial bias).

In Ontario the CBA-OB topics are intiated by a CLE committee made up of practising lawyers with background in CLE, whereas the LSUC has two lawyers responsible for directing CLE (one of whom concentrates mainly on the Bar Admission Course)[4] so the source of the programmes are ideas generated from within the administration of the LSUC. Both organisations are moving in the direction of skills emphasis and responding to need, and away from the heavy emphasis on new legislative development which characterised past programming.

For example, the LSUC has established a pilot project of advisory committees to identify deficiencies in practitioners' knowledge of substantive law and skills. The LSUC then responds to the need with specially designed CLE courses. Apart from family law, real estate and business law will feature heavily in this project due to the number of Errors and Omissions claims originating in these areas. The constraint of such a committee system is its high cost, in time and staff resources.

Statutory provisions

Attempts to formally regulate lawyers competence in Canada are substantially in a state of infancy. The only specific statutory powers over competence are in British Columbia and Quebec.

In the other eight provinces the power of the governing body to police competence must be found, if at all, in the legislative authority to impose disciplinary sanctions for "unbecoming conduct" or "professional misconduct". In Ontario, there has been some

attempt to widen the scope of the Law Society's power to invoke disciplinary hearings by instructing that charges of professional misconduct may be laid where there appears to have been gross or repeated negligence, or gross incompetence. This development has been attributed to the increasing claims on the Errors and Omissions Insurance Plan.

The number of claims paid and reserved rose from 569 in 1977 to 1374 in 1982 while for the same period the number of lawyers in Ontario increased from 9009 to 11,142. In the first three months of 1984, 9 Ontario lawyers have been disciplined for misappropriation of clients funds compared with 11 in the whole year of 1983.[5]

Similarly the ethical (as opposed to statutory) duty to give competent service has not traditionally been enforced by the legal professions governing bodies. It was not until its expression in the Canadian Bar Association Code of Professional Responsibility that competence was generally perceived as an ethical duty and was adopted by several provinces.

Only the provinces of Ontario (in the form of extension causes, CLE programmes or research), British Columbia (with remedial cause work) and Quebec (with refresher courses) have legislated a CLE mandate which is distinct from the issue of competence.

The impetus to remain competent has been generated primarily by the individual lawyer's own desire, encouraged by the voluntary CLE programmes available throughout the provinces, rather than by statutory obligations. Nevertheless, the link between competence and CLE has been made in various reports on the legal profession in Manitoba, British Columbia, Ontario[6] and the Conference on the Quality of Legal Services,[7] and so there is increasing discussion on the need to reflect this development in the statutory authority for the governing bodies of the legal profession.

Incentives

CLE is voluntary in all of the Canadian provinces. Accordingly, there are no sanctions or even incentives for practitioners to attend programmes — it is left up to the individuals decision whether or not to take advanage of CLE. The only discussion regarding compulsory CLE is in relation to the trend towards legal specialisation.

Prior to 1982 Ontario experimented with a system called "preferred areas of practice". It allowed lawyers to designate (and advertise) up to three areas of preferred practice, with a requirement that they attend approximately 12-15 hours of CLE per year. The system was introduced in response to concerns over restrictions on advertising and as a move towards legal specialisation.

The scheme was abandoned in 1982 as it did not live up to expectations. It was recongised that it would not maintain the standards necessary to enable lawyers to hold themselves out as specialists and the educational value of the programme was suspect as there were no evaluation or attendance checks.

In 1978 the question of mandatory CLE was given full consideration at the Conference On the Quality of Legal Services, Ottawa. Five options were explored: voluntary self assessment, license board testing, peer review, mandatory CLE and CLE. The conference recommended that mandatory CLE not be instituted. Various suggestions were made as to the means of promoting more attendance (such as convenient scheduling, publicising individuals participation, formal recognition by certification). The question was posed whether this would be more effective than mandatory CLE which affects conduct and not motivation.

In British Columbia, a committee established by the law society to review mandatory CLE recommended, in 1979, against the adoption of compulsory programmes. On the question of incentives the committee recommended: (i) that the Law Society publish a guideline as to what is a reasonable amount of annual CLR; and (ii) when applying for the annual practising certificate the practitioner be required to file a statement as to the amount of CLE undertaken the previous year. This would serve several purposes in creating an awareness of the time and effort spent on CLE, it could assist in any competency hearing, provide data on any future mandatory CLE plan, and it could be used to determine an individuals insurance premium for the following year.[8]

The concepts of remedial CLE (RCLE), independent study, the Berger proposal (of self educating, exercise and testing programmes) and the Kavanaugh system (of regulating lawyers and the profession by public participation, administrative audits, remedial CLE and periodic recertification) have all been canvassed in Canadian academic writing.[9] These concepts are not yet reflected in programme offerings as despite the availability of audio/video tapes and materials, these are not intended as self-study materials designed for solitary learning (although some may adapt as such).

As for RCLE, apart from the practical problems and costs of such a system, the issue may be moot as all the jurisdictions, with the exception of British Columbia, appear to lack statutory authority to discipline for incompetence.

Regardless of the recommendation against mandatory CLE, there has been a lot of interest in developing some quasi-mandatory CLE as a means of resolving the issue of specialisation.

In 1982, the CBA's Special Committee On Specialisation in the Legal Profession published its report. "The Unknown Experts: Legal Specialists in Canada Today" with a clear recommendation to introduce a formal programme for certification of specialists in law believing that this would be a significant factor in improving competency in the practice of law. Such a programme would have a heavy educational component.

CLE is under provincial control and to date the response to the reports certification recommendation has been unfavourable in all provinces except Ontario where the recognition of specialists is being considered.

Another aproach to CLE incentives, which may see future developments in Ontario, is to alter fees structure for programmes. One idea is for all lawyers to be assessed a CLE levy which would be rebated on attendance at CLE programmes. This would mean that the CLE provider could avoid the dictates of the marketable and offer only those programmes for which there is a real need, rather than those topics which

are merely "in vogue". A recent study (August 1984) by the Federation Of Law Societies entitled "The Continuing Legal Education Needs of Canadian Lawyers" suggests that there is plenty of evidence that lawyers educational needs often differ from the topics being offered in popular marketable CLE programmes.

The CBA-OB offers a reduced fee for practitioners in their first five years of practice. As with the levy idea, this structure is felt by some to be inequitable as the firms pays the registration fee and so it does not assist the rural or single practitioner.

The LSUC is looking for ways to reach more practitioners, especially those who are in outlying areas, have few resources, or who are in legal clinics. Accordingly the Society is currently considering a CLE bursary system. Based on a practitioners need to attend, the relevance to the practice, and financial resources, the registration fee may be reduced on completion of a simple application form. At present the LSUC charges a flat fee, an average one day programme being approximately C$125 registration.

Topics for CLE

Nowhere is the dilemma of the CLE provider more evident than in the process of topic selection. although the CBA-OB and the LSUC are "non profit" organisations they are still constrained by their limited financial resources. Neither can offord to run programmes at a loss and must strike a delicate balance between offering a variety of programmes to fulfil the consumers needs, yet over the course of a financial year these programmes must be sufficiently lucrative to break even.

LSUC is experimenting with new expensive technology without increasing its resources, so in evaluating the "success" of any programme it cannot ignore the financial component.

Meanwhile the CBA-OB must pay all subscriptions to the Federal organisation,[10] of which it receives a rebate of one third with which to fund its activities. Accordingly, its CLE programmes must be self-funding and ideally make a sufficient return for investment in other activities.

The dilemma of topic selection lies in this background of financial constraints, and the conflict between offering lucrative, marketable programmes and those where lawyers incompetence demonstrates the need for a particular topic. The committment of the LSUC to this latter category may be found in its policy of undertaking CLE in order to create, maintain and enhance lawyers competence.

In an attempt to achieve these goals that LSUC offers different levels of programmes although experience shows that lawyers are mainly interested in updating programmes or new developments in law and practice.[11] This is reflected in the listings from various jurisdictions where such topics are foremost among the programmes offered.[12] Second in prominence are courses dealing with fields of practice in which large numbers of lawyers work. For example, in Ontario, the "vogue" areas are business and property law and related fields, such as insurance law. There has also been a lot of emphasis on family law.

In the past CLE programmes tended to be broad and superficial. As of three years ago, one commentator noted that, "specialised skills offerings are rarer and skills training receives modest attention".[13] The trend on 1984 is definitely towards more specialised programmes as these have proved very popular. An example of such topics in Ontario are: technology transfer, mining law, copyright and entertainment law.

The other major development in topics is in regard to "skills" programmes. In Ontario there are approximately 1000 legal graduates per year so the old system of mentors to oversee skills development is no longer effective.[14] The CLE providers are attempting to compensate by offering skills programme on such topics as drafting, advocacy and negotiation. These programmes are difficult to put together as they require a great deal of planning and effort. For example, a programme in traditional lecture format requires approximately six weeks preparation, whereas the lead-in time for a skills seminar is six to eight months.

The increasing attention to skills is reflected in the new Professional Legal Training Programme adopted for the Bar Admission Course in British Columbia. The programme emphasises skills in the acquisition of the necessary knowledge, attitudes and abilities for competence.

The CBA-OB also offers a special interest programme on topics not necessarily of legal content. For example, a programme on "Investing For Lawyers" to equip them to deal with their own assets; a "Hands On" Computer familiarisation course; and a French improvement course (French being an official language in Canada).

The "Advocacy Symposium", a CBA-OB and LSUC joint venture, is the only time the CLE programmers bring in "names" from the UK and the USA, thereby attracting 1100-1300 registrants.

The major private enterprise CLE provider in Ontario, "Insight", offers programmes of a commercial nature which is a direct reflection of its market.[15] The following is an indication of the volume of programmes, and the selection of topics:

In British Columbia, in 1981/2, 120 courses were presented to 8700 registrants, mainly covering aspects of loss prevention and law office management. There was wide interest in the Marine Law "Tug and Tow" programme.

Examples of non-substantive legal issues offered in Nova Scotia were eye witness testimony, and law office management; in Saskatchewan, professional conduct; and in Alberta and British Columbia, legal drafting. In Ontario, in 1983/4 the LSUC offered 60 programmes, 40-45 of which were non-repeats.

Major joint CBA-OB and LSUC projects are Polaris (Land registration) and the new rules on Civil Procedure (to be telecast live by satellite to 14 locations)

Coming up on the 1984 CBA-OB agenda: Wednesday club, series V for solo and small firms – "how to" problems; drafting security, shareholders agreements; entertainment law; new rules for non-barristers; security law with amendments; getting the facts; doing business in Canada; PPSA amendments; so you want to be a director; arbitration; commercial documents, guarantees, liguida-

tions; law of injunctions; libel and slander.

The 1984/5 CBA Catalogue on publications, audio and video tapes features 86 topics under the following headings: administrative; banking; bankruptcy; business and commercial; charities; civil liberties and human rights; civil litigation and procedures; competition; computer; contracts; corporate counsel; criminal; debtor/creditor; electoral; environmental; estate planning and wills; evidence; family; franchises; immigration; insurance; intellectual property; labour; law office management; municipal; pensions; products liability; real property; remedies; securities law; taxation; trusts. Notable programmes in 1983 were: law and the handicapped; negotiating to win.

Adaptation of new technology

Some of the most exciting recent developments have been the adaptation of new technology as a medium for CLE. The innovations of video and satellite are seen as the most efficient way of disseminating quality education throughout the provinces offsetting the effects of the vast distances between the source of CLE programmes and the recipient lawyers. The use of new technology is a direct response to the need for CLE to reach greater numbers of practitioners especially those in smaller firms and in outlying areas.

Until recently the LSUC focussed on substantive areas of law as conveyed by lectures however the trend towards skill building has necessitated changes in pedagogical format. While the traditional format of lectures and questions still predominates there is increasing focus on such teaching methods as case or fact studies, simulation exercises to teach skills (eg collective bargaining, advocacy), panel discussions, and demonstrations (as with family law series of vignettes). The CBA-O holds a three day annual institute on CLE of general programming (in 1983, 2500 registrants) so that those in outlying areas need only expend the time and effort to travel the distance once a year. Other than this annual event most of the Ontario programmes are either half or full day, or a series of evening seminars. Accordingly the LSUC is very sensitive to the need to impart a lot of information in a very short time, hence the CLE providers are encouraging a different orientation in the organisation of material and its presentation (such as avoiding oral presentation, duplicating written material), in the hope of improving the educational value of the programmes.

Written material

The majority of CLE publications are programme materials prepared by the seminar presenters and are available for sale separately after the seminar. The SBA-O does not keep the materials updated (even though they are in loose-leaf binder form).

There are some separate publications but these are few in number as there is little demand. For example, the CBA-O published a book of experts, being lists of recommended expert witnesses, but it was not considered a successful venture in terms of number of sales.

Satellite

The use of satellites for the delivery of Canadian CLE courses was pioneered in British Columbia and is in general use there. In Ontario, the first satellite programme is scheduled for early November 1984, being a joint CBA-LSUC venture on the new rules of Civil Procedure. The only reason for this development is that the topic, in view of the wide sweeping changes to the rule, is considered to be of great importance. The use of satellite is extremely costly, requiring an originating site in Toronto and 14 receiving dishes in various locations in Ontario. The registration fee will be approximately $160-200 with 2000 participants needed in order to break even. The organisers are expecting 3-4000 lawyers to attend the programme, and do not believe they will see a turnout of this magnitude for at least another five years. Accordingly, satellite delivery is only possible for programmes that attract large numbers and unless the technology decreases in price, there are no further plans to present programmes through this medium.

The appeal of satellites is that whereas video is delayed, satellite has an interactive component with one way video and two way audio, providing simultaneous education to the rural and city lawyer. The only disadvantage, other than the major problem of cost, is a slight consumer resistance which manifests itself by higher registrations for the live show in the Toronto orginating center (there being two venues in Toronto for the Civil Procedure programme).

It is highly likely that the financial constraints will diminish as evidenced by recent technological advances in "video-conferencing". *The Economist* (3-9 November, 1984: Science and Technology, p 100) reports that new techniques have been developed for compacting television signals whereby the number of telephone links required for ordinary television transmission is reduced from over 1000 to possibly a single line. The significance is that, in the not too distant future, CLE providers may be able to offer an alternative to satellite technology by providing direct video links to law offices.

Video tapes

It is predicted that the most popular future delivery system will be the professional video tapes, in a combination of live programmes and replay.

In Ontario, the video development is in direct response to the need to reach more people outside Toronto. At present Ontario videos are unedited although CLE providers would much prefer to produce edited professional video tapes. The LSUC is planning to provide the first studio produced tapes for the Toronto market in late 1984 but again the major constraint is that edited tapes are extremely expensive. Video tapes are available for rent or purchase throughout Canada.

The extension of the video tape is the video-forum. The LSUC has enhanced approximately 40 video plays over the past year. This means that the video is scheduled simultaneously in five different locations with a live audio link to the lecturer or panel in a Toronto studio for question time. The results of this technique have been mixed, with some seminars being more successful than others in terms of registrant participation in discussions.

Another idea planned for 1985 is a one hour professionally produced video tape on Family Law using the most capable presenters, to be replayed at later seminars. In Texas,

such programmes are shown in a cinema with several showings per day (the cost is approximately US$15 plus notes). This type of video tape is attractive to CLE providers as preparation results in greater conciseness and lower costs, and it is extremely convenient. The only disadvantage is a concern that in attempting to break into the Toronto market there might be some resistance at first to the fact that the video is not a "live" programme.

In Ontario (as in British Columbia), all CBA or LSUC programmes are audio taped and cassettes are available for hire or sale. This began in the mid 1970's then was discontinued for lack of response. Despite consumer disinterest audio cassettes were reintroduced in 1983-84 as the CLE providers believe that this service should be available along with materials. Ontario has also followed British Columbia's example in experimenting with audio links between an originating seminar and simultaneous siminars at various receiving locations. The overriding consumer reaction has been boredom with just an audio link.

Appropriately, in an era of new technology, Ontario has also been experimenting with computer assistance programmes. It is anticipated that these will be available in approximately one year and will involve an hourly charge for direct access to the LSUC CLE computer. The programmes (probably topics such as the tax implications of family and real estate law) will not be available in floppy disc for the present time. There is also a movement towards using the Quick Law Research terminals (available in law libraries and some firms) to plug into the CLE computer.

While the video tapes will replace the concept of the travelling seminar, there is another type of seminar which it is predicted will become more popular – this is the in-house programme. In the accountancy profession CLE in-house programmes are well developed and so law firms are looking at this very closely to see whether or not this can save time and money. The advantage of an in-house programme is that it allows the participants to tie in their training to their own files.

In the United States some of the large firms are hiring "Directors of Legal Education" who are often non-lawyers. In Canada the focus is more on research with three Toronto firms having "Directors of Research" whose job it is to streamline research and avoid duplication. In the United States there are professionals going in-house and selling their CLE services, but not yet in Canada.

The Canadian Federal Government has expressed interest in CLE in-house programmes for Government lawyers. While CLE providers are considering this in order to develop a policy on the same, there is the recurring problem of limited CLE resources to provide such programmes.

The CLE providers are conscious that in all these developments they must retain control of the programmes, maintain the quality, recruit capable presenters, make CLE more accessible to a wider audience, and at the end of the fiscal year attempt to balance the books.

CLE Models

There is no all encompassing model for Canadian CLE, especially in view of its varying progress in the provinces. The CLE directors of the various Law Societies and CBA branches share an information exchange. Certain countries and organisations are notable for particular developments.

For example, within Canada the CLE Society of British Columbia has been held up as an example of co-operative planning and action among all the organisations which have a responsibility for legal education within the province. It has piloted some very innovative schemes in its use of new technology (such as satellite) and organisation of the Bar Admission course. There are two fulltime lawyers responsible for CLE for 5-6000 lawyers (compared to Ontario where the LSUC has one lawyer responsible for the Bar Admission course and one for CLE programmes, for 17-18000 lawyers).

In the discussions on mandatory CLE, peer review, voluntary self assessment and in-house programming, the medical and accountancy professions provide useful models and analogies.

The Irish, Australian and Singaporean experiences in post university training were considered in the implementation of the Ontario Bar Admission course.

Also in Ontario, it is felt necessary that CLE providers identify their objectives in programming and attempt long range planning of the same. To this end, the models of New South Wales and California have proved interesting. The New South Wales CLE is notable for its overall plan and for being fairly well structured. In California, CLE organisers can identify courses to be offered in five years time (leaving room for new developments), as well as being able to project the need for future skills.

The United States is the most important source of CLE precedents for Canada, so long as it is recognised that the variable factor is the different legal system and concepts, some of which may not be transportable to Canada. Furthermore, there is no American equivalent of the Canadian Bar Admission course, and the greater population base and financial resources of the United States may distort the evaluation of some CLE programmes and media. Despite the above caveat, there are several American States which provide interesting models. For example, the use of professional video tapes is well advanced in California, Texas and Pennsylvania. Texas has a full time lawyer responsible for producing one hour videos to be dispersed around the state. Interestingly, the medium of video formus has been far more successful in the United States than in Canada. Wisconsin and the Illinois Institute for CLE are both experimenting with programmes which appeal to Canadian CLE directors. Iowa and Nevada have small populations yet support, full time CLE directors. There seems to be a correlation between the more advanced American CLE models and the jurisdictions with the more highly regarded law schools.

Relevance to New Zealand

Many of the foregoing problems which Canadian CLE is seeking to address, and the limitations and constraints on CLE providers, are relevant to New Zealand.

Some of the more obvious areas of commonality are:

- The issue of competence – this has become a public and professional concern as more often

attention is turned to the way in which the self governing legal profession discharges its responsibilities;

- economic pressures — issues of economic survival and sharpening competition, as the number of practitioners increase, may be responsible for a decline in the quality of legal services;
- state of the law — the rapidity of change in and the proliferation of statutes and regulations;
- an increasing public awareness by the consumers of legal services and demand for professional accountability. There is a corresponding recognition that it is in the legal professions interest to ensure continued public respect through the vigilant maintenance of high standards of practise (that is, professionalisation);
- geographic factors — New Zealand also has a small population base relative to land mass, with numerous practitioners in outlying areas. The significance of this is limited resources for both providers of and participants in CLE, and a real need to increase the availability and effectiveness of programmes.

The previous outline of developments in CLE topics, media and incentives illustrate the Canadian response to the above issues. New Zealand should be in a position to profit from foreign experience in adapting those developments which have proven benefits for CLE providers and participants. The greatest common challenge facing both Canadian and New Zealand CLE providers in the 1980's will be planning for rapidly changing and increasingly complex social, technological and legal environments. □

Citizen of the world

The password to this whole complex of attitudes and beliefs is a very famous declaration by E M Foster, made first in the late thirties and repeated innumerable times since: "If I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country." Much overrated as a novelist — only *A Passage to India* is of absolutely the first rank — Forster was for successive Cambridge generations the tuning fork of conscience. His own homosexuality, the fastidious privacy of his ways, his place among the Apostles made of him very nearly a court of appeals in questions of ethical choice. Incidentally, one cannot but wonder how much Forster may have known of the truth concerning Burgess, Philby, Maclean, Blunt, and their praetorians. Now, there can be no doubt but that his proposition on betrayal is worth close scrutiny. I happen to feel myself strongly drawn to its implicit valuation. Nationalism is the venom of modern history. Nothing is more bestially absurd than the readiness of human beings to incinerate or slaughter one another in the name of nationhood and under the infantile spell of a flag. Citizenship is a bilateral arrangement that is, that ought always to be subject to critical examination and, if need be, abrogation. No city of man is worth a major injustice, a major falsehood. The death of Socrates outweighs the survival of Athens. Nothing dignifies French history more surely than the willingness of Frenchmen to go to the brink of communal collapse to weaken the bonds of nationhood drastically (as they in fact did) over the Dreyfus case. Long before Forster, Dr Johnson had defined patriotism as the last refuge of a scoundrel. It seems to me doubtful whether the human animal will manage to survive if it does not learn to do without frontiers and passports, if it cannot grasp that we are all guests of each other, as we are of this scarred and poisoned earth. One's homeland is the common patch of space — it can be a hotel room or a bench in the nearest park — that the gross surveillance and harrying of modern bureaucratic regimes, East or West, still allow one for one's work. Trees have roots; men have legs with which to leave after they have, in conscience, said no. Thus, there is in Forster's challenge an ecumenical humanism worth defending. Had Anthony Blunt renounced his gilded career, and sought barren refuge in Moscow or committed suicide rather than inform on his Cambridge brethren, one would condemn him for the traitor he is, but one would acknowledge an enactment of Forster's high paradox and see some logical culmination of a long tradition of boyish fidelity. Blunt, of course, did nothing so quixotic or elegant. He betrayed his country *and* his friends with the same cold gusto.

George Steiner
The Cleric of Treason

1 LSUC is the governing body of the Ontario legal profession and is responsible for the Bar Admission course.

2 Membership of the CBA is voluntary with the Ontario Branch having approximately 13,500 members, including law students.

3 "The Legal Profession and Quality of Service", Report and Materials of the Conference on Quality of Legal Services, October 26-8, 1978, (Ottawa: Federation of Law Societies of Canada, CBA, 1979) p 107.

4 Before admission to the Bar, law graduates serve one year under articles (having completed a three year LLB) to a solicitor practising in the province. They must then complete a six month Bar Admission course of instruction in legal practice, and pass examinations in the same as a prerequisite to admission to the Bar.

5 The Globe and Mail (Toronto), 16 July 1894 at p 7.

6 "Continuing Legal Education and Competence in Canada: Response of the Directors of CLE to Questions Raised by the Workshop on Quality of Legal Services". Federation of Law Societies of Canada, 1981; "The Unknown experts: Legal Specialization in Canada Today", Canadian Bar Association Foundation, 1983.

7 Supra fn 3.

8 Report of the Committee on Mandatory Continuing Legal Education, 39-40 The Advocate 1981-82 at 411.

9 Gold, "Competence and CLE", (1982), Essays on Legal Education, Centre for studies in Canadian Legal Education, 22, 23.

10 The LSUC has the benefit of the full annual practising fee which is approximately C$1000.

11 This is reflected in the very high level of registration for the "Polaris" programme 1984, on the Land Registration Reform Act 1984.

12 Gold, supra fn 9, p 40.

13 Idem at 40.

14 In British Columbia the number of practising lawyers has doubled in less than eight years.

15 Examples are: Real estate syndication; evaluating Canadian oil and gas properties; tax minimisation strategies for small business; computer contracts; personal tax planning; structuring mining ventures; new Planning Act; wills, trusts and estates; tax minimisation through corporate reorganisation; commercial arbitration; suing the government; doing business in the USA; Canadian corporate directors on the firing line; letters of credit; advertising and the law; television production; law of trusts.