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The Courts and dislocated confidence

In a recent decision in the case of *Duncan v The Medical Practitioners Disciplinary Committee* [1985] BCL 495, Jeffries J made passing reference to the decision of the Court of Appeal in *Webster v Auckland Harbour Board* [1983] NZLR 646.

In *Duncan's* case Jeffries J was concerned with issues arising out of disciplinary proceedings against a doctor. The first point in argument was whether the proper procedural steps had been followed, and the Judge decided that for all practical purposes they had, at least to the extent that the applicant for review had not suffered any injustice on that account. The second point was whether there had been a failure in natural justice by the non-disclosure of a letter to the Disciplinary Committee from counsel assisting the Committee. It was held that this letter should have been disclosed but the Judge exercised his discretion against granting relief on that ground. He did grant relief however on the ground that a number of separate charges should have been made, and not just one charge followed by several particulars.

To a considerable extent *Duncan's* case depends on its own facts, although there is an important and careful analysis of the meaning of confidentiality in the professional relationship. Of more general interest however is the Judge's passing reference to *Webster's* case in discussing the question of whether the Proceedings Committee is one that exercises a statutory power within the terms of the Judicature Amendment Act 1972. Jeffries J had no doubt that it did. He then went on as follows:

> I only wish to add this: the legislative experiment especially over the last quarter century with privative clauses has not been successful. I think the omission from the Official Information Act 1982 of such a clause in that Act is a deliberate concession by the legislature of this fact. It would be ironic if the Courts, through dislocated confidence, follow magnetic north by themselves interpreting privatively unexpressed legislative intent. True north is *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA).

Webster's case concerned a property on the foreshore at Herne Bay, Auckland. The Webster family had held a licence since 1934 under which a boat shed and ramp had been constructed. The rent was originally £1 per annum subsequently raised to £2. When the Auckland Harbour Board sought in 1977 to raise this to $640 per annum a dispute ensued and ended with the Board giving notice of termination of the licence and requiring the removal of the structures.

By agreement a preliminary point of law was argued before the trial Judge who ruled in favour of the Board. It was argued for the Board that its actions were not subject to review. This was because they were not a statutory power of decision within the meaning of the Judicature Amendment Act 1972 but were merely the exercise of certain contractual powers and rights. The Court of Appeal comprising Cooke, Jeffries and McMullin JJ, held that a public body in exercising the contractual powers it undoubtedly had, might also be restricted by its public law responsibilities.

The joint judgment of Cooke and Jeffries JJ contained a number of significant statements of general principle. They deserve to the quoted *in extenso.*

> There can be no doubt that all the Board's acts were done directly or indirectly in purported pursuance of statutory powers — the present governing statute being primarily the Harbours Act 1950. Although a contractual licence is involved, the contract was necessarily made under statutory powers; and the Board's powers to do acts incidental to the ownership and management of property, such as the foreshore vested in it, are ultimately all derived from and governed by statute. It is common ground that this alone would not be enough in the circumstances of the case to enable the review sought by the applicants. Mr Hillyer [counsel for the appellant] concedes that he must show decisions in exercise or intended exercise of a statutory power of decision within the meaning of the Judicature Amendment Act. . . .
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> In principle Mr Hillyer's argument for the appellants echoes what is put as follows in H W Wade's *Administrative Law* (5 ed, 1982) p 36:
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> > The powers of public authorities are . . . essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge,

> but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

The joint judgment went on to refer to the case of *Cannock Chase District Council v Kelly* [1978] 1 All ER 152 and the leading case of *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The judgment then looked at the relationship of the issue of invalidity and the statutory power of decision which were said to be interconnected:

> They cannot satisfactorily, we think, be considered separately. Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute.
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> For instance there are the *Wednesbury* principles already mentioned, recent recognitions of which in the House of Lords are to be found in *Bromley London Borough Council v Greater London Council* [1982] 1 All ER 129. This Court has indicated in several recent cases that, while it may be difficult to show that legislation has impliedly made a certain consideration truly mandatory (as distinct from permissible), it is certainly not impossible. Indeed *Valuer-General v Wellington Rugby Football Union Inc* [1982] 1 NZLR 678 provides an actual example of an implied mandatory consideration. Conversely there may be implied illegitimate considerations or motives. . . .
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> Other principles which may be relevant are those of natural justice or fairness. It is certainly arguable (we need say no more for present purposes) that a person who has held a valuable licence for years is entitled to an adequate "hearing" (not necessarily an oral hearing) and a fair consideration of his position before the licence is terminated – or, we think, before it is decided that a new licence will be offered to him only on much more onerous terms.

Central to the argument before the Court was the question of what was a statutory power of decision. It was the view expressed in the joint judgment that the definition in the Judicature Act 1972, as itself amended should be given a wide interpretation. The review procedure should be a flexible and readily available remedy. The judgment expressed this in following terms:

> After the decision in *Thames Jockey Club v New Zealand Racing Authority,* noted in [1975] 2 NZLR 768, the definition of statutory power of decision was widened to include the word "affecting" and in other respects. See *Daemar v Gilliand* [1981] 1 NZLR 61. Thereby Parliament underlined that the modern and flexible procedural provisions of the Act are intended to have a liberal scope. If the applicants are able to show that in making any decision under attack the Board violated the express or implied requirements of some statute (which requirements could include, for instance, relevant considerations or fairness) it is highly probable that they will also be able to show that the decision decided, prescribed or affected their rights or privileges. And if their case did reach that point, we think that it would be contrary to the intent of the Judicature Amendment Act to hold that it was not sufficiently a decision under a power conferred by any Act to enable the review procedure to be used.

Finally the judgment contained some words of warning which were echoed by McMullin J in his generally rather more cautious, separate, but concurring decision. The joint judgment sought to avoid any criticism of administrative meddling and stated:

> The acts of a public body in managing public property are never lightly interfered with by the Courts. Nothing in this judgment is intended to suggest some new willingness to intrude into matters of local body administration. However, it hardly needs saying that local authorities like everyone else have to act in accordance with law. All we are now holding is that in this particular case proceedings whereby the applicants seek to have the lawfulness of the Board's actions reviewed should not be struck out at the threshold.

In his decision McMullin J was more forthright on this point. He concluded his judgment by saying:

> Whether the appellants can ultimately succeed must be decided on the facts at a full hearing. In the meantime the appellants can be said to have won the skirmish. Whether they will win the war is another matter. And it is to be borne in mind that the exercise of such powers by local authorities is more often than not no more than an exercise in management and administration. In the result the decision of a local authority in such circumstances will not be impeached by the Courts merely because it may seem unfair to the private citizen affected. A more objective approach than that is necessary.

Webster's case was referred to and either distinguished or dissented from in a subsequent Court of Appeal decision *NZ Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699. It may be this case that led to the comment by Jeffries J in the quotation given above from *Duncan's* case. He was apparently concerned at the Courts possibly restricting themselves "through dislocated confidence" in providing freely the remedy of judicial review.

Effectively the New Zealand Stock Exchange was incorporated under the Sharebrokers Amendment Act 1981 being the successor to a previous body known as the New Zealand Stock Exchange Association. The Court of Appeal, this time consisted of Woodhouse P, Richardson J and Sir Thaddeus McCarthy. The Court held that the decision by the Stock Exchange to suspend listing a company, in this instance New Zealand Forest

Products the largest company in the country, was not an exercise of a statutory power of decision within the terms of the Judicature Amendment Act 1972.

The single judgment of the Court, given by the President, dealt with the argument about judicial review at p 705 in the following terms:

> It involves an argument that the Exchange had public law responsibilities to avoid acting arbitrarily in relation to the exercise of its right of suspension or delisting. It is said that in the end such a right has its origins in statute by reason of the statutory power given to the Exchange to enter into contracts; or else it could be regarded as the direct exercise of a statutory right. On such a basis we are asked to hold that action taken to suspend or cancel a listing might be made the subject of judicial review. In support of that argument Mr McGrath drew attention to a decision of this Court in *Webster v Auckland Harbour Board* [1983] NZLR 646. He argued that powers to act within the contract were necessarily incidental to public law responsibilities of the Exchange.

The judgment then goes on to discuss the joint judgment in *Webster's* case at some length. The President quotes a passage from the joint judgment given above. To assess the comment that the President makes on it, it is necessary to quote it again in full.

> The issues of invalidity and statutory power of decision are interconnected. They cannot satisfactorily, we think, be considered separately. Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute.

The President then comments on the passage and proceeds to distinguish *Webster's* case in a way that in effect appears to overrule it. The judgment says:

> It will be noticed that in the final two sentences of that statement Cooke J has been careful to make use of the subjunctive on three occasions in order to express what is clearly a tentative view. In that regard it should be kept in mind as well that no argument had been addressed to the Court upon the question as to whether in exercising contractual rights agreed upon as part of the terms of a contract a public authority could be regarded as in a different position from a private citizen. . . .
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> The position is different in the present case. The issue which was not the subject of argument in *Webster v Auckland Harbour Board* has been directly challenged by counsel for the Exchange. Mr Dobson, who argued this branch of the case for the Exchange, submitted in effect that it was fallacious to equate the actual conduct of a statutory body within its statutory sphere with the *exercise of a statutory power* in terms of the Judicature Amendment Act 1972. We would agree. Whether a statutory body with local authority responsibilities or not this question must still depend on whether that conduct falls within any one of the carefully defined and limited categories specified in that Act. And not surprisingly. Whatever may be the position concerning the actual exercise of a statutory power to contract Parliament could never have intended that any corporate body recognised by statute or owing its existence to a specific or general statute such as the Companies Act could have all its commercial operations subject to constant judicial review. . . . However, the short answer is that the relationship between the Exchange and a listed company is in contract and the right to suspend listing is one which is conferred by and exercised under that contract.

These passages call for some comment. With respect the use of the subjunctive by Cooke J would not appear to arise from a tentative view of the law but from a concern to preserve the contingent importance of the factual situation in any individual case. The opening sentences in the quotation from *Webster's* case emphasises that the issues of invalidity and of statutory power of decision cannot satisfactorily be considered separately.

The second point that needs to be considered is the analogy drawn between a public authority and a private citizen. The analogy on the face of it is not a proper one. Private citizens in their dealings with one another are entitled to behave as they please except for the limits that the law imposes on them. Public bodies exist however for the public good, not for their own ends, and therefore different considerations could be said to apply.

Finally the analogy between statutory bodies and corporations under the Companies Act only serves to emphasise the same point. Until very recently, and probably still to some extent (see G Shapira, "Ultra Vires" [1985] NZLJ 124) a body incorporated under the Companies Act "could have all its commercial operations subject to constant judicial review". It could be said that that is after all the very principle laid down in *Ashbury Carriage and Iron Co v Riche* (1875) IR 7 HL 653. Companies now might be given by the new ss 14A and 15A of the Companies Act 1955 as amended, the rights, powers and privileges of a natural person, and this may be justifiable for companies operating for profit in the market place; but it is surely questionable whether statutory bodies established for the public good and to protect the interests of citizens are to be entitled by virtue of an authority granted to them by contract to act unfairly, unreasonably, capriciously or even vindictively. The public should be able to look to the Courts, with confidence, for protection in such situations.

Perhaps it remains for the Privy Council to reconcile or decide between what at present appears to be the marked difference of these two Court of Appeal decisions. It is worthy of note that as things fell out there was unfortunately no one Judge who sat on both cases. In any event it is to be hoped that should a Bill of Rights be adopted the Courts will be prepared to take a large, liberal and fair approach to their powers in its interpretation and application, and that they will not suffer from any dislocation of confidence.

P J Downey

Mistake and restitution: A defence of Conlon v Ozolins

By C B Cato, a Barrister of Auckland

The decision of the Court of Appeal in Conlon v Ozolins *has led to some controversy. In this article Mr Cato argues that the principle laid down in that case of allowing Mrs Ozolins to resile from her contract is not unduly arbitary but represents a sophisticated approach to the concept of mistake in the law of contract.*

The majority judgments of Woodhouse P and McMullin J in *Conlon v Ozolins* [1984] NZLR 489, 496-506 have attracted some criticism from commercial lawyers who consider that they threaten the security of contractual obligations. In a recent comment in this *Journal* Mr G Dukeson, [1985] NZLJ 40 with respect clearly articulated the criticism that has been directed at the majority opinions. In particular, he submitted that the majority went further in their interpretation of s 6(1)(a)(iii) of the Contractual Mistakes Act 1977, than the Contracts and Commercial Law Reform Committee, in their report on *"The Effect of Mistake in Contracts"* Wellington, May 1976 had intended. Further, he was of the opinion that the majority judgments, if correct, clearly constituted a radical departure from the common law. Of these judgments, he said:

> It might be argued, particularly by advocates of law being decided according to the length of the Chancellor's foot, that had this been the intention behind the passing of the Act, this might not be a bad thing. However, it is not at all apparent that this was the intention or that it should be.

In defence here, however, of the majority view, the following point will be made:

(a) Although Mr Dukeson with respect is correct when he asserts that the Contracts and Commercial Law Reform Committee did not intend all unilateral mistakes to be amenable to relief under the Act, it is submitted that the mistake in *Conlon v Ozolins* was of the kind that the Committee envisaged should be covered.

(b) It is submitted also that even at common law the dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 ought not to have been successfully invoked to prohibit Mrs Ozolins from resiling from the agreement on the grounds of her mistake because there was no evidence that Mr Conlon had changed his position on the strength of the agreement. In this regard, it is further submitted that Mahon J in *McCullough v McGrath's Stock & Poultry Limited* [1981] 2 NZLR 428 was with respect incorrect in ruling that a signatory to a written agreement for sale and purchase of land was estopped from resiling from the agreement and could not because of estoppel plead unilaterial mistake under s 6(1)(a)(i) of the Act. Similary, in relation to mistake under s 6(1)(a)(iii) of the Act, it will be argued here that both Greig J, the trial Judge in *Conlon v Ozolins* and Somers J in the Court of Apeal were incorrect in expressing the view that Mrs Ozolins was estopped from pleading her mistake. In this regard, it is submitted that the majority Judges in *Conlon v Ozolins* were correct in their ruling that the Contractual Mistakes Act 1977, abrogated the common law so that relief was available to Mrs Ozolins.

(c) The submission is further advanced that neither the majority opinions of Woodhouse P and McMullin J, nor the Contractual Mistakes Act 1977, can fairly be criticised as justice "according to the length of the Chancellor's foot". Rather, it is submitted that reform in the area of mistake, as in other areas of contract law, such as frustration, illegality or breach was required because the common law was either uncertain or otherwise unsatisfactory and had the potential for unjust or arbitrary results. Further, it will be submitted that the majority approach in *Conlon v Ozolins,* contrary to the opinion of the critics, does not violate in any substantial way the security of contractual transactions. This, it should be noted, was of concern to the dissenting Judge, Somers J, who said [1984] 1 NZLR 489, 508:

> If this should seem a restrictive approach it must be recalled that mistake involves an area in which the law prior to the Act, and Parliament in the Act, has had to balance the injustice of committing a party to a contract he did not intend to make and the commercial expectation of security of contract which had received special mention in s 4(2).

The Facts of Conlon v Ozolins

Before proceeding however, to elaborate upon these submissions, it is appropriate to refer briefly once again to the facts of *Conlon v Ozolins.*

Mrs Ozolins was an elderly woman who owned a large block of land, which she had decided to sell. Mr Conlon was anxious to purchase her land because he saw the potential for a profitable commercial venture. Prior to entering into an agreement with Mrs Ozolins, he had acquired a property adjacent to the land in question belonging to Mrs Ozolins. Eventually, an agreement was entered into for the sale and purchase of Mrs Ozolins' land. Both parties executed the agreement and Mrs Ozolins received legal advice. The agreement provided for the sale of four lots of Mrs Ozolins' land.

However, subseqently, Mrs Ozolins declined to complete on grounds that unknown to the purchaser she had made a mistake in regard to the precise area of land she intended to sell. She did not appreciate that contained within the four lots was land which for many years she had used for growing vegetables. There was no suggestion that Mr Conlon was aware of her mistake. Nor was the solicitor who advised Mrs Ozolins prior to the execution of the

agreement. At first instance, His Honour, Greig J found for the plaintiff and ordered specific performance. In his opinion, Mrs Ozolins could not resile from the intention that was objectively expressed in the written agreement, which she had executed, although he found that she was genuinely mistaken and her intention did not accord with the plaintiff's. Greig J expressed his support for the opinion earlier advanced by Mahon J in *McCullough v McGraths Stock & Poultry Limited* (supra at p 433) that estoppel operated in such circumstances to prevent a mistaken party from seeking relief under the Act.

The estoppel argument was based upon the dictim of Blackburn J in *Smith v Hughes* (supra). Relying on an earlier dictum of Parke B in *Freeman v Cooke* (1848) 2 Exch 654 Blackburn J said:

> I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v Cooke*. If whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

A majority of the Judges of the Court of Appeal in *Conlon v Ozolins* however, disagreed. Woodhouse P (supra at p 499) and McMullin J (supra at p 503-504) considered that the legislation was remedial and was intended to abrogate the common law. Thus estoppel did not operate to preclude Mrs Ozolins seeking relief under the Act.

The intentions of the Contracts and Commercial Law Reform Committee in regard to unilateral mistake

Although the Contracts and Commercial Law Reform Committee was concerned as Mr Dukeson rightly says with relief for mistake, it is important to appreciate also that the Committee did intend reform of the law to widen the jurisdiction of the Court to grant relief in cases of mistake. Of special relevance here is the category of mistake known as a unilateral mistake. Unilateral mistakes may be the subject of relief under the Act in two instances. First, under s 6(1)(a)(i) if the mistake was known to the other. More importantly, however, for present purposes, since it involved a substantial departure from the common law, relief is available under s 6(1)(a)(iii) for a unilateral mistake which in fact results in the parties failing to reach an accord. In the absence of consensus ad idem, there is no contract. It was the view of the Committee that mistakes of this kind should be covered by the legislation. In this regard, express reference was made by the Committee to the famous case of *Raffles v Wichelhaus* (1864) 2 H & C 906; 159 ER 375.

In *Raffles v Wichelhaus,* the seller contracted to sell goods shipped ex Peerless from Bombay but at a different date. It was held that there was no consensus ad idem between the parties on the shipments and hence there was no contract.

A similar case is *Scriven v Hindley* [1915] 3 KB 564. There, the vendor agreed to sell tow and the buyer believing he was purchasing hemp paid a higher and more extravagant price. The Court considered that there was no consensus and hence no contract in these circumstances. It is to be noted that it was not suggested that the vendor appreciated that the purchaser was mistaken.

It would seem that these kinds of mistake, which in the absence of estoppel, would have entitled a party to resile from an "apparent" contractual obligation were intended by the Contracts and Commercial Law Reform Committee to be covered by the legislation. Indeed, although not referred to by any of the Judges of the Court of Appeal, it is important in this regard not to overlook cl 2(3) of the draft Bill as annexed to the Committee's report, which is identical with s 2(3) of the Act. Section 2(3) provides:

> There is a contract for the purposes of this Act, where a contract would have come into existence, but for the circumstances of the kind described in s 61(a) of the Act.

The reasoning behind the Committee's recommendation is apparent in the following observation. Report at pp 20-21:

> The mere fact that a contract is legally binding ought not to prevent the Court from setting it aside if that is the best way of meeting remedial problems. Conversely, the fact that a contract is technically a nullity ought not to prevent a Court from validating it if the justice of the case so requires.

It is conceded, however, that the Committee did not intend that all unilateral mistakes should be covered by the legislation and be amenable to relief. The Committee said this expressly. It was only mistakes of a unilateral kind that resulted in an absence of consensus, or which were known to the other, that were intended to be covered by the legislation. Thus to mention an example postulated by Blackburn J, in *Smith v Hughes,* (1871) LR 6 QB 597, 608. If a person buys a horse without a warranty believing the horse to be sound, and the horse turns out unsound, relief for such a mistake should not be given. Similarly, in regard to the facts of *Smith v Hughes,* if two parties enter into an agreement for the sale of oats, then without more, the fact that the purchaser thought he was buying old oats ought not to permit him to resile from the contract after he has discovered that in fact the oats the vendor intended to sell were new. Although the Committee said it (report at p 16) "had devoted a good deal of time" to this question, it was not their intention that unilateral mistakes of a kind which either were unknown to the other or which did not go to the question of consensus should give rise to relief.

But the mistake in *Conlon v Ozolins* was of the consensus kind. The vendor and purchaser, as Greig J found, had not agreed on the subject matter of the contract, namely the amount of land which

the vendor would convey. McMullin J said on this point [1984] 1 NZLR 489, 502, "The Judge held there was a mutual mistake between the parties; that they had misunderstood one another and were at cross purposes". Woodhouse P observed that (at p 499) "their respective decisions to proceed and finally to enter into the written contract were influenced by a mistaken belief on the one side that was different from the mistaken belief on the other and also that each mistake was about the size of the land to be bought and sold". Earlier, in his judgment, His Honour had said, (at p 498):

> throughout the period of negotiation and during the actual time of execution of the written contract these parties were at cross purposes. There was no correspondence of verbal offer and acceptance whatever may be the common law situation in terms of the written agreement.

Accordingly, only if the mistake could have been described as one relating to the quality of the subject matter would the critics have been correct. But for reasons given above, it is submitted that the mistake was not of that kind but was more fundamental. It went to the very heart of the transaction, so that at common law, there was in fact no contract. This kind of mistake, however, came within s 6(1)(a)(iii) and s 2(3) of the Act.

Estoppel and mistake at common law

In his judgment in *Conlon v Ozolins,* Woodhouse P accepted that at common law Mrs Ozolins would have been estopped. His Honour said, (at p 499) "Once carried into the written agreement the contract could not be undone at common law . . . . " McMullin J also appeared to accept that, (at p 503) "In terms of *Freeman v Cooke* and *Smith v Hughes,* the appellant would be bound at common law by the bargain as expressed in the agreement for sale and purchase". These Judges essentially disagreed with the approach taken by Mahon J in *McCullough v McGrath's Stock & Poultry Limited* because in their opinion, estoppel did not survive the Act which was a code intended to abrogate the common law.

Although, however, it is conceded that the dictum of Blackburn J in *Smith v Hughes* immediately appears wide enough to support the conclusion that at common law Mrs Ozolins would be estopped because she had executed the agreement, it is submitted that a closer reading of the cases upon which Blackburn J's observations were based do not support the proposition that estoppel should have operated in the absence of evidence of change of position.

Foremost of the cases was *Freeman v Cooke* (1848) 2 Exch 654. This case, however, had nothing to do with contractual mistake. It was a case of trover. There, the issue was whether the assignees of a bankrupt, who had represented to a sheriff that certain goods were not his in order to mislead the sheriff, could subsequently sue the sheriff in trover for the goods after they had been sold. The Court held that the assignees were estopped from relying on their title in these circumstances.

Nor indeed, do the cases which were principally relied upon in *Freeman v Cooke,* namely *Pickard v Sears* (1837) 6A & E 469 or *Greg v Wells* (1839) 10 E 90 have anything to do with estoppel in the context of contractual mistake. They, too, were cases where a plaintiff was precluded from bringing claims in trover against defendants where the plaintiff's conduct had induced the other to change position. In all of these cases, estoppel operated, it is submitted, because it would have been unconscionable to permit a plaintiff or his assigns to maintain title against another when that person had been induced to change position because of the conduct of the plaintiff.

However, where there is no change of position, then there is no reason to hold the mistaken party estopped from resiling from the transaction. Merely because there is in existence a written contract should not entitle a party who has not altered position on the strength of the contract to plead estoppel. Had, for example, Mr Conlon been able to show that he had on the basis of the agreement with Mrs Ozolins, entered into the acquisition of other land with a view to consolidating both parcels for commercial development, that should have been sufficient to have found an estoppel. However, that was not the case. He had acquired the neighbouring land in advance of Mrs Ozolins agreeing to sell her land to him, and had accordingly assumed the risk that he might not acquire the adjoining land from her.

It is submitted therefore that the solution to *Conlon v Ozolins* ought not to have been any different at common law because there was no basis upon which estoppel should have operated to prevent Mrs Ozolins resiling from the contract.

Finally, on this point, assuming that Mr Conlon had changed his position on the strength of his agreement with Mrs Ozolins, the Court under the Contractual Mistakes Act 1977 had ample power to tailor relief to meet the circumstances of the case. Not only is the Court expressly enjoined to consider the extent to which the party seeking relief has caused the mistake, but further even if s 7(2) were not an operative bar to relief, the Court could have ordered Mrs Ozolins to pay suitable compensation to Mr Conlon as a condition of not enforcing the agreement. On any restitutionary analysis this approach is defensible.

***Conlon v Ozolins:* "Justice according to the length of the Chancellor's foot"?**

Criticism of the majority decision or for that matter the legislation itself as justice "according to the length of the Chancellor's foot" is with respect an exaggeration. The Contractual Mistakes Act 1977 properly understood was intended to mitigate the uncertainties and the potentiality for inequitable or arbitrary results at common law. These difficulties are well documented in respect of the Contracts and Commercial Law Reform Committee (report at pp 3-9) and it is not proposed to elaborate further upon these here.

However, it is not only in the area of contractual mistakes that we in New Zealand have effected reform of the common law relating to contractual transactions in order to mitigate unconsciounable results. The first enactment was the Frustrated Contracts Act 1944 which like its English predecessor, was passed to avoid the potential for injustice at common law. For an analysis of the problems occasioned

by the inability of the common law to apportion for loss in cases of frustration, the judgment of Lord Wright in *Fibrosa v Fairbairn, Lawson & Co*, [1943] AC 32, is enlightening.

Another area of reform was illegality. The Illegal Contracts Act 1970 was passed to enable Courts to mitigate the potential for unsatisfactory and in some cases unconscionable results which the common law had a capacity to achieve. The purpose for which the legislation was enacted was discussed by Cooke J in the Court of Appeal in *Broadlands Rentals Limited v R D Bull Limited* [1976] 2 NZLR 595, 600. It is to be observed that the writers Goff and Jones in their book on Restitution were very critical of the common law and suggested statutory reform. A brief mention is made of the New Zealand Legislation *The Law of Restitution* Sweet & Maxwell (2ed) 1978, p 342 in their book. Further, the Contracts and Commercial Law Reform Committee (report at p 20) in their report on mistake expressly said that, in their opinion, the approach embodied in the Illegal Contracts Act 1970 in regard to relief, was "equally applicable" to mistake.

Finally, there is the Contractual Remedies Act 1979, s 9 of which assists to avoid the result in *Sumpter v Hedges* [1898] 1 QB 673 where a plaintiff was unable to recover any part of the consideration after default on the grounds that the obligation was entire, in the sense that the obligation to pay arose only on completion of the contract. Athough there are some who may applaud the common law approach in cases of this kind, the potential for injustice is more obvious where the plaintiff's default is attributable to insolvency. Should the plaintiff's creditors be deprived of all benefit from his work and the defendant be given an unexpected windfall? It is to be noted again, that the writers Goff and Jones (supra at pp 390-391), argue that in these circumstances a party in default should be entitled to some remuneration for work performed which is of benefit to the other.

Accordingly, rather than justice "according to the length of the Chancellor's foot", the legislation enacted in this country in regard to frustration, illegality, breach and mistake should be seen as intended to simplify the law in relation to contractual transactions and to mitigate the potential for unconscionable results which the common law had a capacity to achieve. The majority decision in *Conlon v Ozolins* is consistent with this approach. The decision is authority for the proposition that contracts otherwise void at common law for an absence of consensus because of mistake are amenable to relief under the Act. The case does not violate the security of contractual transactions. A party will still be able to act confidently upon an agreement. Subsequently, in deciding whether or not to grant relief under the Act, the Court must consider the conduct of the mistaken party, and further, in deciding what relief if any to grant should take into account the loss or injury the other party has suffered. This is not, it is submitted, palm tree justice. It is simply the application of a sophisticated restitutionary approach to mistake and "apparent" contracts. □

Correspondence

Sir

I note in the March 1985 issue of *The New Zealand Law Journal*, at p 89, that the retiring Chief District Court Judge, Sir Desmond Sullivan, is quoted in an interview as follows:

> For instance, we have sufficient Judges to be doing four jury trials a day in Auckland but we have only two jury Courts. Although there are Courts available at the High Court, for some administrative reason, we cannot use them so trials are delayed unnecessarily.

Your readers may be interested to know the following points:

1 In the "temporary" premises at nos 9 and 15 Eden Crescent, Auckland, to which the High Court moved some three years ago, there are nine Courtrooms. Only four are equipped for jury trials. Although the ten Judges stationed in Auckland are not often all available to sit in Auckland at any given time, it is by no means exceptional for all nine Courtrooms to be used at the same time.

2 The number of criminal trials awaiting a hearing in the Auckland High Court has been around the 70 mark now for some months. For most of 1985, we had all four jury Courts operating in an endeavour to offer accused persons a trial as soon as feasible. Frequently, trials particularly for drug charges can occupy literally weeks of the Court's time. Jury disagreements seem to be on the increase. Provision has also to be made for the admittedly few civil jury cases, most of which last for at least a week. In other words, the present facilities at Auckland High Court for jury trials are stretched to the limit and have been for some time.

3 It follows that, therefore, it is not possible to hold District Court jury trials within the precincts of the present High Court building, even if it were constitutionally proper to do so. I am strongly of the view that it would not be proper.

I should not like it to be thought that the High Court Judges in Auckland (on whose behalf I speak) are unsympathetic to the accommodation problems faced by the District Court. Clearly, the provision of only two Courtrooms for District Court jury trials took no account of the dramatic increase in elections for trial that occurred when the new jurisdiction was created. We are delighted to note that work is soon to begin on a new District Court complex in Auckland. We hope that work will begin shortly on restoring our historic Waterloo Quadrant building and on further developing the site so as to create a High Court which adequately serves the needs of New Zealand's largest city.

R I Barker
Executive Judge
High Court
Auckland

Judicial review and the Attorney-General

By G M Illingworth, a Barrister of Auckland

In this article the author discusses the discretionary responsibilities of the Attorney-General and the recent New Zealand cases dealing with this in the light of Australian and English decisions. He argues that there could be a greater degree of judicial control of the discretion than the cases presently show.

In *Barton v R* [1980] 32 ALR 449 the High Court of Australia had occasion to consider the position of the Attorney-General for New South Wales in relation to the supervisory jurisdiction of the superior Courts. *Barton* has now been followed by two New Zealand Judges: Prichard J in *Saywell v Attorney-General* [1982] 2 NZLR 97 and O'Regan J in *Tindal v Muldoon and Others* (unreported High Court, Auckland, 7 November 1983 A383/83).

These three cases together with the judgment of McMullin J in *Daemar v Gilliand* [1979] 2 NZLR 7 (SC), which preceded *Barton*, deal with a vitally important area of constitutional and administrative law: the accountability of the law officers of the Crown. This is an area in which traditional principles of English constitutional law meet face to face with what Lord Hailsham LC has described as "the rapidly developing jurisprudence of administrative law" *London and Clydeside Estates v Aberdeen District Council* [1979] 3 All ER 876. For the time being, the more conservative approach seems to have won acceptance. But an examination of the cases reveals a number of debatable issues.

As yet the New Zealand Court of Appeal has not had to consider these issues directly. That day may not be far off. It is understood that the *Tindal* case is proceeding on appeal. It is of interest to consider whether our Court of Appeal is likely to follow the reasoning of the High Court of Australia in *Barton* or whether its analysis will be more like its own previous decisions in cases such as *Reid v Rowley* [1977] 2 NZLR 472. *Norrie v University of Auckland* [1984] 2 NZLR 129 and *Daemar v Gilliand* [1981] 1 NZLR 61 (CA); the issue of reviewability of the Solicitor-General's decision to enter a stay of proceedings was not argued in the Court of Appeal.

Those cases did not involve the law officers of the Crown, but they did involve arguments that the Court had no jurisdiction to review certain kinds of decision.

The New Zealand Court of Appeal has shown a distinct preference to adopt an approach which gives the Court a wide jurisdiction in respect of official decision-makers but which allows the Court, as a matter of discretion, to refuse to intervene, even though a technical ground of review might be made out.

In contrast with this approach, the High Court of Australia, in *Barton*, has held that at least one area of the Attorney-General's decision-making role is completely immune from judicial review.

It is obvious that the law officers of the Crown are, in many respects, in a unique position. For this reason a case can be made for treating them in a different way from other public decision-making bodies and officers. But as a matter of principle, that conclusion is by no means inevitable. Leaving aside historical aspects, an equally strong case might be made for treating at least some, and possibly all of the categories of decision-making exercised by the Attorney-General or his delegates on the same principles as apply to other official decision-makers.

Even taking into account the historical position of the Attorney-General and such judicial precedents as exist, it is necessary to recognise that there are different categories of decision made by the Attorney-General and that authorities as to the reviewability of one category may not necessarily be applicable to another. Nor does it necessarily follow that an immunity possessed by the Attorney-General ought to be conferred on a Crown Solicitor, as occurred in *Saywell*.

In this paper, therefore, the recent cases will be discussed and analysed. *Barton v R* and *Saywell v Attorney-General*, both of which concerned review of the presentment of indictments, will be discussed first, followed by *Daemar v Gilliand* and *Tindal v Muldoon and Others*, both of which concerned stays of proceedings.

The *Barton* case

In *Barton* two ex officio indictments had been presented in the name of the Attorney-General for New South Wales. The accused applied to the Equity Division of the Supreme Court of New South Wales for declarations that the indictments were invalid and for injunctive relief. The Attorney-General moved to strike out the application and was successful. The applicants appealed to the Court of Appeal, without success, and from there the case went to the High Court. The High Court was required to decide:

(a) whether the Attorney-General's decision to file an ex officio indictment is subject to judicial review; and
(b) whether the trial Court could intervene by exercising its inherent jurisdiction to prevent an abuse of process.

This aspect arose because the accused also moved for orders before the Supreme Court in its

criminal jursidiction and the appeals related to the refusal to grant that relief, as well as to the equity proceedings.

The second question constitutes a separate topic of study in itself and will not be considered here in any detail. The concept of an "ex officio indictment" is something of a hybrid. It was established as early as the reign of Edward I that the King could put a man upon trial for treason or felony without going through the preliminary procedures of presentment and indicment. For discussion of ex officio informations see Edwards, *The Law Officers of the Crown* (1964) 262 et seq.

As the attorney of the king in the Courts the Attorney-General was held to possess this same privilege. This privilege was exercised by the simple expedient of filing an information in the King's Bench Division. Such an information came to be known as an "ex officio information" or "criminal information".

Since the end of the fourteenth century, this prerogative power was limited by statute so that it could be followed only for misdemeanors and not for treason or felonies. In England, the privilege was ultimately abolished. In Australia, however, s 5 of the Australian Court's Act 1828, an Imperial statute which is still in force in NSW, authorised the commencement of proceedings for "all crimes, misdemeanors and offences . . ." by information in the name of the Attorney-General. Section 4 of the New South Wales Crimes Act 1900 defines the word "indictment" to include "any information presented or filed as provided by law for the prosecution of offences".

So, when the High Court of Australia uses the term "ex officio indictment", it means an indictment filed in the Supreme Court by the Attorney-General without any formal committal proceedings. The corresponding power exists in New Zealand by virtue of s 345(3) of the Crimes Act 1961.

In substance this is the same thing as an ex officio information, although it is governed, to some extent at least, by statute rather than by the prerogative.

In respect of one of the indictments with which the High Court of Australia was concerned in *Barton*, committal proceedings had been commenced but not completed. In respect of the other indictment, no committal proceedings had been held at all. For reasons of convenience the Attorney-General's power to proceed without committal proceedings had been invoked and ex officio indictments had been preferred. The applicants sought relief on the basis that to proceed without the normal committal proceedings put them at a disadvantage and was unfair.

In the joint judgment of Gibbs and Mason JJ, which was the principal judgment delivered, reference was made to the cases of *R v Prosser* [1848] 11 BEAC 306; 50 ER 834 and *R v Allen* [1862] 1 B & C 850; 121 ER 929. It was said, on the authority of those cases, that the Courts cannot review the Attorney-General's exercise of the analogous prerogative power to enter or refuse a nolle prosequi. A further line of cases including *London County Council v Attorney-General* [1902] AC 165, and *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70; 1978 AC 435, was cited in support of the proposition that the Courts cannot examine a decision by the Attorney-General to grant or refuse his fiat for a relator action.

The case of *R v Comptroller General of Patents; ex parte Tomlinson* [1899] 1 QB 909 was cited as authority for the immunity of the Attorney-General from review in relation to his power to present an ex officio information. Reference was made to the view that the Attorney-General is accountable only to Parliament; see *London County Council v Attorney-General* [1902] AC 165; and see *Edwards* op cit at 289 and it was noted that an alternative remedy was available — the inherent power of the trial Court to prevent an abuse of its process. These various strands of reasoning were woven together in the conclusion that the Attorney-General enjoys a general immunity from judicial review.

It might have been expected that the basis for such an immunity would be adequately explained as a matter of principle, not just because of the effect of precedent. Unfortunately, none of the Judges were able to give a very convincing account of the principles which might be said to support the existence of such an immunity.

Gibbs and Mason JJ, in their judgment, at p 455 said:

> *Prosser* dealt, not with the prerogative power to present an ex officio information, but with the prerogative power to enter a nolle prosequi. Nonetheless, there is no reason to doubt that the conclusion rests on the general principle that a prerogative power was not examinable by the Courts.

This reason does not seem adequate in the modern context. It used to be thought that the Courts could not review the exercise of any aspect of the Royal prerogative. That view was rejected by the English Court of Appeal in *Laker Airways Limited v Department of Trade* [1977] QB 643.

In the *Laker* case it was argued that the Courts could not examine the exercise of a prerogative power. Lord Denning said at p 705:

> Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as any other discretionary power which is vested in the executive.

A similar approach is demonstrated in the line of cases relating to the Criminal Injuries Compensation Board, the most important being *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864.

In that case Lord Parker CJ said at p 881:

> I can see no reason either in principle or in authority why a Board set up as this Board was set up is not a body of persons amenable to the jurisdiction of this Court. True it is not set up by statute but the fact that it is set up by executive Government, ie under the prerogative, does not render its acts any the less lawful. Indeed, the writ of certiorari was issued not only to Courts set up by statute but to Courts whose authority is derived, inter alia from the prerogative. Once the jurisdiction is extended, as it clearly has been, to tribunals as opposed to Courts, there is no reason why the remedy by way of

> certiorari cannot be invoked to a body of persons set up under the prerogative.

In the same case Diplock LJ (as he then was) said at p 884:

> The earlier history of writ of certiorari shows that it was issued to Courts whose authority was derived from the prerogative, from Royal Charter, from franchise or custom as well as from acts of Parliament. Its recent history shows that as new kinds of tribunals have been created, orders of certiorari have been extended to them too and to all persons who under authority of the Government have exercised quasi judicial functions.

It is of some interest that *ex parte Lain* was referred to with approval, although on another point, by the Judicial Committee of the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shin* [1983] 2 WLR 735, 740.

If these authorities are applicable then the fact that the Attorney-General exercises a power which derives from the royal prerogative would not automatically result in his decisions being immune from judicial review.

But in *Barton*, the Attorney-General's powers were not necessarily prerogative powers at all. The common law powers had been altered significantly by the statutory provisions referred to above. On the authority of *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508, it is to be presumed that the Attorney-General acts under the express statutory powers, while they remain in force, rather than by virtue of the royal prerogative.

An argument of this sort was expressly put forward in *Barton*. Gibbs and Mason JJ rejected it on the basis that s 5 of the Australian Courts Act 1928 imposes no duty on the Attorney-General to consider whether a prosecution should be instituted. The section merely indicates the mode in which a criminal prosecution shall be instituted. From this the Judges concluded at p 458:

> All this indicates that Parliament intended to give the Attorney-General for the colony the unexaminable discretion possessed by the Attorney-General in England acting on behalf of the Crown.

But this seems to miss the point. The New South Wales Attorney-General would have had the same prerogative powers as the English Attorney-General without the need for statutory provisions to supplement or regulate those powers. The fact that statutory provisions were thought necessary tends to indicate that the legislature considered the prerogative powers inadequate. The bringing of any area under statutory control, even partially, would normally militate in favour of judicial review rather than against it, there being no hint in the wording of the relevant provisions that the reverse effect was intended.

The reviewability of prerogative officers has been considered recently in New Zealand in connection with the *Royal Commission on the Thomas Case* [1980] 1 NZLR 602, 611-615 (Full Court). The issue was considered in some detail by a full bench of the High Court. The High Court referred with approval to the views of Lord Parker CJ in *ex parte Lain* as to the scope of the writ of certiorari. Reference was also made to the *Laker* case which was said to be "an illustration of the increased willingness of the Courts to subject the exercise of the royal prerogative to tests of 'fairness' . . ." (supra p 611). A bench of five in the Court of Appeal upheld the High Court judgment.

In New Zealand it may be concluded, therefore, that the fact that the Attorney-General may exercise a prerogative power, or a power derived from or in the nature of a prerogative power would not, of itself, lead to his decisions being immune from judicial review.

An alternative basis for the Attorney-General's immunity, referred to in the judgment of Gibbs and Mason JJ in *Barton*, is somewhat curious. The case of *ex parte Tomlinson* [1982] 1 NZLR 252 is cited as authority for the proposition that the Attorney-General is immune from review in respect of a decision to file an ex officio information. That case in turn relies upon *Re Van Gelders Patent* (1888) 6 RPC 22 where the rationale for the immunity is said to be the fact that the Attorney-General, when exercising his functions as an officer of the Crown, does not act as "a Court in the ordinary sense".

It will be sufficient again to cite Lord Parker CJ in *ex parte Lain* to demonstate the point that English administrative law has come a long way since these cases were decided. Lord Parker CJ said at p 882:

> The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty.

In New Zealand further support for this view is to be found in s 3(2A) of the Judicature Amendment Act 1972, as amended by the Judicature Amendment Act 1977. That subsection provides that it shall not be a bar to the grant of relief in proceedings for certiorari, prohibition or judicial review that the person who has exercised or is about to exercise a statutory power was not under a duty to act judicially, see *Daemar v Gilliand* [1981] 1 NZLR 61, 63 per Cooke J.

It is necessary next to consider the cases cited by Gibbs and Mason JJ in support of the proposition that the Courts cannot examine the exercise by the Attorney-General of his common law power to grant or refuse a fiat in connection with a relator action. The first of the two cases cited is *London County Council v Attorney-General* (supra). In that case the House of Lords decided that the decision of the Attorney-General to grant his fiat was not reviewable. The Earl of Halsbury LC said at p 168:

> My Lords, one question has been raised . . . which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he

> is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of Law to intervene?[1]

Again, it is of interest to note the basis upon which the Attorney-General is said to be immune from judicial review. The basis seems to be that the Attorney-General would not go outside his jurisdiction simply because he made a mistake or acted wrongly. Because there are no fetters on the exercise of his discretion he is regarded as being free to choose the manner in which he exercises that discretion.

If that is the basis for the decision then it could be argued that this ground, too, has been affected by developments in the area of administrative law. At one time it was accepted doctrine that jurisdiction was like a field. So long as the decision-maker stayed within his field then the Courts would not intervene. That concept was exploded by the decision of the House of Lords in *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147. The concept of jurisdictional error which prevails today is fundamentally different from that which prevailed at the time *London County Council v Attorney-General* was decided.

It has to be accepted, however, that the *London County Council* case was expressly upheld by a very strongly constituted House of Lords in *Gouriet v Union of Post Office Workers* [1978] AC 435; [1977] 3 All ER 70. It is to that case, then, that we must turn to seek a modern exposition of the rationale for the immunity of the Attorney-General from judicial review.

It is important to note that none of their Lordships' opinions in *Gouriet* rested upon the idea that the Attorney-General enjoyed immunity because of the prerogative nature or origins of the power which he exercised. Neither was their reasoning based upon the absence of a duty to act judicially. In contrast to the reasoning employed by Gibbs and Mason JJ in *Barton* (supra, at p 80), their opinions were primarily based upon the distinction between public and private law. Lord Wilberforce put it in the following way:

> It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of those rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.

Lord Diplock said at p 95:

> My Lords, at the heart of the issues in these appeals lies the difference between private law and public law. It is the failure to recognise this distinction that has in my view lead to some confusion and an unaccustomed degree of rhetoric in this case. . . .

In the Court of Appeal Lord Denning MR had referred to the threat of defiance of the criminal law by the unions. He had posed the question "are the Courts to stand idly by?" In reply to that question Lord Diplock said, at p 96:

> Courts of Justice do not act of their own motion. In our legal system it is their function to stand idly by until their aid is invoked by someone recognised by law as entitled to claim the remedy in justice that he seeks. Courts of Justice cannot compel anyone to invoke their aid who does not wish to do so; nor can they demand an explanation for his abstention. That is why it is now conceded that the Attorney-General cannot be called on to disclose his reasons for refusing on 14 January to authorise the bringing of proceedings in his name against the UPW when so requested by Mr Gouriet.

This passage is of vital importance. The *Gouriet* case was not in the form of an application for judicial review of the decision of the Attorney-General to refuse his grant his fiat. To the contrary, it arose because a private individual chose to initiate, in his own name, proceedings which he was held to have no standing to commence. In the context of *those* proceedings, the Courts could have no jurisdiction to review a decision by the Attorney-General, even if in correctly constituted review proceedings such jurisdiction might have existed.

The case having been decided on a point of locus standi, strictly speaking it would not have to be regarded as a final determination of the question of reviewability of decisions by the Attorney-General, particualrly in relation to other categories of decision, such as a decision to file an ex officio indictment under a statutory provision.

But even if one ignores that technical point, it is clear that Lord Diplock's analysis is fundamentally different from that of Gibbs and Mason JJ in the *Barton* case. Lord Diplock's analysis rests on the basis that a Court of Justice cannot compel any person to invoke its aid nor question the reasons for failing to do so. Because the Attorney-General was the only person who had standing to apply for the relief sought by the plaintiff, the plaintiff's claim ought to have been struck out.

In an application for review of the Attorney-General's decision to file a criminal information, different considerations would apply. The application could not be struck out on the basis that the applicant had no standing because, assuming that the applicant was the accused in the criminal proceedings, his personal rights and freedoms would most clearly be affected above and beyond the general interests of the public. He would be required to attend the Court and could be remanded in custody or on bail. His reputation could be affected. He would, without doubt, fall within

the category of persons who are normally accorded locus standi by the Courts.

It would be foolish to suggest that the *Gouriet* case can be dismissed lightly. There are dicta to the effect that in making his decision, the Attorney-General is not subject to control by the Courts. The problem is that none of the Law Lords expressly articulated the juridical basis upon which the Attorney-General's decision is said to be immune from review. That is not to say that they failed to express good reasons why a Court might refuse to intervene. But they failed to say why a Court, in an appropriate case, would not have *jurisdiction* to review an Attorney-General's decision.

Returning, then, to the *Barton* case it may be argued that none of the authorities cited fully justify the position which was ultimately reached. Another reason for the immunity suggested in the judgment of Gibbs and Mason JJ is the idea that the Attorney-General is accountable to Parliament alone. In the context of modern party politics the unreality of that notion is manifest.

The *Padfield* case, [1968] AC 997 demonstrates the willingness of the Courts to exercise control over cabinet ministers. Other cases demonstrate that the Governor-General is not beyond the reach of judicial review eg *CREENZ v Governor-General* [1981] 1 NZLR 172. Why should the Attorney-General enjoy a unique position?

The judgment of Gibbs and Mason JJ was the principal judgment in the *Barton* case, and although the Court was not unanimous on all points, none of the other judges, except Wilson J, added anything significant relating to the reviewability of the Attorney General.

Wilson J said (supra at p 470-471):

> I find strong additional support for the conclusion in recalling the special nature of the powers in question, and its historical context. It is clearly a statutory power. It exceeds the customary prerogative power of the Attorney-General in respect both of the range of offences to which it applies, and of the repository of the power. It extends to all indictable offences, thus including felonies within its reach, and it may be exercised by persons, other than the Attorney-General, authorised by the Governor to do so. Nevertheless, it is a very distinctive type of statutory power, retaining in its relationship to the process of criminal justice something of the nature of prerogative power. As such, it is a power which does not lend itself to the supervision of the Courts, including those Courts whose jurisdiction relates to the trial of proceedings so initiated.

This analysis, with its reference to "the special nature of the power in question", is somewhat more convincing than that found in the judgment of Gibbs and Mason JJ. By emphasising the special nature of the power, Wilson J raises the concept of justiciability and evokes the words of the Judicial Committee of the Privy Council in *Durayappah v Fernando* [1967] 2 AC 337, 349. In that case their Lordships said that all of the surrounding circumstances of the exercise of the power in question had to be taken into account to decide whether the *audi alteram partem* principle applied. A similar view was expressed by Lord Morris of Borth-Y-Jest in *Furnell v Whangarei High School's Board* [1973] 2 NZLR 705, 718; [1973] AC 660, 679. There Lord Morris said that the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.

But those dicta do not take the matter to the point where the Courts must say that they will never have jurisdiction to review an Attorney-General's decision. To the contrary, that kind of approach would require a Court to examine the Attorney-General's position in relation to the specific type of decision in question and to decide whether, *in those circumstances,* the principles of natural justice or fairness were applicable.

Similar comments may be made concerning justiciability. Surely the Court has jurisdiction to take its enquiry at least far enough to ascertain whether or not the proceedings raise a justiciable issue. That the decision in question has been made by a particular officer or even that the decision-making power is of a particular kind gives no basis for supposing that the exercise of such power will *never* give rise to an issue which is justiciable in the Courts.

It is submitted that the difference in approach is significant and important. If the Court has jurisdiction to exercise control over a particular officer, but as a general rule, exercises a discretion not to do so because of the special nature of his position, there is left open the possibility that in an exceptional case the Court might be persuaded to exercise its jurisdiction to intervene. It may require a very extreme case, but constitutional crises do occur and extreme cases are always possible. If the Courts are to say that they have no jurisdiction to intervene; if they say that the Attorney-General is completely immune from judicial review and is accountable to Parliament alone, then they may be closing a door which in future they might wish had been left ajar. They may end up by recognising the truth of the words of Cooke J in his dissenting judgment, which was concerned with a different kind of application, in *CIR v Lemmington Holdings Ltd* [1982] 1 NZLR 517, 529, where he said:

> To rule out entirely the possibility of relief . . . would be, as I see it, to discard a weapon in the judicial armoury which can be very valuable in maintaining the rule of law.

Saywell v Attorney-General

This case involved an application for judicial review of a decision of the Crown Solicitor at New Plymouth to present an indictment charging the applicant with one count of manslaughter. The applicant's basic complaint was that by laying only the charge of manslaughter the Crown Solicitor had held in reserve two other charges which could have been included in the indictment. The applicant complained that the procedure which had been adopted had been unfair and prejudicial to him.

Counsel for the Crown moved to strike out the application for judicial review on the ground that the Court had no jurisdiction to review the decision in question. The

application had been made under the reformed procedure provided by the Judicature Amendment Act 1972, as amended by the Judicature Amendment Act 1977. Under that Act it is necessary to point to the exercise or purported exercise of a statutory power. In argument, it was assumed by the Crown that the presentment of an indictment by a Crown Solicitor constitutes the exercise of a statutory power pursuant to the provisions of s 345(2) of the Crimes Act 1961.

That sections says:

> An indictment under subs (1) of this section may be presented by the Attorney-General or a Crown Solicitor in any case, or by the informant in the case of a private prosecution.

Counsel for the Crown argued that, even though the presentment of an indictment might constitute the exercise of a statutory power, nevertheless the exercise of that particular type of statutory power was not reviewable pursuant to the provisions of the Judicature Amendment Act 1972 because the exercise or purported exercise of statutory power fulfills only one of two essential conditions for reviewability. The second essential condition, found in s 4(1) of the Judicature Amendment Act 1972, is that the applicant would have been entitled to relief in proceedings for mandamus, prohibition, certiorari, declaration or injunction.

Relying upon the decision of the High Court of Australia in *Barton*, counsel for the Crown argued that the applicant would not have been entitled to relief under any of those forms of procedure. From the judgment, it seems that counsel for the Crown was at some pains to show that the position of the Attorney-General of New South Wales is substantially similar to the position of a Crown Solicitor in New Zealand. On that basis, it was argued that the *Barton* decision was directly applicable and the Court was invited to apply *Barton* and strike out the application.

Prichard J was reluctant to accept the concession by the Crown that the presentment of an indictment by a Crown Solicitor constitutes the exercise of a statutory power. He went as far as to outline an argument to the contrary (supra at p 100-101). That argument rested on the basis that s 345(2) of the Crimes Act 1961 is directed towards regulating the exercise of a common law right, namely the original right of any person to present an indictment in respect of any crime, rather than the creation of a new statutory power.

Because of the approach adopted by the Crown, Prichard J was obliged to leave this aspect of the case as an open question. Assuming, therefore, without deciding, that the presentment of an indictment by a Crown Solicitor constituted the exercise of a statutory power, Prichard J went on to consider the second limb of the argument. Before doing so, however, he said at p 102:

> At the same time, if it be assumed that the presenting of an indictment by a Crown Solicitor in New Zealand is, technically, the exercise of a statutory power, it is my view that it is a power which has roots extending strongly into the common law and that it is relevant to have regard to that aspect of the nature of the power when it comes to the question whether the Court should review its exercise.

Prichard J reviewed the historical background and concluded, in agreement with the submissions of the Crown, that there is a close similarity between the present position in New Zealand under s 345 of the Crimes Act and that which pertains in Australia under the Australian Courts Act 1828 (supra at p 103). Having outlined the background of the *Barton* case and having quoted extensively from the judgments of Gibbs and Mason JJ, Prichard J said at p 104:

> *Barton v R* was concerned with an ex officio indictment presented by the Attorney-General. However, I see no reason why the reasoning of the High Court of Australia should not apply with equal force to an indictment presented in the ordinary way by a Crown Solicitor following a committal for trial.

At this point, Prichard J may have overlooked an issue of some significance. The Attorney-General's power to present an ex officio information was originally part of the Royal prerogative. As has already been pointed out, the High Court of Australia used that as a basis, albeit a questionable basis, for saying that the Attorney-General was immune from judicial review. But a Crown Solicitor is in a completely different position. When he presents an ordinary indictment can it be said that he is exercising any part of the Royal prerogative? To the contrary, as Prichard J himself pointed out, it was originally the right of every person to present an indictment, although admittedly this was done in the name of the Crown.[2]

Even if the High Court of Australia is correct in saying that the prerogative origins of the power to present an ex officio indictment justify the view that the Attorney-General is immune from judicial review, it does not necessarily follow that the exercise of an assumed statutory power is immune from judicial review simply because that power has common law origins. To say that a power has prerogative origins is quite a different thing from saying that it has common law origins. The implications are not all the same. In the first case, it would have to be acknowledged that the Courts have been reluctant in the past to control the exercise of the prerogative. If the jurisdiction to do so has now been successfully asserted, it must be regarded as a fairly recent development and one with which not all jurists would necessarily agree. Although the existence of the prerogative is recognised by and is part of the common law, there are many common law powers which are not part of the prerogative. The two concepts are not coterminous.

Rather than distinguishing between these two categories, Prichard J seems almost to treat the one as being equivalent to the other. The following passage illustrates the point (supra at p 105):

> I am persuaded that the right exercised by the Crown Solicitor in presenting an indictment even though it being the exercise of a statutory power, is a power of a very special kind, not to be equated in any way with those decisions and actions of officials and statutory bodies whose

exercise of their statute given powers is commonly subjected to judicial review. In this regard I refer in particular to the historical background of the right to present a written accusation of crime to a Court of competent jurisdiction and adopt, with respect, what was said by Wilson J in the *Barton* case (at pp 470-471):

> . . . It is a very distinctive type of statutory power, retaining in its relationship to the process of criminal justice something of the nature of a prerogative power. As such, it is a power which does not lend itself to supervision by the Courts, including those Courts whose jurisdiction relates to the trial of proceedings so initiated (supra at p 105).

It may well be that the decision to present an indictment is a power of a special kind. It also seems true to say that traditionally the exercise of such power has not been subject to judicial review. But here is the issue; is the question of reviewability to be decided by tradition or principle? The unprecedented development of administrative law over the last 30 years demonstrates beyond all doubt that principle rather than tradition must be the touchstone. Upon what principle can it be said that the High Court has no jurisdiction to review the decision of a Crown Solicitor to present an indictment? Applying modern administrative law principles it is hardly convincing to say that the immunity arises because of the prerogative nature or origins of the power in question. It is even less convincing to say that there is an immunity because the power in question "has roots extending strongly into the common law". And when the one is substituted for the other without explanation or critical examination, the principle which the Courts say they are upholding seems questionable indeed.

Following the example given in the *Barton* case, Prichard J made mention of the undesirability of the Court appearing to exercise a supervisory role in determining what criminal prosecutions it should hear. That there is such a principle cannot be doubted. But neither can it be said that this principle is invariable. The very next point made by Prichard J is that which concerns the availability of an alternative remedy. The alternative remedy is the inherent jurisdiction of the Court to prevent abuse of its own process or ordering a stay of proceedings in an appropriate case. That is nothing more and nothing less then the Judge exercising control over what prosecutions it should hear and determine. The existence of the inherent power to control abuse of process demonstrates the point that the right of the subject to have access to the Courts is always subject to the control of the Courts. It is not an overriding principle. Neither is it an overriding principle that the Courts must never appear to control the decision as to what charges are prosecuted. The overriding principle is that the Judges, in the last resort, have the responsibility of preserving the integrity of the judicial system. If it be found more convenient to invoke that fundamental constitutional safeguard by one form of procedure rather than another, why should that matter?

As with the *Barton* case, it is submitted that Prichard J gives no compelling reason why the Court should take the attitude that it has no jurisdiction to intervene. The reasons given are equally consistent with an approach which allows the Court to say that it has jurisdiction to intervene, but that as a matter of discretion it will generally refuse to do so, in all but rare and extreme cases.

Daemar v Gilliand

Turning now to the power of the Attorney-General to enter a *nolle prosequi* or stay of proceedings, it is necessary to consider the judgment of McMullin J in *Daemar v Gilliand* (supra). The case involved four separate applications for review. Only one aspect will be discussed here. That aspect relates to the application to review the decision of the Solicitor-General to enter a stay of proceedings in respect of several informations laid by the applicant. The Solicitor-General moved to strike out the application for review on the ground that the stay of proceedings was not subject to review and that the application for review was frivolous vexatious or an abuse of the procedure of the Court. McMullin J decided that the decision to enter a stay of proceedings was not the exercise or purported exercise of a statutory power. In the *Tindal* case (supra) O'Regan J expressed the view that McMullin J in coming to that conclusion, had not fully appreciated the effect of the Judicature Amendment Act 1977 which came into force shortly after the conclusion of the hearing of the *Daemar* case but before the delivery of the judgment. O'Regan J did not find it necessary to determine the issue and it must therefore be regarded as an open question.

The second limb of the submissions for the Crown was the same as in the *Saywell* case: it was argued that even if the power to stay proceedings is a statutory power within the definition provided by the Judicature Amendment Act 1972, it is not a power for which the remedies of mandamus, prohibition, certiorari, declaration or injunction will lie.

In accepting that submission McMullin J said at p 27:

> The power to stay proceedings was never subject to the control of the prerogative writs. Neither was it originally a creature of statute. It was part of the prerogative which has long been vested in the Attorney-General in England.

McMullin J cited *R v Allen* (supra) and *R v Comptroller General of Patents* (supra), both of which have been referred to in relation to the discussion of *Barton v R.* McMullin J cited a number of other authorities, including *Gouriet v Union of Post Office Workers* (supra) in support of the proposition that the powers and duties of the Attorney-General are not subject to control or supervision of the Courts.

There can be no doubt that McMullin J supplied ample authority for the view which he took. But to consider such a matter solely in terms of judicial precedents provides no answer to questions of principle. Old authorities are likely to be based on outdated doctrines. Judgments which merely repeat conclusions reached in old cases without reconciling those conclusions with currently accepted principles do little to enhance the clarity of modern jurisprudential

thinking. In short, McMullin J did not really address himself to the apparent conflict between the older, more conservative approach, and the more recent interventionist approach highlighted by such decisions as that of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

As has been noted already, *Daemar v Gilliand* was taken to the Court of Appeal. The aspect which we have been discussing was not argued there, however, and no reference to that aspect was made in the Court of Appeal. There can be no suggestion, therefore, that the Court of Appeal either expressly or impliedly approved the approach adopted by McMullin J at first instance. Nor, for that matter, can it be said that they disapproved of his approach.

Tindal v Muldoon and Others

In this case[3] the plaintiff applied for judicial review of decisions of the Solicitor-General to stay proceedings on a number of informations laid by the plaintiff. Four of the five defendants, including the Solicitor-General, moved to strike out the application for review. Counsel for Solicitor-General, supported by other counsel, argued that the questions in issue had been concluded by the decision of McMullin J in *Daemar v Gilliand.*

Having referred to the possibility that McMullin J had not fully appreciated the effect of the Judicature Amendment Act 1977, O'Regan J said that he did not find it necessary to determine whether the decision to stay proceedings constituted the exercise of a statutory power for the reason that he agreed with the second limb of McMullin J's judgment, namely that the plaintiff would not be entitled to relief in proceedings for mandamus, prohibition, certiorari, declaration or injunction.

The plaintiff was a litigant in person. On the issue of reviewability it appears that he relied without more upon an article entitled "The Attorney-General and the Staying of Proceedings", by F M Brookfield [1978] NZLJ 467.

That article had been written before the decision of the High Court of Australia in *Barton*. It had also been wirtten without notice of the judgment of McMullin J in *Daemar v Gilliand*, which at that time had not been reported.

Brookfield had concluded that the Attorney-General might, in some circumstances, be subject to judicial review. In coming to that conclusion he had placed reliance upon the judgment of Fox J in *R v Kent, ex parte McIntosh* (1970) 17 FLR 65. But by the time the *Tindal* case was argued that decision had been expressly overruled in *Barton.*

Brookfield had added a postcript to his article a short while later.[4] There McMullin J's judgment was discussed and the view maintained that in some circumstances a decision to stay proceedings might still be reviewable. But the *Barton* case had still not been decided and Brookfield continued to place reliance on *R v Kent ex parte McIntosh.*

Because of these difficulties, O'Regan J was able to belittle the argument that the Attorney-General's power to enter a stay of proceedings might, in some circumstances, be subject to judicial review. It must be remembered, however, that O'Regan J did not have the benefit of hearing from counsel on the point. Competent counsel could have addressed himself directly to the reasoning employed in *Daemar v Gilliand* and *Barton v R.* Clearly, this would have been much more satisfactory.

O'Regan J tended to emphasise the negative aspects of the applicant's arguments by pointing out the lack of reasons to support the conclusion that a decision to stay proceedings is reviewable. That approach may have been justifiable in the circumstances of the case, but it contributes little to an understanding of the principles involved. O'Regan J was content simply to concur with the dictum of Wilson J in *Barton* where he said, in relation to the decision to proffer an ex officio indictment:

> It is clearly a decision which ought to be reserved for the consideration of the Attorney-General himself. In this, as in other aspects of the administration of the criminal justice system the Courts and the community must rely heavily upon the integrity of the Attorney-General for the faithful discharge of the prerogatives and privileges of his high office, leaving his actions to be questioned, if at all in Parliament.

No attempt is made to explain why the citizen must rely upon the integrity of the Attorney-General and yet is not obliged to do so in respect of cabinet ministers or even the Governor-General. Nor is there any attempt to explain why, in an era in which party politics seems to have undermined the whole pattern of constitutional convention. the concept of responsibility to Parliament should be accepted as the complete answer.

Conclusions

Each of the cases discussed seems, to a greater or lesser degree, to be open to the criticism that it relies too heavily on precedent and too little on principle. Even if the same result had been reached in the end, much more light could have been thrown on the matters in issue had account been taken of recent developments in administrative law. In none of the cases discussed was any reference made to the decision of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* (supra) and the developments which have followed on from that decision. In none of the cases discussed was any reference made to cases such as *Laker Airways v Department of Trade* (supra) and *R v Criminal Injuries Compensation Board ex parte Lain* (supra) dealing with developments relating to the reviewability of prerogative powers. The central issue of justiciability was almost wholly neglected.

These were issues crying out for attention, yet no attempt was made in any of the judgments to deal with them. Part of the problem may have been that two of the four cases involved applicants appearing in person rather than by counsel. Nevertheless, even those cases will carry a persuasive authority such that it may shortly be too late to revert to a more principled approach.

On thing is clear. The Courts have shown a marked reluctance to supervise the functions of the law officers of the Crown. In reality, one suspects that this is not so much because of the existence of any high constitutional principle which leads

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Sentencing (II):

Matters of aggravation and mitigation

By Geoff Hall, Senior Lecturer in Law, University of Otago

This is the second part of a two part article on "Sentencing", the first part of which was published at [1985] NZLJ 139. In that part the author dealt with the nature and gravity of the offence and its bearing on sentencing policy. In the concluding part the author discusses the offender's circumstances, the behaviour of the offender subsequent to the offence, and factors not to be taken into consideration by the Court.

Circumstances of the offender

Age

The weight given to personal circumstances is usually closely related to a consideration of rehabilitative potential; the age of an offender is thus a factor of considerable importance when determining an appropriate sentence. The younger the offender, the less likely he is to have reached an advanced stage of his criminal career. Consequently, a youthful offender should generally receive a lesser sentence than an older and more mature one. With young offenders all hope of reformation should not be abandoned too readily, and sentences should be chosen that avoid institutionalisation. However, because of the degree of correlation between youth and violence, particularly the prevalence of premeditated crime involving the use of weapons, the Court of Appeal has stated that the possibilities of reform of young offenders may be overshadowed by the necessity to impose an appropriate sentence designed to deter others of a like mind: eg *Walker* (supra).

At the other end of the scale, advanced age, maturity and a good record over a large number of years, particularly if accompanied by ill-health, may persuade the Court that a custodial sentence is inappropriate: eg *Henry v Advocate-General of the Cook Islands* 24 October 1979 (M1347/79) (Full Court) (noted in [1979] BCL para 726). There is a reluctance to sentence a person to imprisonment where there is a possibility that life expectancy will be greatly reduced through aggravation of a medical condition or that the person may not live to be released: eg *Henry* (supra).

Personality and character

Factors such as medical problems (eg epilepsy), personality disorders, emotional stress, financial difficulties, depression, overwork, marital and family problems are all relevant when imposing sentence. The significance or weight to be attached to these factors in any particular case depends on the degree to which the personal factor is considered to be indicative of lack of premeditation, of uncharacteristic behaviour that is unlikely to be repeated, or of conduct for which medication and treatment may be given and accepted with a view to eliminating the cause of the offending. Pre-sentence reports assist the Court in this respect. Where the Court is sentencing with a view to achieving the reformation or treatment of the offender, or the disposal of a person who is troublesome in the community, it must be mindful of the need for there to be a reasonable relationship between the sentence imposed and the gravity of the offending: *R v Elliott* [1981] 1 NZLR 295.

Mercy

Mercy may be shown where the offender's personality (eg immaturity, low level of intelligence, history of mental illness, social inadequacy, susceptibility to provocation), background (eg suffering deprivation and extreme violence as a child) or peculiar circumstances (eg severe emotional distress, domestic difficulties) give rise to the offence. In domestic disputes the level of culpability varies greatly, preventing sensible preconceptions as to an appropriate sentence based for example on some kind of tariff: *R v Lavea* 11 December 1979 (CA197/79). The trial Judge has the fundamental right and responsibility, in appropriate cases, to allow the promptings of mercy to operate and, even in cases which normally call for a deterrent sentence, he may conclude that the state is best served by taking a form of action calulated to encourage reformation: *R v Wihapi* [1976] 1 NZLR 422. This principle was reaffirmed in *R v Lawson* [1982] 2 NZLR 219 where the order to come up for sentence if called upon, imposed upon a co-offender convicted of conspiracy to commit burglary and who had voluntarily committed himself for treatment for alcoholism, was said to be justified. It was an attempt by the trial Judge to rescue an offender "as a brand from the burning".

Race, nationality, ethnic background

The race or ethnic background of an offender has not been expressly considered by the Court of Appeal in relation to sentence. Equality before the law is a basic concept fundamental to the administration of justice. It is embodied in the judicial oath to do "right to all manner of people . . . without fear or favour,

affection or ill will". Consequently, it is submitted that the sentencing principles outlined in this article are to be applied in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. Nevertheless, these same principles require the Court to take into account all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group: *Neal v R* (1982) 42 ALR 609. The Court should impose the penalty which reflects matters of mitigation arising from the offender's background and personal situation, and which recognises the structure and operation of the society within which he lives, in particular, the degree to which his cultural or ethnic heritage predominates and any problems of a trans-cultural nature that he may have experienced. This is a basic requirement of a system of justice that is evenhanded, consistent and uniform.

The issue of the relevance to sentence of the fact that the offender may be, or has been, subject to some traditional punishment or response within his local community, has arisen in Australia in the context of aboriginal customary or tribal law. The leading cases are *Jadurin v R* (1982) 44 ALR 424, *Mamarika v R* (1982) 42 ALR 94, *Neal* (supra), *R v Herbert* (1983) 23 NTR 22, *R v Sampson* (1984) 53 ALR 542, from which the following propositions can be extracted. The attitude of members of the offender's local community to him and to the offence is of particular relevance, especially where the offence was committed within that community and where the victim was from that community. That the offender has been subjected to some form of local dispute resolution, even if this involves some additional response under aboriginal customary law is relevant, especially where members of his local community are thereby reconciled. The imposition of further punishment by the Court is not precluded. The Court cannot order or impose traditional punishment not lawful under the general law, nor should it give the impression of having sanctioned the exacting of retribution by the offender's own community, particularly where this involves the infliction of physical harm.

These principles do not exclude the ability of a Judge, in appropriate cases, to deal with an offender in accordance with his membership and the practices of his cultural or ethnic group, subject always to control remaining with the Court, and to the provisions of the law. Alternative means of rehabilitation which appropriately take account of different cultural or ethnic values should be utilised. A failure by the Court to take account of these factors may create an injustice for the offender, by making the sentence more onerous than it would be for an offender of a different cultural or ethnic background, with different traditions, customs and mores.

The mere fact that an offender, who is not ordinarily resident in New Zealand, wishes to return home and is being kept in prison at cost to the New Zealand tax-payer is not a mitigating factor. To treat people coming from overseas more favourably would be to simply encourage them to offend: *R v Day* 4 June 1976 (CA19/76).

Sex

A female offender should not expect to be treated more favourably than a male: *R v Simm* 9 October 1981 (CA148/81) (noted in [1981] BCL para 980); *R v Williams and Williams* (1953) 37 Cr App R 71. In particular, a woman who allows herself to be used in a situation where she is not dominated or coerced, in order to facilitate the commission of a crime (eg the importation of drugs secreted on her body) should not expect to be treated more leniently because of her sex: *R v Osborne* 17 December 1976 (CA166/76).

Good character

Matters such as a stable home background, a sound school or military record, steady employment, a loyal family supporter, or devotion of time and effort to community activities are usually considered to be an indication that a person will not re-offend. The Court of Appeal stated in *R v Howe* [1982] 1 NZLR 618, 629: "Persons who have shown themselves generally law-abiding citizens of good character are usually entitled to invoke their creditable record in mitigation when they come before the Courts, even for quite serious offences." However, the more serious the offence the less mitigating is a person's good character.

With certain types of offences, eg drugs and fraud, the fact that a person has a responsible position, or is involved in community activities, may be regarded as compounding the offence, in that the offender has a heavier responsibility to maintain law-abiding behaviour. In two cases decided on the same day – *R v Stuart* 17 October 1975 (CA84/75) (noted in [1975] BCL para 1331), *R v Bryant* 17 October 1975 (CA83/75) (noted in [1975] BCL para 1334, 5) – the Court held offences of possessing cannabis for the purpose of supply to be exacerbated by the fact that the offenders' positions brought them into contact with young people. Moreover, in the latter case the defendant had repeatedly stated that he disagreed with and intended to disregard the law in relation to cannabis and the Court expressed the fear that he might attempt to convert or encourage others to adopt a similar attitude to his own. In *R v Hustler* 6 October 1980 (CA162/80) (noted in [1980] BCL para 955, [1981] NZ Recent Law 114) the Court emphasised that a barrister or solicitor is under a special responsibility to the public to conduct himself so as to promote respect for the law and confidence in the integrity of the administration of justice. In the case of fraud a person's good character or reputation only assists in his deception of his victims; thus it should have an aggravating rather than a mitigating effect. A similar rationale applies to the sentencing of drug couriers: *R v Aramah* (1982) 76 Cr App R 190.

First offender

This is clearly a matter of mitigation, particularly where a person is able to point to living in the community for many years, or to having reached maturity or middle age, with a blameless record: eg *R v Young* 14 July 1972 (CA27/72). However, where an offender has committed an offence for which imprisonment is appropriate, the Court is not prevented from imposing this sentence merely because it is a first offence: eg *Aitken v Police* High

Court Nelson, 6 June 1979 (M1737-58). The mitigating effect has perhaps been given added emphasis in other jurisdictions. It has been said in the Federal Court of Australia in *Crawley v R* [1981] 36 ALR 241, (at 246 per Blackburn J) "that as a general principle of sentencing, it takes a very serious offence to warrant a custodial sentence for a man with an unblemished record"; and by the English Court of Appeal in *R v Bibi* [1980] 1 WLR 1193 that where a prison sentence is appropriate for a first offender it should be as short as possible, while being consistent with the objectives of punishment and with previous decisions in similar cases.

Intoxication

Drunkenness may be regarded as a mitigating factor where it affects the quality of an act or results in the commission of an impulsive offence which is out of character: eg *R v Morgan* (1909) 12 GLR 475. Where the effect of liquor was known, or should have been known, to the offender, he is not able to shelter behind that drinking to escape a proper penalty, indeed a deterrent sentence may be appropriate – *R v Campbell* 4 November 1980 (CA134/80); particularly as a person in this condition may act irrationally and consequently be more frightening to his victim.

Where a person is charged with offences involving driving under the influence of alcohol it is the degree of impairment that the alcohol produces in the individual offender rather than the amount consumed that is important: *Hopfler v MOT* High Court Wellington 2 December 1980, (M356/80) (noted in [1981] BCL para 40).

Addiction

Addiction to drugs, alcohol or gambling may be a mitigating factor. This depends to a large extent on the nature, gravity, prevalence and circumstances of the offence and on the likelihood of the offender breaking his dependency by responding to treatment. Addiction to drugs may be a mitigating factor where a person is convicted of possessing, or even importing a small quantity of drugs into the country for his own purposes (eg *R v Bryan* 2 March 1978 (CA180/77), but there is little room for regard to personal circumstances where a person is charged with supplying a Class A drug. "Persons who have become the miserable victims of this trade may well deserve to be pitied. But when they stoop to systematically spreading the contagion the Courts are left with little room for the exercise of a merciful discretion in their favour": *R v Anderson* 28 June 1979 (CA204/78) (noted in [1979] BCL para 449). Generally however, the Courts will reward a genuine attempt to shake free from addiction with a reduced sentence: eg *R v Philip* 19 March 1982 (CA272/81). A rehabilitative or merciful sentence may be appropriate in such circumstances, eg *Lawson* (supra).

The choice between a custodial or non-custodial sentence, or the determination of the term of imprisonment, must not be dictated by the Court's desire to cure the offender, but by the circumstances and gravity of the offence committed. Rehabilitation is important in such a case, but it must be accommodated within what is otherwise the just and fair punishment for the offence committed: *R v Ford* [1969] 1 WLR 1703, [1969] 3 All ER 782; *Eastham v R* [1978] WAR 86; *Freeman v Harris* [1980] VR 267.

Further consequences of offending upon offender

The breakdown of the offender's marriage, the loss of livelihood, career, professional status, prospects of promotion, right to superannuation, the suffering of humiliation and the stigma and ignominy of a criminal conviction, are all mitigating factors. The Courts view in a similar fashion the fact that conduct has resulted in serious injury to the offender, the death of a loved one, or severe financial loss.

The continuing loyal support of a devoted and intelligent spouse can be mitigating, particularly where the offending is of a sexual nature (eg *R v Hamilton-Wallace* 14 August 1979 (CA49/79) (indecency between males)) or the victim is a member of the family eg *R v Hansen* 17 August 1976 (CA53/76) (manslaughter of two month old son).

Consequences of incarceration of offender on others

As a general rule a male offender cannot hide behind the skirts of his wife, nor can male and female offenders seek refuge from a sentence of imprisonment in the tender age of their children. Distress and hardship to one's dependants are inevitable consequences of crime. They are nevertheless factors that may be considered, although where the offending is serious or premeditated they are unlikely to be given much weight: *R v French* 4 November 1974 (CA69/74) (female offender with two very young children who had participated substantially in an armed robbery – sentence of four years imprisonment affirmed).

While it is difficult to extract any principles from the decisions of the Court of Appeal, it appears extreme or exceptional hardship is required before the Court will exercise mercy. The Court has reduced a term of imprisonment to enable the immediate release of an inmate where there was the likelihood of grave emotional damage to children and spouse unless the family was re-united: *R v Henry* 21 March 1979 (CA187/78); and where the wife of an inmate was physically incapable of looking after the house and coping with the children, and had attempted suicide: *R v Kelly* 16 September 1981 (CA90/81).

Additional Hardship of imprisonment

A custodial sentence will always impose physical and emotional hardship, and deprivation upon the person imprisoned. Where these matters would be aggravated by characteristics peculiar to the offender this is a proper consideration to be taken into account by the sentencing Judge. In *R v Lane* 7 December 1981 (CA184/81) the Court of Appeal affirmed a sentence of 18 months imprisonment on charges of supplying a Class A drug, imposed upon a tetraplegic. The sentencing Judge had indicated that normally he would impose a sentence of five years imprisonment for this particular offence, but the disability of the offender would result in him being confined in a prison hospital, where the physical and emotional strain would at times be unbearable, and this justified a substantial reduction in sentence.

The Justice Department has a general policy that a mother and

child should not be separated after birth and that a child should not be kept in prison with the mother. To implement this policy there are three options open to the Department: (1) an application may be made to the Parole Board to have the applicant and the child, when born, paroled to some place outside a prison institution; (2) on the birth of the child, application may be made forthwith to the Governor-General for the exercise of the prerogative of mercy; and (3) the Minister of Justice may be asked to direct the release of the applicant pursuant to s 31A(1)(a) of the Penal Institutions Act 1954 (as inserted by the Penal Institutions Amendment Act 1975, s 14). This policy was reviewed by the Court of Appeal in *R v Keenan* 18 February 1981 (CA256/80) where an otherwise appropriate sentence of 12 months imprisonment for offences of theft was reduced to three months, thus facilitating the appellant's immediate release in accord with the reality that the original sentence imposed could not and would not be carried out. However, in *R v Murphy* 2 August 1983 (CA 18/83) (noted in [1983] BCL para 728) the Court refused to reduce a sentence of six months imprisonment imposed upon a pregnant woman convicted of wilfully ill-treating a foster child. Whether the anticipated delivery date of this, her fifth child, coincided with the term of imprisonment (including remission) was not stated.

The hostility that a former police officer or prison officer, a police informant, or a sex offender could expect to face in prison has been regarded as a mitigating factor in other jurisdictions, particularly where for his own protection, an inmate is required to serve his sentence in solitary confinment: eg *R v Lowe* (1977) 66 Cr App R 122; *R v Davies* (1978) 68 Cr App R 319;*R v Golding and Golding* [1980] 24 SASR 161. *Davies* was cited in *R v Veale* 16 September 1983 (CA79/83) (noted in [1984] NZ Recent Law 89, [1983] BCL para 941) where it was accepted that circumstances could arise where some weight should properly be given to the special hardship occasioned to a prisoner from an enforced isolation which was the result of his co-operation with the law enforcement authorities.

Previous Convictions

Regard may be had to an offender's record when imposing sentence. This matter is not without its difficulties, as the Court has to reconcile two principles; on the one hand the acceptance of the preventive purpose of punishment, and, on the other, the rejection of punishing an offender again for earlier offences: *R v Casey* [1931] NZLR 594; *R v Ward* [1976] 1 NZLR 588.

The compromise adopted by the Court of Appeal is that previous convictions may be examined to establish the *character* of an offender and to assist in the determination of the punishment that is appropriate for a man of that character for the particular offence committed: see eg *Howe* (supra). Primarily, regard must be had to the intrinsic nature and gravity of the offence charged. A sentence must not be increased merely because an offender has previous convictions, with the result that he is thereby punished twice for the same offence: *R v Power* [1973] 2 NZLR 617.

The commission of several offences of the same or similar type will normally result in an offender receiving a more severe sentence on the basis that his previous convictions indicate a predilection to commit a particular type of crime: *Casey* (supra); *Ward* (supra). This is especially so where a second offence is committeed against the same victim: eg *R v Marshall* 1 October 1979 (CA86/79) (indecent act on girl under twelve, previously sentenced for attempted sexual intercourse with the girl). Where previous offences are of a similar nature, but are more serious (eg taking a motorcar – maximum sentence, seven years) than the offence for which sentence is being imposed (eg interfering with a motorcar – maximum sentence, two years), the previous sentences must not mislead the Court into passing a sentence disproportionate to the nature and gravity of the present offence: eg *R v Frewen* 22 February 1973 (CA 127/72). An offender who commits different types of offences and whose record merely indicates a general indifference to his legal obligations may find that less emphasis is placed on his record: eg *Casey* (supra) (receiving stolen goods – previous convictions for sexual offences).

If an offender has received a lenient sentence for a previous offence, further offending will be viewed in a more serious light as evidence of failure to avail oneself of the opportunity for rehabilitation: eg *R v McFarlane and Mangin* 9 October 1981 (CA146/81) (noted in [1981] BCL para 979). The position is similar where a person has received a warning from the police but continues in his behaviour: eg *R v Coombridge* 18 May 1981 (CA185/80).

A further aggravating factor is re-offending within a short time of previous offending. This is compounded where the offending is of a serious nature, and where it occurs soon after release from a custodial sentence: eg *R v Hiroki* 8 July 1975 (CA36/75), *R v Harding* 7 August 1980 (CA101/80); or while on parole: eg *R v Rameka* [1973] 2 NZLR 592. Consecutive sentences are appropriate where further offending occurs while on bail: eg *R v Wallace* [1983] NZLR 758; or while a non-custodial sentence such as probation or periodic detention is being served: eg *Veale* (supra).

Where an offender has been convicted previously for offences similar to the one before the Court, the Court should have regard to the type and length of sentences imposed on those occasions and refrain from passing a sentence that is markedly different to those for the earlier offences: *R v Sutton* 9 September 1974 (CA64/74); *R v Bryant* 17 October 1975 (CA83/75) (noted in [1975] BCL para 1334, 5). A favourable report on completion of sentence reinforces this principle. In imposing a sentence for repeated offences of driving while disqualified if other means fail imprisonment may be appropriate, but where that sanction has not been imposed earlier, then only a short term should be imposed: *R v Osmand* 13 August 1982 (CA79/82) (noted in [1982] BCL para 937). The same principle applies to increase in the level of fines (eg *Cronin & Co v MOT* 22 February 1982 HC Hamilton (M39/82) (offence against Road User Charges Act 1977)).

Where there are a number of previous convictions, the appropriate sentence will often be

imprisonment. Past convictions may demonstrate that any deterrent sentence other than imprisonment is unlikely to be effective. Obviously in determining the appropriate sentence the Court must have regard to past sentences and their efficacy or lack of it: *Police v Kalepu* [1973] 1 NZLR 125. When sentencing offenders with a long criminal history consideration may be given to whether the offender is reaching the stage or age (normally 30 years and beyond) where the futility of his offending might grow more apparent to him: eg *Veale* (supra); *Bradley* (supra).

Leniency may be exercised in an offender's favour if there is evidence of an honest endeavour to avoid committing further offences since his last conviction or release from custody. Credit should be given for a significant period of law-abiding behaviour, and in some circumstances it may assist in effectively erasing the effect of previous convictions. Even when the time is relatively short, some credit may be given where the offender has settled down (eg married or obtained regular employment — *R v Riley* [1982] 1 NZLR 1) and is making an honest endeavour to avoid conflict with the law, but has weakened under pressure (eg loss of job through redundancy, domestic crisis). This is accentuated where a man of good character may have been similarly affected: *R v Nuttall* (1908) 1 Cr App R 180. However, a deliberate or violent return to crime will militate against this leniency.

Co-offenders

There is no requriement in law that co-offenders should be treated alike. It is perfectly proper for the sentencing Judge, or sentencing Judges, where offenders are sentenced in different Courts, to distinguish between co-offenders by imposing different sentences: *Police v Egden* [1977] 1 NZLR 123. Sentencing a co-offender is not unlike sentencing an individual. The Judge must assess the culpability and degree of participation of each offender, examine the mitigating factors which affect each and then determine whether differential treatment is justified: *Lawson* (supra); *R v Uiti* [1983] NZLR 532; *R v Moananui* [1983] NZLR 537. Thus the ringleader, the brains behind the operation, the one who initiated the involvement of others in the offence or who could have put a stop to the incident, will usually receive a harsher sentence than the other participants in the crime: *Rameka* (supra); *R v Hartley* [1978] 2 NZLR 199; *R v Prast* [1982] 1 NZLR 56.

Mitigating factors include a participant endeavouring to discourage a co-offender from further offending, particularly the use of excessive violence; and that an offender was under the influence or domination of a co-offender, or was coerced into participating in the incident, but not to the extent that he would have a defence in law. It is proper to distinguish between leaders and followers: *Hartley* (supra), *Howe* (supra). However, where offenders embark on a common enterprise it may be quite unreal to make any fine distinctions as to the precise part which may have been played by each of them — *R v Peers* 6 August 1981 (CA 103/80); especially where each participant is of adult age, and the role or part of each is predetermined and an essential feature of the enterprise. As a general rule, if the responsibility of the offenders for the commission of the offence and all other relevant factors are indistinguishable, identical sentences should be imposed, particularly where deterrence is a main concern of the sentencing Judge.

An offender who receives a recommendation of leniency from the jury will often be treated more leniently than another co-offender, although an endeavour by the Court to keep disparity to a minimum and avoid injustice may militate against this: *R v Williams and Bluegum* 6 August 1980 (CA141, 142/80) (noted in [1980] BCL para 796). Where co-offenders enter different pleas, are convicted on different charges (eg accessory after the fact; party to the offence), or are subject to different legislative provisions (eg one offender is sentenced in the Children and Young Persons' Court, the other is an adult), this may justify a difference in their treatment.

Recommendation by jury

The sentencing Judge may take into account a rider added to the verdict of the jury, whether it be a recommendation for maximum sentence, or a recommendation for leniency or mercy (eg *R v Morgan* (1909) 12 GLR 475, *Williams and Bluegum* (supra) — a sentence of periodic detention imposed for the offence of rape was affirmed by the Court of Appeal). Nevertheless, the responsibility of imposing sentence ultimately reposes with the Judge. The jury as a consequence of its recommendation, must not be permitted to usurp the exercise of the Judge's sentencing function.

Behaviour of the offender subsequent to the offence

Contrition and co-operation with the police

An offender's actions after committing an offence may have a significant bearing on the Court's assessment of both the gravity of his offending and the purpose of punishment which needs emphasis in the particular case. Evidence of genuine feelings of contrition, repentance or remorse should be taken into account in determining an appropriate sentence. They may indicate, for example, that specific deterrence, or the need to bring home to the offender the gravity of the offence, need not be a principal concern.

Contrition may be shown in a number of ways: by immediately rendering assistance to the victim (administering first-aid or calling emergency services — eg *R v Raumati* 6 August 1980 (CA 70/80)); by going to the police station and making a full and immediate confession — eg in *R v McCook* 17 June 1982 (CA9/82) the Court reduced a sentence for arson from seven years imprisonment to four years where the offender, after realising the extent of the conflagration and the enormity of his actions, alerted the fire brigade and initiated an interview with the police in which he disclosed his involvement; by admitting responsibility for further offences when being questioned by the police, by giving information to the police, or evidence in Court, relating to other participants in the offence or to further offending by other persons; by surrendering to the police when in a confrontation situation; by disclosing the whereabouts of the proceeds of the offending — eg *R v Bradley* [1979] 2 NZLR 262; by pleading guilty to the offence; by accepting counselling and help for psychological problems

or sexual deviation; by voluntarily paying compensation or making reparation or restitution – eg *R v Porter* (1913) 9 Cr App R 213; *R v Bell* (1919) 14 Cr App R 36; *R v Todd* 28 November 1983 (CA 218/83) (noted in [1983] BCL para 1183).

The fact that an offender has elected to assist the police by naming his accomplices has long been recognised as a mitigating factor. In *R v James and Sharman* (1913) 9 Cr App R 142 the English Court of Appeal stated "it is expedient that [thieves] should be persuaded not to trust one another, that there should not be 'honour among thieves' " (at 144, per Darling J). See also *R v Paul* [1928] SASR 16; *Lowe* (supra); *Davies* (supra); *R v Barber* (1976) 14 SASR 388; *Golding and Golding* (supra). Where significant help is given to the police by an accomplice, in the long term interests of justice as well as fairness to the individual, a reduction in sentence that is significant in a real sense may properly be allowed: *R v Morgan* 8 December 1983 (CA241/83).

The extent to which co-operation justifies a reduction in sentence in any given case is not something that can be approached by reference to any particular formula or method. It depends to a large degree on the individual circumstances of the case, but the gravity of the offence and the nature, extent and importance of the assistance given should be considered: *Morgan* (supra); *Davies* (supra); *R v Genet* 10 April 1984 (CA146/83) (noted in [1984] BCL para 469) – the offence might not otherwise have been discovered, but no reduction was made as a lenient sentence had been imposed by the trial Judge and any further reduction would have brought the sentence to a level inappropriate to the gravity of the offending. When it is given at the cost of personal danger, co-operation deserves "generous recognition" *Barber* (supra); *Morgan* (supra). In drug cases the fact that an offender has chosen to disclose to the police that he has further quantities of drugs in his possession, or that he has given all the assistance he could in identifying his supplier, is a relevant matter. The revealing of suppliers can be crucial in suppressing the drug trade; it is so important that it should be recognised in a significant way on sentence: *R v Urlich* [1981] 1 NZLR 310; *R v Loughlin* [1982] 1 NZLR 236.

Similarly, the public interest is such that developments between time of sentence and the hearing of a timely appeal are not "necessarily totally irrelevant"; *R v Milley* 2 November 1982 (CAA81/82). Nevertheless, major weight should not be attached to what has occurred since sentence. It is much more important to give offenders credit, where it is appropriate on the facts, to matters occurring at an earlier stage. See also *Veale* (supra).

The willingness of a sexual offender to undergo treatment whilst in prison, the availability and likelihood of success of which is unknown, is usually viewed as an administrative matter not justifying a reduction of sentence: *R v Hirini* 7 February 1980 (CA158/79), (noted in [1980] BCL para 212). The Court should not appear to be striking a bargain with the offender.

Plea

While it is clear that the appropriate sentence for an offence should not be increased merely because by pleading not guilty an offender has exercised his right to put the prosecution to proof; it is equally clear that it is appropriate to make some reduction in what would otherwise have been the correct sentence, where a person has pleaded guilty. New Zealand authority for these two propositions may be found in *R v Taylor* [1968] NZLR 981, 987 where the Court of Appeal quoted with approval the statement of Edmund-Davies LJ in *R v de Haan* [1968] 2 QB 108, 111, [1967] 3 All ER 618, 619 that "a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest".

The "public interest" is not defined in these cases. However, there appears to be three rationales for regarding a guilty plea as a mitigating factor. First, a plea of guilty may be evidence of genuine contrition, repentance or remorse and show the potential for, or the commencement of, self-rehabilitation; secondly, it is socially expedient, in that it reduces pressure on the criminal justice system by saving the country the time and expense of a lengthy trial: *R v Parata* 25 November 1983 (CA65/83) (noted in [1984] NZ Recent Law 246); and thirdly, it spares a victim, especially the victim of a sexual offence, the ordeal, distress, embarrassment of reliving in public a shocking and frightening experience (*R v Paul* 1 March 1985 (CA68/84) (noted in [1985] BCL para 361)) and, in elderly victims in particular, possible feelings of ignominy and even shame in giving evidence about the activites which were the subject matter of the charge: *R v Tahu* 1 November 1971 (CA90/71).

A plea of guilty may also be self-serving; it may be entered as an inducement to the prosecution not to proceed with a more serious charge, or be merely a recognition of the overwhelming weight of evidence. Australian authorities suggest that where a guilty plea is solely self-interested it is not a matter of mitigation: see eg *R v Shannon* [1979] 21 SASR 442, in which the members of the Supreme Court of South Australia, in separate judgments, exhaustively examine the effect of a guilty plea upon sentence.

A second matter yet to be clarified, is the *extent* to which a guilty plea should justify the reduction of an otherwise correct sentence ie, what the discount should be. A real and apparent reduction is necessary: *Paul* (supra) – a cumulative sentence of three years imprisonment for attempted rape, and concurrent sentences for a number of burglaries, were ordered to be served concurrently with a seven year sentence for rape. In *Taylor* (supra) the reduction was one quarter – one year from a four year sentence. Essentially, however, this will be a matter left to the discretion of the sentencing Judge. A mathematical approach in the form of a uniform percentage reduction in sentence is inappropriate.

Time spent in custody

When determining the appropriate sentence, whether it be custodial or non-custodial, the Court should consider and give credit for the length of time that the offender has been in custody before trial: eg *R v Puru* [1984] 1 NZLR 248. This may include time spent in custody in another country awaiting deportation: *R v Tattley* 25 June 1981 (CA5/81) (noted in [1981] BCL para 607). It is suggested that the principle should extend to where an offender has served a sentence in

another jurisidiction for offences which are closely related in time and character to the offence for which sentence is being imposed. The totality principle should extend to a crime spree committed in more than one country: see eg *R v Todd* [1982] 2 NSWLR 517 where offences were committed in more than one Australian state.

Adherence to conditions of bail
Where a person has been remanded on bail, the fact that he has faithfully adhered to the terms of his release may be seen to indicate a degree of conscientiousness which the Court wishes to encourage: *R v Upritchard and Mangin* (High Court Auckland 27 March 1979 (T252/78) noted in [1979] BCL para 309).

Delay
A delay, which is not the fault of the offender, between detection of the offence and either the commencement of prosecution (eg *R v Emery* 15 February 1973 (CA2/73)), or trial (eg *R v Clarke* [1982] 1 NZLR 654), or the hearing of an appeal, during which time feelings of anxiety or stress as to the future may be rife, should be regarded by the Court as mitigating. Criminal matters should be dealt with and disposed of promptly.

It has been said in another jurisdiction that sentencing for a "stale crime" requires a considerable measure of understanding and flexibility of approach. Even where the delay is caused by the actions of the offender (eg leaving the country), a consideration of the background and circumstances of the offending, the offender, and of fairness to the offender in his current situation may result in a more lenient sentence than otherwise would have been appropriate: *Todd* (supra).

Where an offender is able to demonstrate that he has taken steps during the time of delay to reform by a complete change of life-style or by adopting new responsibilities (eg abandonment of drug usage — *Loughlin* (supra), new family commitments, steady employment, new circle of acquaintances, payment of debts, entering into new financial liabilities — *R v Rogers* 24 September 1980 (CA113/80) (noted in [1980] BCL para 954)), the punitive and deterrent aspects of the sentencing process should not be allowed to dominate so as to possibly destroy the results of that rehabilitation. This principle was extended in *R v Carstairs* 29 July 1977 (CA145/76) to reform evidenced by conduct in prison. In reducing a sentence of imprisonment on these grounds, however, might the Court not be seen to be usurping the functions of the Parole Board? Moreover, the Court should be acutely aware of the pressure upon an offender to evidence reform during the period of delay and should be wary of a careful charade by the offender.

Added emphasis may be given to these matters, where the Crown appeals against sentence and this fact is not brought to the notice of an offender who makes significant career or domestic decisions on the basis of the trial Judge's sentence (eg *Police v Duffy* 6 September 1983 High Court Wellington (M117/83) noted in [1983] BCL para 881); or there is no application under s 399 of the Crimes Act 1961 to stop the sentence running, pending the hearing of the appeal, and the defendant is close to completing a custodial sentence: eg *Puru* (supra), *R v Hooper* 18 May 1983 (CA251/82) (on work parole, living in pre-release hostel, in regular employment and spending weekends with family); or where the Judge has refused a request under s 399 and the offender can point to a favourable report on his response to a non-custodial sentence: *Rogers* (supra). In these circumstances, the court may consider that it would be unduly harsh, and contrary to the overall interests of justice, to increase the term of imprisonment or to remove the offender from his family and the community by incarcerating him.

Factors not to be considered by the Court
There is a difference between, on the one hand, refraining from deducting something from what would otherwise have been a "normal" sentence for particular crime, and, on the other hand, adding something to what would otherwise have been such a sentence: *R v Hustler* 6 October 1980 (CA162/80) (noted in [1980] BCL para 955, [1981] NZ Recent Law 114).

Lack of contrition
Evidence which indicates that an offender has no feelings of remorse must not mislead the Court into imposing a longer sentence than would otherwise have been appropriate for the particular offence. Matters which do not justify an increase in sentence include not co-operating with the police by telling lies: *Hustler* (supra); refusing to identify one's accomplices: *Barber* (supra) or refusing to disclose one's source of drug supply; abandoning the victim in an injured state to die: *Heemi v R* 30 October 1981 (CA174/81); following the commission of one offence by a further distinct and serious offence: *R v Watson* 3 September 1979 (CA129/79); having successfully hidden or disposed of ill-gotten gains; or inability to make restitution: *R v Pritchard* (1929) 21 Cr App R 152.

Conduct of defence
It is entirely contrary to proper sentencing principle to add to the sentence that otherwise would be appropriate because of the time and cost of the trial, the manner in which the defence was conducted, discourteous behaviour towards the Court by the offender, or the uttering of provocative statements at time of sentence: *R v Minto* [1982] 1 NZLR 606. If necessary, the conduct should be sanctioned through the passing of a separate sentence for contempt of Court: Ibid. A Court may in an appropriate case and in a suitably balanced and sensitive way give some weight to the apparent lack of remorse on the part of the offender. In *R v Keenan* 18 February 1981 (CA256/80) the offender lied to the court and attempted to place the blame on an innocent person. Testimonials as to good character were introduced in mitigation. The offender's conduct, characterised as "blatant lies" and "vicious conduct", demonstrated not only an absence of contrition, but were also relevant to the matter of character, and an account could thus be taken of them in the matter of credits and debits which were said to be so often a feature of the sentencing process. On the other hand, an offender is not to receive a higher or an entirely different sentence because he has affronted the Court.

Further matters which can not aggravate the penalty beyond the level warranted by the nature and gravity of the offence are a plea of

not guilty; election of trial by jury – *R v Jamieson* (1975) 61 Cr App R 318; per jury – *R v Quinn* (1932) 23 Cr App R 196, *R v Dunbar* (1966) 51 Cr App R 57, *Hustler* (supra); suborning perjury *R v Burton* (1941) 28 Cr App R 80); false allegations of improper conduct by the police – *R v Harper* [1968] 2 QB 108, [1967] 3 All ER 619n), *R v Skone* (1966) 51 Cr App R 165. Those matters that consistute further offences should form the subject of separate criminal charges: eg *R v Abbott* 23 August 1984 (CA141/84) (noted in [1984] BCL para 1045).

Cost of trial or appeal to the offender

Large expenditure incurred by the offender in defending himself should not be considered as a matter of weight in assessing sentence. Although by law every man is entitled to require that the offence be proved beyond reasonable doubt, the fact that he is well off, and incurs such expenditure without success, is not a ground for reducing sentence. If it were otherwise, it would mean imposing a lesser sentence on a wealthy man than on a poor man: *R v Radich* [1954] NZLR 86.

Offences other than those with which the offender is charged

These must not be considered by the sentencing Judge, even where they are admitted by the offender. They may of course be the subject of separate prosecutions.

Factual basis

In determining the appropriate sentence the Court must not adopt a view of the facts inconsistent with the plea that has been accepted from the offender, or the verdict of the jury.

Early release (remission) and parole

The Court should not take early release or the possibility of parole into account when determining the length of a sentence of imprisonment. Nor should a sentencing Judge abidcate his responsibility to give appropriate weight to the various mitigating factors pertaining to the offender by leaving that task to the Parole Board.

An offender should be sentenced to a term of imprisonment commensurate with the gravity of his offending and this should not be exceeded merely because the court believes that an earlier release will occur because of the granting of remission: *R v Maguire and Enos* (1956) 40 Cr App R 92; *R v Assa Singh* [1965] 2 QB 312; [1965] 1 All ER 938. Similarly, the possibility of the offender being released on parole should not be considered: *R v Stockdale* [1981] 2 NZLR 189. It is granted by the Parole Board after consideration of factors which may be quite different to those considered by the Judge at the time of sentence. The role of the Court is a judicial one, the role of the Board is administrative. An inmate serving a sentence of imprisonment is not automatically eligible for parole after serving a specified portion of his sentence; he is entitled only to have his case considered by the Board. Consequently, an expectation of early release conveyed to an offender may be not borne out by subsequent events: *R v Glease* [1978] Crim L R 372. In England there is an exception to this principle where treatment of the offender or the protection of the public is the main aim of the sentence: *R v Turner* (1967) 51 Cr App R 72. However, one must question this distinction in light of the decline of the rehabilitative ideal and increasing recognition of the fact that it is very difficult, if not impossible, to reform anyone whilst they are in prison. In any event, it is clear in New Zealand, these reasons notwithstanding, that the courts must not impose a sentence disproportionate to the offence: *R v Metcalfe* [1962] NZLR 1009; *Ward* (supra); *R v Elliot* [1981] 1 NZLR 295.

Conclusion

The judicial obligation is to ensure that the punishment which the Judge imposes in the name of the community, is itself a civilised reaction, determined not on impulse or emotion but in terms of justice and deliberation: *Puru* (supra). The task of determining a just and fair punishment, of imposing a sentence which is in accord with the general moral sense of the community, is ultimately an intuitive assessment by the sentencing Judge of the various aspects of the sentencing process. Appellate review and the necessity for even-handed administration of justice have spawned the principles of sentencing enunciated in this article. These sentencing factors, which both relieve the Judge from too close a personal involvement with the case in hand, and promote consistency of approach on the part of individual Judges, must be familiar to counsel presenting pleas on sentence. Moreover, sentencing patterns do not remain static, the significance of particular factors ebbs and flows; counsel must remain ever alert to their roles as innovators suggesting new factors to be considered by the sentencing Court. □

Judgment by forecast

In quite a large number of actions, the real issue is not whether the claimant is entitled to damages, but the amount of the damages. Each party has an exaggerated view which becomes more exaggerated the more he thinks about it. The legal advisers on each side attempt valiantly to narrow the gap and the procedure for paying into Court or making offers assists. However, in the context of industrial wage-bargaining, the Japanese have come up with a novel idea which has, I believe, been accepted by one of their UK factories. It is worthy of consideration in other contexts. It is known as the "flip flop" decision.

It works this way. Each party has to state the amount which he expects to be awarded or, as the case may be, be ordered to pay. This should be, but, of course, is not by any means the same as the amount which the claimant is claiming or that which the respondent is prepared to concede. The Court is unaware of the parties' forecast is until it has decided what is the appropriate figure to award. It announces this figure and then gives judgment not for that sum, but for the sum forecast by one of the parties which is nearest the Court's figure. The practical result of such a system would be that the parties' forecast would be highly realistic and very near to each other. And the result of that would be a spate of settlements. It is worth more than a passing thought.

Sir John Donaldson MR

The Law Society Conference 1984

The judiciary under martial law regimes

By Fali S Nariman, Senior Advocate Bar of the Supreme Court, New Delhi, India

In August 1984 LAWASIA held a seminar in Dhaka, Bangladesh on the subject of judicial independence. This article reflects the views formed by Mr Nariman as a result of attending that seminar. Mr Nariman attended the 1984 New Zealand Law Society Conference at Rotorua, where he presented a paper and took an active part in the proceedings. The "region" referred to in the first sentence is of course the Indian sub-continent and the contiguous countries of South-East Asia.

It is now more than 30 years since each of the former colonies of one or other of the great powers in this region became independent. But the pattern of government has changed – most of them started with a parliamentary system which still prevails in India. But in many parts of South and South-East Asia, there has been a shift; to the Presidential form of Government which is, of course, in theory, democratic since the Presidential office is an elected one; too often, however, the Presidential form of government lapses into a civilian dictatorship. The temptations of absolutism are great and the task of an independent judiciary is a trying one. There is always the charisma of the National Leader trying his best to relieve the poverty-stricken masses, only to be thwarted (so it is said) by a Bench of non-elected Judges who cannot gauge the real aspirations of the people.

Often Presidential forms of government in this region have yielded to Martial Law regimes – there is law and order (or an outward semblance of it) but no rule of law: Judges are required to take an oath not to a Constitution but to a Martial Law Order: to a *firman*.

How does a Judiciary relate to an autocratic non-elected regime? If you are going through a period of revolution which has succeeded and a Writ is filed, what do you do? – Resign? Fly in the face of the Martial Law Administrator? Or do you continue on and modify your decisions to face constitutional facts as they emerge? Is it important for the Judiciary to continue to function at any cost? – even at the cost of its independence?

Lawyers around the world have tried to set down principles conducive to an independent judiciary – the International Commission of Jurists, the International Bar Association, the Law Association for Asia and the Western Pacific (LAWASIA) have each attempted their own formulations: they all proceed on the basis that there is a yardstick of minimum standards which can be applied to all functioning judicial bodies, to all Courts in every country.

Their efforts were deliberated upon at the World Conference on the Independence of Justice held in Montreal in June last year. It was attended by representatives of many organisations around the world, as also by the President and Justices of the International Court of Justice. It is hoped their conclusions will form the basis of a declaration by the United Nations on the Independence of Justice. But at the pace at which international forums function, we are unlikely to see the formulation of any such universally accepted Declaration in this decade!

Meanwhile, even the *sine qua non* of an independent judiciary, a guaranteed tenure of office, is denied in Martial Law Regimes. The reason is the reluctance to govern by an objective set of laws, the tendency to frame rules to suit the whims of those in charge of the governmental machine. I remember the charming story related at a seminar of the Indian Branch of the International Law Association a few years ago – by a sitting Judge of the Supreme Court of a neighbouring country. He was a fearless Judge and internationally recognised as such: it was he who was nominated to accept the Nobel Peace Prize on behalf of Amnesty International when it was awarded to that organisation.

He was very friendly with the man who later became the President of his country and its Chief Martial Law Administrator – that President is no more and so one can relate the incident without causing offence. The President turned to his friend the Judge and asked him to draft a Constitution for the country, the administration of which he had just taken over. The Judge said:

> When I was a young boy at Calcutta, there was a famous playwright and two famous actors – each having a different theatrical style. Whenever the playwright was commissioned to write a scenario, he would ask for which one of the two actors it was intended, so that the play would suit the talent and ability of that actor. Do you want me to write a Constitution like that playwright wrote his plays?

The President saw the point He asked someone else to do the drafting. It was only the smouldering memories of a past friendship that saved the Judge's life!

Tailor-made constitutions imposed by force of arms are an impediment in the search for norms for an independent judiciary.

Bangladesh is an instance in point. When it came into being, it was

provided by the Provisional Constitutional Order of 11 January 1972, that there would be a High Court of Bangladesh consisting of a Chief Justice and other Judges appointed from time to time. The constitution of Bangladesh which came into force on 16 December 1972 provided for a unitary form of government. Fundamental rights were guaranteed and made enforceable through the superior Courts. There was no provision made for a Declaration of Emergency, and hence, no fundamental rights could be suspended. The power of suspension was only acquired later by the Constitution Fourth Amendment Act, 1975 – and was twice invoked.

The High Court had superintendence and control over all Tribunals and Courts – but after the Fourth Amendment (1975), superintendence was restricted only to the Courts subordinate to the High Courts. The tenure of Judges was guaranteed and extended until the age of 62 years, their independence was secured by providing that they could not be removed except by the President pursuant to a resolution of Parliament passed by majority of not less than two-thirds of the total number of members of Parliament on grounds only of proved misbehaviour or incapacity (Article 94(2)). By a subsequent amendment, the impeachment procedure was substituted by a provision for removal on a reference by the President to the Supreme Judicial Council composed of the Chief Justice and the next two senior Judges. This safeguard against removal of Judges continued to be available notwithstanding the promulgation of Martial Law in 1975.

The situation changed after the Proclamation of Martial Law on 24 March 1982. Although under that Proclamation, Judges continued to function, all writ proceedings were declared to have abated. A few days later (on 11 April 1982), the Proclamation First Amendment Order of 1982 provided that a Judge of the High Court (ie the High Court and Appellate Court divisions of the Supreme Court) could be removed by the Chief Martial Law Administrator. Paragraph 10(4) reads:

> A person holding any office mentioned in paragraph 3 (Judges) and paragraphs 6, 7 and 9 may be removed from office by the Chief Martial Law Administrator without assigning any reason.

In the past few months, three Judges of the High Court of Bangladesh have been removed from office under para 10(4) by the Chief Martial Law Administrator – that is without assigning any reason.

Under the Proclamation First Amendment Order of 1982 (11 April 1982), the Chief Justice of Bangladesh, whether appointed before or after the Proclamation, was obliged to retire from office if he had held office for a term of three years – even if he had not attained the retirement age of 62 years (proviso to para 10(1) of the Order of 1982).

The result was that Chief Justice Kamaluddin Hoosein who had been the Chief Justice for more than three years, in April 1982, automatically demitted office. The way he went does little credit to the system. On 12 April 1982, the Chief Justice was hearing a batch of cases in which several advocates were engaged; the Chief Justice was not impressed by the merits of the cases and was not inclined to grant relief to the clients of these advocates. The same would have been the fate of another client whose case was not in the batch, but was listed that day and reached later that day.

The advocate engaged in the case raised a new plea – the plea of *Coram non judice*. He said that it was reported in the newspapers that morning that the Chief Justice could not hold office for more than three years. The Chief Justice then sent for the Attorney-General (since the gazetted copy of the Proclamation of Sunday, 11 April 1982, was not available) and asked him whether there was such a provision and whether it applied only prospectively or included the present Chief Justice. The Attorney-General came and enlightened the Chief Justice that he had demitted office by reason of the Proclamation Order (No 1) of 1982. The Chief Justice rose, went to his Chamber, took off his judicial robes for the last time, and bade farewell to the advocates in the Bar Library.

The provision for compulsory retirement of the Head of the Judiciary in military regimes was not unknown in Pakistan. In September 1979, when Yakub Ali, the then Chief Justice of the Supreme Court of Pakistan displeased the authorities by granting an interim order on Begum Bhutto's petition against her husband's detention, he was also made to go – by a Presidential Order reducing the retirement age for a Chief Justice!

Some cynics say he deserved it. They cannot help recall that it was the Supreme Court of Pakistan which in October 1958 (in *Dosso's* case PLD 1958 SC 533) gave legal recognition to the Martial Law Regime which abrogated the established Constitution. The Judges with their fine intellectual attainments perceived (what one author has wryly described as) "constitutional contours in extra-constitutional actions"! They legitimised tyranny. *Dosso's* case was overruled 14 years later by the same Supreme Court when the country was in the grip of another Martial Law Regime. In *Asma Jilani's Case* PLD 1972 SC the Court ruled that martial law was illegal and the military commander a usurper. But it was too late. Constitutional transgressions had been long since recognised as law; Martial Law had become part of the legal culture of the country.

All this is a pity. In the field of liberty, the highest Courts functioning in the two wings of Pakistan had a distinguished record. They had held that in petitions for habeas corpus, the satisfaction of the detaining authority was always justiciable. Way back in 1969 they had refused to follow the wartime majority judgment of the House of Lords in *Liversidge v Anderson* delivered in November 1941. The Supreme Court of (East) Pakistan in judgments rendered in 1966 and 1967 had zealously upheld its right to scrutinise and pronounce upon the validity of every order of preventive detention. The High Court of Bangladesh inherited and preserved this tradition.

But things have not been the same in Bangladesh after the Proclamation of 11 April 1982. The fear that has beset the Judges is apparent from one of the stories I heard. It was confirmed by many advocates. About four months ago, in April this year, three successive Division Benches refused to hear a Petition for a writ of habeas corpus – one Judge saying in open Court that, "my heart trembles".

Ultimately another Bench agreed to hear the case. During arguments by petitioner's counsel, this Bench (undeterred by what Justice Cardozo called "the hydraulic pressure of events") expressed its opinion about

the illegality of the detention; when its jurisdiction was questioned, the Judges pointed out to counsel appearing for the Government that although the Constitution of the People's Republic of Bangladesh (which empowered Courts to issue writs) was suspended by the Proclamation of Martial Law (24 March 1982), the power to grant habeas corpus under s 491 of the Criminal Procedure Code remained. Counsel for the Government wisely advised a retreat. Orders for the release of the detenu were passed – and a confrontation avoided.

The basic problem in military regimes is the absence of any continuous constitutional tradition. During the period of 25 years before liberation, when what is now Dangladesh was East Pakistan, the longest period during which a democratic constitution with entrenched rights and supervisory jurisdiction of superior Courts functioned was a little over two years – from March 1956 to 7 October 1958; the only other period in this long history was when President Ayub's Constitution of 1962 with entrenched rights operated from 10 January 1964 till September 1965, when Emergency was declared.

In the People's Republic of Bangladesh itself, the working of the Constitution has been frequently interrupted by Emergencies and Martial Law – the longest period in which the Constitution and entrenched rights operated was again a little over two years (16 December 1972 to 27 December 1974). Other short periods of constitutionalism and the rule of law adding up to another two years were punctuated by intermittent periods of Emergency or Martial Law. In the 12 years of its existence, the period of constitutional government in Bangladesh has not exceeded four years. Happily, responding to public opinion, the Chief Martial Law Administrator has recently announced the abolition of Military Courts and Tribunals. A date has been set for December this year for holding national elections.

In his celebrated dissent in *Liversidge v Anderson*, Lord Atkin reminded his colleagues in that oft-quoted purple passage that in England:

> amid the clash of arms, the laws are not silent; they may be changed but they speak the same language in war as in peace.

A biography of that great Judge has just been published. In it is recorded that he once wrote to a friend that he (Atkin) believed that an impartial administration of justice is:

> like oxygen in the air; they (the people) know and care nothing about it until it is withdrawn.

Wise words. Words to ponder over – not only for the people of Bangladesh and Pakistan but for the rest of us all in this great sub-continent.

In the end, the importance of a universally accepted set of principles for the independence of the Judiciary is only this, that it makes it a trifle easier for a national Judge who is occasionally called upon (and is inclined to respond to that call) to summon up that quality which Napoleon once described as "four-o'clock-in-the-morning-courage". A Universal Declaration, or better still a World Charter of Justice – which (hopefully) is the next step after the Montreal Conference, will forge a bond amongst the Judges of the world: for Judges functioning under conditions where oxygen is in plenty, and for Judges labouring under conditions where it is rare, where at times to breathe the air of liberty requires an effort. □

Statutory interpretation

[The respondents'] argument is agreeable and compact. The Act says nothing about fraud. It says nothing about intent. It says nothing to the effect that the defendant must at least know at the moment at which the false statement was made that it was being made in a form which was different from that which was then intended. It simply says that at the moment at which the statement is made the defendant must know that the statement was false. At first sight the appellant's argument was that anticipated by W S Gilbert in *The Mikado*:

> Mikado: That's the pathetic part of it. Unfortunately the fool of an Act says: "compassing the death of the Heir Apparent". There's not a word about a mistake. [At this stage I must enter a caveat: wait and see.]
> Koko, Pitti-sing and Nanki Poo: No.
> Mikado: Or not knowing. [But see above.]
> Koko: No.
> Mikado: Or having no notion.
> Pitti-Sing: No.
> Mikado: Or not being there.
> Nanki Poo: No.
> Mikado: There should be of course.
> Koko, Pitti-sing and Nanki Poo: Yes.
> Mikado: But there isn't
> Koko, Pitti-sing and Nanki Poo: Oh.
> Mikado: That is the slovenly way in which these Acts are always drawn.

Unfortunately for the respondents, the last remark of the Mikado is not fair to the Trade Descriptions Act 1968. In that Act, there are words about mistake and having no notion.

Lord Hailsham
Wings Ltd v Ellis
(HL, judgment 25.10.84)

Law as a normative power

The legal system is not necessarily the most powerful or the most inherently correct system of norms: many people may be prepared to go to prison for the sake of their beliefs, their adherence to competing norms, but such instances are the exception. Most laws are obeyed because they are perceived as being "the Law". As with the acceptance of the authority of the State, there is probably at the very least a presumption in favour of obeying the law simply because it is the "Law". Fear of legal sanctions will certainly play a part but, given the sheer mass of laws in a complex society, there must be another explanation for obedience. It could even be argued in a perverse way that deliberate breaking of a minor law for the sake of added "spice" or excitement is an equal acknowledgment of its authority.

Lord Mackay
7th Commonwealth Law Conference

The changing basis of decision-making

Is reason sufficient?

By Principal Planning Judge A R Turner CMG

This paper was originally given as the Newnham Lecture to the Annual Conference of the New Zealand Institution of Professional Engineers at Wellington on 11 February 1985. It is also being published in the Journal of the Institution. It is a lecture of considerable interest for lawyers, more particularly for those engaged on planning matters. It describes the changes of approach by the Planning Tribunal. The author acknowledges a change in his own attitude. He says that to some extent he now sees that a technological approach to planning issues is no longer sufficient, and that in many cases, particularly those involving Maori rights, there are value judgments to be made.

Introduction

In giving this address I am conscious that I am speaking to members of a learned profession. Now, a profession is a vocation in which knowledge of some department of learning is used in its application to the affairs of others. In the practice of their profession, engineers expect to use their knowledge to produce structures of grandeur which are a tribute to their professional expertise. Engineers alter nature, and the manner in which and the urgency with which they alter nature can vary according to the circumstances of the times. I am reminded of the comment by the American engineer who said that with his country growing the way it was, he simply could not sit back and let nature take its course.

Engineers are technocrats. They believe in the application of rational and value-free scientific and managerial techniques to the natural environment, which is regarded as neutral and from which mankind can profitably shape his destiny. But professionalism is not merely specialised competence. One writer said that professionalism is a tribal ideology, and that a profession reflects the values into which its members have been socialised. A profession has its own particular attitudes and it does have its own values – attitudes and values which are not necessarily the same as those of the community which it serves.

Sometimes it is necessary for the profession to bring in a speaker from outside to learn something of what the outside world is thinking, and that I understand to be the purpose of this lecture.

First to make an important statement about values. I refer to the report of an English committee made last year. It was on the subject which is quite irrelevant to today's address. It was the report of a Committee of Inquiry into human fertilisation and embryology known as the Warnoch Committee. In the course of their report the Committee said that matters of ultimate value are not susceptible of proof. And I would like you to bear that statement in mind over the course of my address.

I am a member of the legal profession. My profession does not produce structure of grandeur, nor does it deal with the certain and inexorable laws of nature as does the engineering profession. My profession deals with the body of rules, which a community recognises as binding on its members, whether formally enacted or customary. Those rules relate to human conduct. In the past the law has dealt principally with the behaviour of human beings towards one another. But increasingly the law is becoming concerned with the way in which humans manage the physical environment in which they live. The law also regulates the manner in which, and the considerations by which, the community makes decisions affecting its well-being, decisions affecting the changes it makes to the physical environment.

My particular responsibility for the last 15 years has been with the body of law which regulates the conduct of the people of this country towards our physical and biological environment. And it is the changing basis of that law and the changing basis of decision-making under it which I wish to speak about.

It is appropriate in this introductory part of my address that I bring to your attention two further statements made in the report of the Warnoch Committee which have relevance to what I have to say. One is, that the law is the embodiment of a common moral position. The other is, that doctors and scientists (and I may add for the purposes of this address, engineers) all work within the moral and legal framework determined by society. That explains the surprise and bewilderment of some engineers when they give evidence before the Planning Tribunal. Bewilderment that something which to them is self-evident is being challenged and questioned.

Historical

I now wish to traverse some historical material, and to indicate

the path taken by the law in recent years, and important changes which have occurred. When I first took up my appointment I could properly have described my approach to the exercise of my jurisdiction as a technological one. I believed that I was required like engineers to apply rational, scientific and managerial techniques in the management of the natural environment. At that time I saw the purpose of land use planning as being to achieve an orderly and coherent system of land uses. I saw it as striving to achieve amenity, that is pleasantness, harmony and coherence in the environment in which we live; to achieve an overall sense of order between the structures we build; and to achieve a degree of harmony between the natural and the artificial.

Land use planning is not of course an exact science. There are differences of opinion as to the relationships that land uses have to one another. I expect that all of us have had personal experience of what we in land use planning call LULUs. I think LULU is an American slang word for a mistake. But in land use planning, LULU is an acronym for Locally Unwanted Land Uses. Those desirable or necessary land uses which no-one wishes to have in their immediate neighbourhood. Taverns are an example. Many people wish to have a tavern somewhere handy, but nobody wishes to live next door to one. Rubbish tips are another example. In the USA, I suppose nuclear power stations are a major LULU. Internationally, perhaps nuclear testing and the disposal of nuclear waste. Our task is to find a home for the LULUs.

Our jurisdiction in the Planning Tribunal also extends to matters of water quality and water use. The management of our natural waters is more of an exact science than the management of land uses. Questions of water quality, the prevention of water pollution, and a judgment as to whether a discharge can be made into particular waters, involve the application of science and scientific principles. And in 1970 the law in that field did not require anything more than the technological approach that I have described.

But in 1973 a small cloud appeared on our horizon. I did not recognise it as such at the time, but it is clear in retrospect. There were appeals by the Maori people and others over the water rights required for the Huntly Power Station. The power station takes water from the Waikato River, uses it for cooling purposes and discharges heated water back into the river. No other change in the quality of the water is made. The question of the extent to which the river can accept heat is highly technical and the appeals involved very detailed scientific evidence. But in the course of the case in opposition to the water rights a very respected member of the Maori community told us that according to the beliefs of the Maori people, there is a taniwha at each bend of the river and that these taniwhas are the guardians of the river.

An event with a different significance occurred the following year, 1974. That saw the first occasion on which a water right authorising the damming of a river for the purpose of electricity generation came on appeal. In determining the appeal, we ruled that the Act under which the right was to be granted was concerned with rights to water and the effect which the right if sustained would have on other people's use of that water. But the Maori owners of the land which would be flooded by the dam appealed to the High Court and the Court ruled that we had determined the matter on too narrow a basis. The High Court held that the term "soil conservation" used in the Act extends to and includes preservation of the soil for productive purposes. The Court therefore ruled that the Act required us to take into account the loss of productive land which would occur if the right to dam was upheld; and that the loss of that productive land had to be weighed against the benefit which would follow from the exercise of the right. The matter was remitted for reconsideration, and after reconsideration we held that the right should not issue; that in the circumstances the loss of productive land outweighed the benefit to be gained by electricity generation.

As you will have perceived the effect of the High Court ruling was to say that a scientific approach was no longer sufficient. A scientific approach is still required on such technical questions as are raised by a particular proposal. But where the exercise of the right involves gains and losses of resources, a value judgment is required as to the relative importance of those resources to the community.

In 1982 the High Court took its 1974 decision a stage further. In its decision over the water rights for the Clutha high dam the High Court held that the end use of the electricity which would be generated, could be relevant to the grant or refusal of rights to dam a river for electricity generation. Thus the scope of relevant considerations was widened, beyond the immediate resources to be gained or lost, to include what can perhaps properly be called "down-stream" resources.

In 1977 the Town and Country Planning Act was revised and for the first time the new Act declared that one of the matters to be taken into account in making land use decisions is "the wise use and management of New Zealand's resources". Another matter which appeared in the Act for the first time is the "the relationship of the Maori people, their culture and traditions with their ancestral land".

The significance of the first of those two provisions was touched on by the Court of Appeal in 1981. We had said that that provision does not give us a wide-ranging brief to manage all New Zealand's resources that land use planning has no control over resources once they have been taken from the land. But in proceedings brought before the Court of Appeal in relation to the Synthetic Fuel Plant at Motunui one of the Judges in that Court said that the phrase "wise use and management of New Zealand's resources" must include resources such as natural gas for producing motor fuel. So it seems that the local planning authority and the Planning Tribunal had jurisdiction to consider whether or not our natural gas should have been put to some other purpose.

Another event occurred in 1981 which is of relevance, namely the enactment of the Mining Amendment Act. That Act gave the Tribunal jurisdiction to conduct inquiries into applications for mining privileges. Among matters which Parliament requires the Tribunal to take into account under that Act are: the nature and extent

of the mineral resource in the land and its relationship to other resources and industries, and the economic, social and environmental effects of the grant of the mining privilege.

The purpose of this historical narrative is to point out to you that my original approach to the exercise of my jurisdiction is now completely out of date – that a narrow technological approach is now inadequate – that the statutes which the Planning Tribunal administers require that when decisions are being made concerning the management of our physical environment, not only shall the environmental consequences be taken into account but also the social, cultural and economic implications of the decision – and that when resources are affected to a significant degree the importance of the resources to be gained and lost must be weighed. This can be aptly described as diversification of our jurisdiction and of the factors which have to be taken into account.

But there have been changes in community attitudes as well; changes which have not been reflected in the legislation or Court decisions. I wish to mention two of them.

The first is that a large section of the community is expecting that decisions affecting the physical and biological environment will not simply choose between particular resources. These people are seeking the preservation, undisturbed, of particular parts of the physical environment. That section of the community is arguing that the statutory powers of decision-making should be used to that end. Some manifestations of this expectation can be mentioned very quickly.

One of the most significant was the movement to prevent the level of Lake Manapouri being raised as part of a hydro-electric scheme. Another was the movement to preserve the South Island beech forests, and the presentation of the Maruia Declaration to Parliament. That movement has now enlarged its objectives and seeks the preservation of all remaining native forests, for example Purerora, Waitutu and Whirinaki. In more recent years there has been pressure to preserve what are called "wild and scenic rivers". That pressure resulted in an amendment of the Water and Soil Conservation Act in 1981 and the enactment of a procedure whereby certain outstanding rivers can be identified, and for the time being protected from development.

There is the movement for the preservation of this country's remaining wetlands. There is the movement for the preservation of our one remaining unmodified geothermal system, the Waimangu geothermal area. There is the movement to protect particular land and water areas from what is perceived as incompatible development. Local bills have been sponsored to prevent mining privileges being granted on the Coromandel Peninsula and on Great Barrier Island. Two weeks ago the Prime Minister anounced that an amendment to the Mining Act will be introduced to the House by the middle of this year outlawing large-scale open case mining on the Coromandel and Otago Peninsulas.

Associated with these movements to preserve natural features is the general desire of the community to preserve rare and endangered species of wildlife. For example the black robins on the Chatham Islands and the Kokako. Also there is a desire to preserve and protect complete ecosystems.

But with some small exceptions the law does not provide for the preservation, undisturbed, of particular parts of the physical environment. In general the law still reflects the ancient common law philosophy that the owner of land is entitled to do what he likes with it.

The second change in the attitude of a section of the community is the desire of the Maori people to have their cultural, spiritual and traditional beliefs taken into account in the administration of the law relating to the physical environment.

I have already adverted to the mention in the 1973 case of the taniwhas which guard the Waikato River and I have mentioned the provision of the Act which now requires the relationship of the Maori people to their ancestral land to be recognised. The Tribunal interprets the latter provision as encouraging the Maori people to use their land for traditional Maori purposes. But that provision has raised Maori expectations far beyond the matter of the use they make of their own land. They are seeking to impose restrictions upon how non-Maoris may use land owned by non-Maoris.

In 1981 the question of water rights required for the Steel Mill at Glenbrook came before the Planning Tribunal. The mill is being enlarged in capacity and at present it draws water from an underground source. That source will be insufficient for the extended mill. The only available and sufficient supply is from the Waikato River. The steel company sought rights authorising it to take water from the river, convey it by pipeline overland to the mill, and hold it in a reservoir until required for process purposes. After use in the mill the water would be treated and ultimately discharged into the Manukau Harbour. A sincere Maori woman of middle age brought an appeal and asked that the water rights sought for the mill not be granted on the grounds that the exercise of the rights would adversely affect the cultural, spiritual and traditional relationship which the Tainui people have with the Waikato River and the Manukau Harbour. She said that the taniwha of the Waikato River is a deadly enemy of the taniwha of the Manukau Harbur and that one dare not mix the blood of one with the blood of the other. That was her sole ground of opposition to the grant of the rights. The Tribunal ruled that the Act does not allow purely metaphysical concerns to be taken into account and dismissed her appeal.

The question of Maori spiritual and traditional beliefs has recently been considered by the Waitangi Tribunal. In a report given in November 1984 on the proposal by the Rotorua District Council to construct a pipeline and to discharge treated sewage effluent into the Kaituna River, the Waitangi Tribunal said that to mix waters that have been contaminated by human waste with waters used for gathering food is deeply objectionable on Maori spiritual grounds. It also said, more specifically, that the discharge into the Kaituna River of sewage effluent, no matter how scientifically pure, is contrary to Maori cultural and spiritual values. In that report it made a recommendation to the Minister of Works that the Water and Soil Act and related legislation be amended to enable regional water boards and

the Planning Tribunal to take into account Maori spiritual and cultural values when considering applications for the grant of water rights.

But at this point it is perhaps appropriate that I remind you of the title and sub-title of this address, namely: the Changing Basis of Decision-Making — Is Reason Sufficient? Even before the Waitangi Tribunal issued its recent report the present Minister for the Environment had issued a public statement to the effect that Maori spiritual and cultural values should be taken into account and recognised in the law which regulates the use of natural water.

Discussion of these changes

The use of resources

The power to decide by judicial process which of two or more resources should be used or preserved and to decide the purpose to which a resource should be put if it is to be used, has grown up more by accident than by design. The original purpose of the Planning Tribunal was to safeguard the individual against arbitrary or unreasonable decisions by local government. Its jurisdiction has been extended to authorise it to make value judgments over the use of resources. But questions of the latter kind are not justiciable: they are not capable of final resolution by judicial process. Because they involve value judgments, there is no final indisputably correct answer.

Furthermore this jurisdiction now vested in the Tribunal suffers from a serious deficiency — it is not comprehensive. Not all questions over the use of major resources are decided that way. Neither the expansion of the steel mill at Glenbrook nor the expansion of the oil refinery at Marsden Point required an express planning consent. Both projects are authorised "as of right" by the relevant planning schemes.

In 1981 I attended a residential seminar in Cambridge, England, organised by the International Bar Association on the topic of environmental law. One of the speakers at that seminar was a London barrister who at the time was chairing a public hearing into a proposal by the National Coal Board to open up a new coal mine in a delightful part of rural England. The inquiry had lasted for six months. I made the general comment there that England has three major sources of energy viz coal, North Sea oil and natural gas, and nuclear power, and that the matter of the reliance to be placed on energy derived from one or other of those sources was largely a matter of personal choice according to one's perceptions of the degree and importance of the risks and environmental damage associated with each.

A decision on the question of which resource should be used, depends upon the values held by the community. It depends upon the esteem in which the resource is held. It depends upon the community's estimation of its worth and usefulness. It depends upon society's appreciation of the significance of the hazards involved and of the degree of environmental degradation which would be caused. Community values change over a period of time. But not only do community and personal estimations of values change, economic values change. Aluminium prices fluctuate. It is possible to switch the use of electricity overnight from one purpose to another. So I repeat that the purpose to which a resource should be put cannot be finally answered by judicial process.

Over the last few years the role of the Planning Tribunal has been allowed to become confused. Matters of national policy have become mixed with matters of land use. But if questions concerning the use of resources are not justiciable, who then should make those decisions? How should they be made? Recent governments have wrestled with that problem. None has yet found a satisfactory answer. The former government found its answer in the National Development Act. The present government intends to repeal that Act. I do not know whether it intends to replace it with something else.

It is misleading to say that decisions of that kind are political in nature, because of the overtones associated with the word "political". But when a decision of that kind has to be made, the community must first have a broad understanding of what the consequences will be, one way or the other; and the decision when made, must be seen and accepted as the right one by the majority of the members of the community.

D E Fisher, Professor of Law at Victoria University has written on that question recently. He said:

> What is required is a simple, easily understood and flexible procedure under the control of an impartial chairman who sees his function as receiving information and points of view, articulating them in his report, determining the direction towards which the information and articulated views incline, indicating the tentative conclusions to which the process directs and reporting back to the decision-maker or, where competent, making the decision himself.

It seems that although the ultimate issue is not justiciable, there should be some judicial input into the decision-making process.

The preservation of ecosytgems and rare and endangered species.

I think that everyone would agree that mankind should not change the whole of the physical environment in which he lives; that here and there representative samples of the natural environment should be preserved, unmodified.

The writers of the recently published book, *To Save a Forest: Whirinaki*, say that "a duty of care arises where parts of nature are scarce and are virtually in peril of extinction, precious to science and superb for human enjoyment. Stewardship must then involve curtailment of our purely economic expectations."

We would all agree with that statement. But how much should be preserved? Who defines scarcity? Who says what is precious and superb?

There are interest groups within our community who have decided for themselves which parts of our environment should be preserved. They seem to be somewhat intransigent, very difficult to bargain with, and unwilling to accept compromises. To them, wilderness values are irreplaceable and priceless, incompatible with the concept of multiple use.

Recently a goldminer applied for a mining licence over 140 hectares of beech forest situated in the

Maruia Valley. The area applied for is within the Victoria Forest Park, which is 177,000 hectares. In the Maruia Valley, an ecological area of about 6,000 hectares is being set aside to be preserved untouched. The 140 hectares which the miner applied for is not within the ecological area and it turned out that he was proposing to disturb no more than two hectares a year over a ten year period, and that beech tree regeneration would be certain and relatively rapid. The application for the mining licence was opposed by the Native Forests Action Council, and in evidence to the Planning Tribunal a witness for the Council said:

> The forests of the Maruia symbolise the beauty and worth of New Zealand's native forests to a great many people. These forests have a spiritual significance that has inspired and sustained the forest conservation since its resurgence in the early 1970's.

How can a judicial tribunal deal with a statement like that? Is it possible to decide objectively and scientifically just what and how much should be preserved?

Spiritual values

The suggestion that Maori spiritual values be recognised in our law is understandable. For too long decisions have been made by the dominant culture with little regard for the rights and sensitivities of minorities.

But the implications of what is suggested must be considered carefully before any change is made to the law. To take the case of the opposition to the water rights sought by New Zealand Steel. The spiritual belief that the taniwha of the Waikato River is an enemy of the taniwha of the Manukau Harbour is to attribute spiritual personality to natural features and to give those spiritual beings power to direct how human beings should conduct their affairs. It is possible that this particular belief had its origin in some natural event long past and that the Maori people have spiritualised what they could not explain rationally.

But many things which formerly could not be explained can now be explained, and to attribute spiritual personality to natural features and to give those spirits power over human activity would now be rejected by most people as sheer superstition, as merely irrational belief founded on fear or ignorance. As beliefs which restrict mankind unreasonably. We have been promised that we shall know the truth and that the truth will set us free. But perhaps some have difficulty in recognising the truth when they see it.

The law should be secular. The law should be concerned with the physical, not the metaphysical. The current philosophy is that the law should not legislate religious beliefs; that it should not require our conduct to conform to spiritual belief. It does not require that public decisions be made having regard to spiritual beliefs.

Nevertheless, although the law should be secular, there is a spiritual dimension in all the decisions we make. The spiritual dimension is concerned with relationships. Primarily it is concerned with our relationship to the creator of the universe. But it is also concerned with our relationship to other human beings and to the physical environment in which we live.

The spiritual dimension in our decisions concerning the physical environment becomes apparent when we seek answers to the simple questions – Why care for the environment? Why preserve particular ecosystems? Why protect endangered species?

When I asked a scientist once why she believed that the community should protect an endangered species, she was rather at a loss for an answer. She finally said that we should preserve endangered species in order to preserve the gene pool – that at some time in the future humanity might find some use for the genes of that particular animal. That was a technological answer – based on the possibility of the utility of the animal to the human race.

You will each have your own answer to the question: why care for the environment? But I would expect that your answer is an emotional and spiritual one rather than a rational one.

There is no biological justification for conservation. Nature will not miss the loss of another forest, the extinction of another endangered species. Nature will not grieve about the modification by man of another ecosystem. Millions of acres of forest have been lost already. There are few ecosystems which have not already been modified. Uncounted species of animals and birds have died out in past ages.

The validation of conservation lies in the human situation and in the human heart. We say that if something else becomes extinct or destroyed, the world will be the poorer. But it is only man who can make that evaluation.

The authors of the book from which I have already quoted say that the reason why we care for the environment is a values matter, that values are intuitively and emotionally felt and that they are sources of conviction which we should not apologise for.

What then is the human situation? What is mankind's relationship to the physical world in which he lives?

There are three (and only three) possible relationships. First: that mankind has authority and power over the physical environment and is answerable to no one as to how he exercises that power. Such limits as he places on his power are purely voluntary and self-imposed. The second, that the physical world has a life or spirit of its own which must be respected by mankind and which places limits on man's actions. The third, that mankind has freedom of action over the physical universe but is answerable to a higher power (the creator) for the manner in which he exercises that power.

Which of these three do you believe is the valid relationship? We all expressly or tacitly adopt one or other of those positions.

Many people in the western world tacitly adopt the first. They think and decide on the basis that there are no constraints on man's power over the physical environment. But increasingly that attitude is being called into question. It is being blamed as the root cause of environmental degradation, pollution and over-exploitation of resources. It is being called into question by the environmentalists who seek to preserve parts of nature. By those who seek to insert a spiritual dimension into our decision-making.

Many who would describe

themselves as environmentalists have been seeking a new ethic, an environmental ethic. Some of them argue that the integrity of natural ecostystems should be preserved not simply for the pleasure of mankind, but as a matter of biotic right. Nature they contend contains its own purpose which should be respected as a matter of ethical principle.

Morally, that philosophy forces man to be more conscious of his responsibilities towards nature. But this bioethical approach seems to me to be little different from the animistic belief that every tree, spring, stream and other significant natural object has its own guardian spirit which has to be placated before the object is interfered with in any way. I have already indicated that that belief is alive and well today among some people in New Zealand.

I personally reject the bioethical approach. To me it denigrates the status of mankind. It fails to give man his rightful mana and dignity within the physical world. It disregards the importance and significance of man's mind and his emotions.

For me there is only one valid relationship between mankind and the world in which he lives. That is as steward on behalf of the one who created it. The Bible says:

> The earth is the Lord's and all that is in it.
> The world and those who dwell in it.

That is my belief. The Bible records that God placed the first man in the garden of this world to cultivate it and guard it and that he put man in charge of all the fish, the birds and the wild animals. That I accept as my relationship.

I am not turning this lecture into a sermon. I have endeavoured to trace for you the changing basis of decision-making. I have pointed out that the technological approach is no longer sufficient, that in many cases value judgments are involved, that matters of ultimate value are not susceptible of proof, that some people are questioning traditional values and wish to introduce new values into the decisions which the community makes concerning the environment and the use of resources. Some are asserting that their spiritual values should be recognised when decisions are made.

I have said that the law cannot recognise spiritual values directly. But the law should be the embodiment of a common moral position, and it will therefore in some way necessarily and indirectly reflect the spiritual values, the ethical position, adopted consciously or unconsciously by the community at large. The law should reflect (not dictate) those matters of ultimate value which are incapable of proof.

I have posed the question; is reason sufficient for our decision-making in this field. My answer to that question is: no. What ingredient must be added? I suggest that the ingredient to be added is reverence.

The dictionary defines "reverence" as deep respect and veneration for some thing, place or person regarded as having a sacred or exalted character. When we come to make decisions which affect the physical environment, should we not show reverence towards the one who created the world? If you do not believe in a creator, should you not show reverence in the face of the amazing complexity, diversity, beauty and perfection of the physical environment?

I am not arguing for an abandonment of reason, but for the addition of reverence to reason. Our decisions should still be in accordance with reason. Reason tells us that we should not over-exploit or pollute our environment. Reverence tells us that from time to time a proposed development which could be justified on rational grounds should nevertheless not proceed because of the intrinsic value of the natural features which would be lost or modified.

Respect for each other may require that when there are several ways of achieving a particular objective the method be chosen which recognises the sensitivities of a particular section of the community. But alternatives are not always available.

It appears to me that what the environmental movement, and what the Maori people are asking in effect is that the community have a more caring attitude to our environment than in the past. That we make a greater effort to live in harmony with the world and less effort to dominate and exploit it. □

South Africa as ally

It is therefore inevitable that a state like South Africa, which displays her most hideous blemish in the middle of her face, should be denounced so vociferously while her tyrannical neighbours get off, on the whole, scot-free. For South Africa is our friend. In two world wars her people fought and died for our protection. In the global conflict which threatens to engulf us, she alone in the whole continent of Africa could be relied upon to take our side. It is therefore natural to feel guilty about South Africa, in a way that we could never feel guilty about the Soviet Union or China. . . .

It is probably true that blacks enjoy greater freedom, greater prosperity, greater opportunity and greater peace in South Africa than in most neighbouring countries (this seems to be implied by the constant tide of illegal black immigration). But the blemish of apartheid ensures that such virtues will never be considered. Those, like Edward Kennedy, who wash their consciences publicly in the ever abundant stream of rhetoric have found in South Africa too easy a means to put their hearts on display, and will never now be tired of so profitable a pastime.

There is, however, a deeper reason for the assault on South Africa and one which shows that, despite all our abhorrence of apartheid, South Africa is our natural friend.

You can, within limits, speak out against the prevailing oppression. Your voice will be multiplied by the press, by the Universities, and by Parliamentary discussion. Your rights will be defined in Parliament and protected by the Courts. The Courts will even protect you against the Government and when – as frequently happens – the Roman Dutch law conflicts in principle with oppressive legislation, it is the legislation and not the law that is discarded.

As a result, it is worthwhile to abuse South Africa: you might actually *achieve* something. Your voice is echoed internally and answered by those in power. By contrast you can shout at the Soviet Union till you are blue in the face and you will not change it in the smallest particular. If any Soviet citizen is rash enough to take up your cry he is at one deprived of legal protection, and harshly silenced.

Roger Scruton

The Times (2 April 1985)

The law relating to foster care in New Zealand (II)

By N A Johnston and R J Hooker

This is the second part of a two part article on "The law relating to foster care in New Zealand" the first part of which was published at [1985] NZLJ 160. In this concluding part the authors outline difficulties which foster parents face when wanting to adopt a child. The authors look at the somewhat unclear legal position of foster parents, adoption and welfare of the child, wardship proceedings, and lastly, the legalities of a ward of the Court travelling overseas with his foster parents.

Foster parents and adoption

One other alternative to afford legal status for the foster parents is for them to adopt the child. For this to be achieved the consent of the child's guardians (usually the natural parents) is necessary or an order dispensing with their consent is required. Since 1978 the Director-General has taken positive steps with making such applications to the Court and thus freeing the child for adoption. The application must however be brought in New Zealand under s 8 of the Adoption Act and the welfare of the child is only an issue if the Court finds the factual basis on which to support making an order.

This position must be contrasted to England where the ground is that of the parents in unreasonably withholding their consent. The Court, in considering this ground, has been able in England to consider that the interests of the child are whether a reasonable parent, would, taking into account the welfare of the child, give his or her consent to the adoption of their child. Usually the Department has relied on the ground "that the parent has failed to carry out the duty and care of parenthood", which is characterised by a failure to show a close attentive part in the nurturing of the child. All but two of the applications brought by the Department have been successful.

As in the case of *P v Director-General of Social Welfare* (supra) actions of Departmental social workers, particularly if found to be inappropriate or unfair, can have a bearing on the Judicial decision. A recent example of this was a decision of Judge Bremner in *Director-General of Social Welfare v H* (unreported District Court, Upper Hutt MFP 784/82) where the Court dismissed the application.

Most of the applications have been made where the child in question is already with foster parents, has formed familiar ties, and where the foster parents intend to apply to adopt the child if the application is successful.

The rights and interests of the foster parents in such cases have been regarded by the Courts as legally relevant. As far back as 1974, His Honour, Mr Justice MacArthur J in *K v E* [1974] 2 NZLR, quoted with approval the well known speech of Lord Simon in the English House of Lords a case of *O'connor v A and B* [1971] 1 WLR 1227 – 1236:

> The volunteers to perform a social duty primarily imposed on others who are unwilling themselves to perform such a duty acquire therefore a right to be considered, and once they actually enter on the performance of responsibilities twoards the child acquire thereby a further right to be considered.

In the subsequent High Court decision of *E v M* (unreported, High Court, Wellington, 13 September 1979, Jeffries J), a landmark decision in this area for foster parents, His Honour, in the course of a judgment in which he carefully reviews the authorities and dispenses with parental consent to adoption, also specifically recognised at p 9 the rights of the foster parents in this type of case. Furthermore, he said at p 13:

> A has now been in the care and control of Mr and Mrs E for five years in which time she has grown from a young baby into a child of nearly eight years. They are her parents in every way excepting biological. She has emerged into consciousness as a human being knowing no others in this role. There is no period in the life of a human being which exceeds that in the influence it exerts upon a adult. There is no period in the life of a human being which exceeds that in the influence it exerts upon an adult. There is not a scintilla of criticism of the manner in which the appellants have performed this role, and they now wish to seal it with an adoption order. It is noteworthy that the respondents used the satisfactory nature of the care of A by the E's as a reason at times for not communicating with her. In the period after 1976 when the guardianship order was made with the long term plan that A return by 1978 because the M's did nothing, or next to it, the same was not happening in the relationship between A and her foster parents. It was strengthening and developing to the point that to disrupt it now would, in my view, be unthinkable. The respondents would do well to weigh this aspect before giving into feelings of betrayal on the part of the Department.

Adoption and the welfare of the child

The narrowness of the grounds and the inability of the Court because of the legislation to look at the welfare of the child in the area of adoption have however been major obstacles to promoting this field. The authors, as Departmental legal advisors, while

not commenting on the social work view that a child should be adopted have often had to advise not to bring an application to dispense with the parents' consent before the Court simply because the focus is not on the welfare of the child but on the degree of parental failure or inadequacy. There have been a large number of files seen by the authors where the parents have constantly exercised access and shown interest in their child but will never be in a position to adequately care for their child themselves. Their adoption in the face of parental opposition will never be achievable regardless of its social work merits. The only legal option is therefore guardianship and custody as discussed before.

Challenges by foster parents to Department decisions have however been infrequent. That is not to say that a basis for judicial challenge does not exist but that foster parents seldom lack either the legal or financial or emotional support to take the matter to Court. Indeed the authors regularly see cases where foster parents could rightly challenge the decision of the social workers but have not done so.

New Zealand, being a member of the Commonwealth and a common law system is guided by the decision of the English Courts. Foster parents have, in England, in general terms, at least on the reported decisions, been generally unsuccessful in challenging local authority decisions concerning children in the care of the local authority. The House of Lords in *A v Liverpool City Council* [1982] AC 386 finally stamped the criteria that the English lower Courts had been formulating in previous decisions, namely, that the Court should not use its inherent jurisdiction to make a child a ward of Court where the child is in the care of the local authority unless the local authority is acting in breach of its statutory duty or in bad faith or requires powers in addition to those afforded to it by the legislature.

In New Zealand the High Court has generally accepted those restrictions but it seems has gone beyond a total restrictive application. Three cases demonstrate that proposition. In each case the High Court removed the child from the care of the Director-General of Social Welfare. In *M v M* (1982) 1 NZFLR 136 the foster mother of the child (also the child's aunt), born 2 August 1979, sought to have the child placed under the guardianship of the High Court and herself appointed agent of the High Court, with the child in her care. The child had earlier been placed under the guardianship of the Director-General of Social Welfare, by order of the Children and Young Persons Court on 12 November 1980. The foster mother had initially applied to the Family Court for guardianship and custody orders but this application was dismissed hence the application to the High Court. The Director-General wished as guardian to place the child with foster parents with a view to the eventual adoption of the child by those foster parents. In determining the case Mr Justice Ongley stated:

> It is only in exceptional circumstances that there will be any justification for the Court exercising its wardship jurisdiction so as to interfere with a decision of the Director-General of Social Welfare, made in the exercising of the discretion given him by statute. The High Court in New Zealand is in the same position vis à vis the Director-General as the Family Court of the High Court is in England in relation to a local authority exercising its statutory function in the care and protection of children. It is proper that the restraint observed in English Courts in exercising this jurisdiction should also be observed in New Zealand. Cases may arise involving an excess of powers under the legislation affecting children and young persons. Conceivably, bad faith could be shown on the part of an officer purporting to perform his function under the legislation. The Court's powers may in particular circumstances be supplemental to those of the Director-General. It is not desirable to categorise too strictly the circumstances in which wardship might be appropriate though a guardianship order already exists under the Children and Young Persons Act 1974. If it had been intended by the legislature that this ancient jurisdiction deriving directly from the sovereign was to be ousted by the statute which codifies much of the law dealing with the care and welfare of children, it would have been so provided in explicit terms. The jurisdiction remains in the Court though its exercise must be tempered to accommodate those detailed statutory provisions which are clearly intended to prevail where they are exercised in good faith and within the proper limits of the discretion given to the Director-General by the statute.

His Honour Mr Justice Ongley found no basis to meet the criteria, it being only a challenge to the merits of the decision by the Director-General.

The applicant subsequently appealed to the Court of Appeal, *M v M* (1983) 2 NZFLR 270. The Court of Appeal did not hear the case until almost 18 months after the High Court decision, the child remaining in the interim with the foster parent. The relationship between the applicant and the child had "consolidated" and there had been a change in the attitude of the social worker, namely that she now supported the placement since to remove the child would cause considerable psychological damage that she doubted the child would successfully withstand given its earlier life. The Court of Appeal observed that the Children and Young Persons Act under which the Director-General operated was concerned with "under-privileged or deprived children" (p 506) whereas the Guardianship Act under which the applicant filed her proceedings was concerned with "the status and rights generally of children and their parents or guardians who might be appointed to care for them". Recognising that aspect and the changed attitude of the Director-General, the Court of Appeal could find no reason for the Director-General to continue to be involved in the care of the child. Accordingly, the child was placed under the guardianship of the Court and the foster mother was appointed Agent of the Court.

Wardship proceedings

A similar approach was taken by the High Court in a further unreported decision in *G v the Director-General of Social Welfare* (unreported. Auckland, High Court, Sinclair J).

Wardship proceedings were taken in May 1981 by the foster parents when the social workers had decided to remove the child from the foster parents. The proceedings were initiated to stop that decision being implemented. For a variety of reasons the proceedings were not heard until early 1984 and then Mr Justice Sinclair, having made the child a

Ward of Court in an earlier hearing (February 1984) appointed the foster parents guardian of the child and placed the child in the custody of the foster parents reserving access to the natural parents. The wardship order was then discharged, leaving the Director-General with no status in relation to the child.

The other leading New Zealand authority in which foster parents have challenged the decision of social workers by use of the High Court's wardship provisions is *In the Guardianship of S* (1983) 2 NZFLR 65.

S was born in December, 1972 and on 31 May, 1976 he was placed under the guardianship of the Director-General of Social Welfare by order of the Children and Young Persons Court. Since the guardianship order the Department had placed S in 14 different foster homes. The applicants had successfully fostered another boy who had behavioural problems and sought to foster S, their request being declined by the Department. They sought to have the child made a Ward of the High Court and placed with them. His Honour the Chief Justice in his judgment set out ss 3, 4, and 49(4) of the Children and Young Persons Act which provide as follows:

> 3. Objects of Act — The objects of this Act are —
>
> (a) To promote the well-being of children and young persons by assisting individuals, families and communities to overcome social problems with which they are confronted.
>
> (b) To promote the welfare of the family to reduce the incidence of disruption of family relationships, and to mitigate the effects of such disruption where it occurs.
>
> 4. Interests of child or young person paramount — Any Court which or person who exercises in respect of any child or young person any powers conferred by this Act shall treat the interests of the child or young person as the first and paramount consideration to the extent that this is consistent with adopting a course calculated to —
>
> (a) Secure for the child or young person, such care, guidance, and correction, as is necessary for the welfare of the child or young person and in the public interest; and
>
> (b) Conserved or promote as far as may be possible a satisfactory relationship between the child or young person and other persons (whether within his family, his domestic environment, or the community at large).
>
> 49(4) The Director-General shall have the responsibility for providing care, protection, education, training, and control for every child or young person placed under his care by agreement in accordance with Section 11 of this Act or by order of the Court under Section 31 of Section 36 of this Act, and to this end may authorise any social worker to arrange placements in foster care, institutions, and employment and to make other arrangements.

He concluded that:

> on the evidence before me that there has been a failure by the Director-General through his Department to fulfil the purposes of the Act, at least in the case of S. The Department has not provided him with the care, protection, education and training which he was entitled to expect and has not, in my view, placed the welfare of S as the first and paramount consideration (p 75).

The Chief Justice therefore ordered that S be placed under the guardianship of the High Court and be placed with the applicants. The High Court clearly referred in the case of *In the Guardianship of S* to the objectives of the Children and Young Persons Act and the Director-General's duty. It would seem therefore implicit that the High Court was prepared to examine the Director-General's track record on any foster child's placement and the failure to provide appropriate social work services.

In response to this decision the Department conducted an inquiry into the handling of the case (The Hegge Report).

The authors have also been involved in and they are currently awaiting decision from the Court on several other cases in which foster parents have challenged decisions of the social workers including one where grandparents are seeking custody of a child where the social worker has taken complaint proceedings concerning the care and welfare of the child pursuant to the provisions of the Children and Young Persons Act. The foster parents have no standing to be heard in the Children and Young Persons Court and as they had cared for the child most of its life, the child aged three, they instituted High Court proceedings.

The Director-General has, however, taken some legal initiatives on *behalf* of foster parents. The Wardship case referred to earlier as *Director-General of Social Welfare v B* (1980) and the area of dispensation of parental consent to adoption are two examples. But there are others.

Travelling overseas

In two cases, the Director-General has initiated Wardship action in the High Court to obtain High Court approval for long-term foster children to travel overseas with their foster parents when their foster parents have decided to reside overseas. Each has been vigorously defended but the Court has held that it was in the child's best interests that it should stay with the foster parents to whom it was psychologically attached. One of these cases has been reported as *Re an application by Director-General of Social Welfare* (1982) 1 NZFLR 111. It concerned Rosemary who was aged nine at the time of the hearing and had been with the foster parents since aged 4½. At p 114 *Roger J* quoted the evidence of child psychiatrist, Dr Zelas, in a passage which has since been referred to in a number of other cases.

> The evidence, and particularly that of Dr Zelas established that there was what was referred to as "a bonding" between Rosemary and her foster parents. Dr Zelas described it in these terms:
>
> Bonding or attachment as it is also known is a reciprocal process which takes place between a child and its caretakers. It's a two-way emotional attachment which transcends cupboard love but is demonstrated by all the personal interaction which takes place round the day to day caring for a child. Such bonding is necessary for the personal growth and development of a child and can influence not only the personality growth and behavior but even the physical growth. It has been shown that such bonds are not the

function of blood ties, but of length, continuity and quality of care by a parenting person. Significant bonding therefore occurs in most long term foster care situations particularly when children have been placed with a foster family at four or five years of age. When such bonding occurs one can speak of the caretakers as being the child's psychological parents. Disruption of such bonds cannot be affected without severe risk to the child's development. It is to the child a catastrophe of the same magnitude as suddenly being orphaned. This process has been conservatively proposed by Goldstein as being a period of 12 months long term care for a child up to the age of three years at placement and 24 months for a child placed from the age of three years and upwards coupled with an express wish by the foster parents for the child to remain with them permanently. Rosemary I understand was placed with the foster parents' family at 4½ years of age and they have expressed a strong desire for Rosemary to remain in their family including at some stage a wish to adopt her. As to whether it is possible for a child to have dual bonding or degrees of bonding with two separate families, it is and one has to make a decision about the most important ties from the point of view of the continuing development of the child. In my opinion in this particular case the weight of bonding is associated with the continuity of the caretaking of the child and that her psychological parents at this stage are in fact the foster parents. A disruption of this relationship would be the same thing as for another child having her parents die or abandon her.

In another case, also defended, the High Court, in Wardship, on application by the Director-General, authorised a ten-year-old State Ward to go to Australia with foster parents already residing there at the time of the hearing. The foster parents had never had Lisa in their home for anything other than holidays and weekends, during which time they had become extremely attached to her and vice versa. The foster father had received a transfer on promotion to Australia. The child wished to go. There was never any prospect of the natural parens resuming care of the child. The Judge found, after hearing further expert evidence, that it was in the girl's best interests to go. The child has apparently flourished in her "new family" in Australia and makes the odd trip back to New Zealand to have some contact with her natural parents.

The Director-General has also applied successfully in Wardship to:

(a) Keep a child the subject of a s 11 agreement with its foster parents.

(b) Keep a child in substitute voluntary agency foster care while the foster parents completed (successfully) an application to dispense with the consent to adoption of the natural mother.

In both situations, the foster parents had no legal security at all.

Conclusion

In summary therefore, the writers consider that the New Zealand legislation has afforded foster parents inadequate rights or standing in the Court either to be heard in the process of litigation or to achieve status in relation to their child. The New Zealand Courts have often taken the initiative in promoting the best interests of foster children in litigation in which the foster parents have either been parties or have had an interest. Where foster parents have challenged or achieved status it has often been an expensive process, both in terms of finance and emotion. These and the many other legal issues in foster care need critical examination in any forthcoming legislation in areas such as Guardianship, Adoption, Juvenile Delinquency and neglected or abused children. □

continued from p 183

to that result, but rather because the Judges believe that to open the way for judicial review of decisions such as those discussed would be to open the floodgates to great volumes of litigation by persons affected by the system of criminal justice. By maintaining the attitude that the Courts do not have jurisdiction to entertain those kinds of proceedings all such applications may be nipped in the bud. They are able to be summarily disposed of on an application to strike out. So as soon as the Courts admit the *possibility* of reviewing such a decision, even if only in an extreme case, the way is opened, at least partly, for applicants to file their proceedings, to insist upon a hearing and to have their day in Court. Admittedly that is a somewhat cynical conclusion. But it is to be hoped that, if the opportunity does arise for the New Zealand Court of Appeal to state its views, it will do so in terms which will leave less room for such cynicism.

To set the prosecutorial function, in particular, above the law without adequately explaining why, is to invite a cynical response. If there are strong reasons for hedging the Attorney-General about with a special immunity from review then let the reasons be articulated clearly and let the immunity rest upon those reasons. But if the immunity can be justified only by an appeal to outdated judicial precedents then those precedents should be abandoned and replaced by a more rational approach based upon principles which can be shown to be consistent with the rule of law. □

1 See: W S Clarke, "Judicial Review of the Discretionary Powers of the Attorney-General of Hong Kong in the Conduct of Criminal Proceedings" (1983) HKLJ 133.

2 But see Clark, supra n 1 at 135. See also Devlin, *"The Criminal Prosecution" (1960)* at 17; Marshall, *Constitutional Theory* (1971) at 25-27.

3 Supra (unreported High Court, Auckland 7 November 1983 (A 383/83)); and see also the casenote by M Taggart at [1984] NZ Recent Law 197.

4 "The Law Officers and S 77A: A Postscript", [1979] NZLJ 129.