THE NEW ZEALAND
LAW
JOURNAL
21 OCTOBER 1985

The game's the thing

Rugby players and administrators around the world must sometimes feel that their sport is unfairly treated over the issue of playing with South Africans. The reason of course is that rugby is such an important sport in South Africa. If someone wanted to go there for a darts tournament there would not be the same degree of passionate concern on the part of those opposed to apartheid. Within our type of democratic society sport is largely a voluntary and privately organised activity. But the sporting bodies themselves must of course act within the law, both public and private. Consequently it is not surprising that decisions by sporting bodies, rugby ones in particular, have led to legal questions being raised about South African tours. There are comments on the recent New Zealand case at [1985] NZLJ 221, and on an Irish case at [1985] NZLJ 220.

There has recently been a House of Lords decision on a situation that arose in England last year as a result of a rugby tour of South Africa. The case of *Wheeler v Leicester City Council* [1985] 2 All ER 1106 raised a number of different legal issues of considerable importance in the field of administrative law. The case is particularly noteworthy for the restraint that the House of Lords put on the exercise by a statutory body of a power of punishment by administrative action. In April 1984 three members of the Leicester Football Club (despite its name it is a rugby club and not a soccer club) were invited to join an English team selected to tour South Africa. They accepted the invitation which was not contrary to the rules of the club nor of the Rugby Football Union.

The Leicester City Council through its leader Mr Soulsby sought to discourage the tour and asked the club to endorse its anti-apartheid stand and put pressure on the three players not to tour. Mr Soulsby at a meeting with club officials supplied four questions to the club and indicated that affirmative answers were required to each question. The club replied that it disapproved of apartheid but that it was not unlawful for the players to go, which they did.

The club in its letter to the Council before the tour stated that:

> the club join with the council in condemning apartheid but recognise that there are differences of opinion about the way in which the barriers of apartheid can be broken down ... the club, having read the memorandum to the RFU prepared by the anti-apartheid movement, and accepting the serious nature of its contents, have supplied copies to the tour players and asked them to seriously consider the contents before reaching a decision whether to tour. The club are and always have been multi-racial.

This did not satisfy the Council which after the tour banned the club and its members from using a recreation ground for which it had a licence and which it had used for training and club matches.

Forbes J at first instance, and the Court of Appeal (Browne-Wilkinson LJ dissenting) had upheld the action of the Council mainly because Leicester has 25% of its population who are of either Asian or Afro-Caribbean origin, and local authorities are required by s 71 of the Race Relations Act 1976 to promote good relations between persons of different racial groups.

Lord Templeman began his opinion bluntly:

> My Lords, in my opinion the Leicester City Council were not entitled to withdraw from the Leicester Football Club the facilities for training and playing enjoyed by the club for many years on the council's recreation ground, for one simple and good reason. The club could not be punished because the club had done nothing wrong.

His Lordship then went on to describe the factual situation as being that the club itself could not be said to practice racial discrimination, and that it had not been guilty of any breach of the Race Relations Act 1976. The club had stated that it did not support apartheid and did not support the decision of the three players to go to South Africa on tour. Indeed Lord Templeman said, the club had sought to discourage the players by sending them copies of the reasoned memorandum that had been published by groups opposed to the tour.

Against this background Lord Templeman then went on to make what could well become a classic and much quoted statement on freedom in the area of administrative law:

> The council does not contend that the club should have threatened or punished the three club members who participated in the tour of that the club could properly have done so. Nevertheless, the club has been punished by the council, according to Mr Soulsby, for "failing to condemn the tour and to discourage its members from playing". My Lords, the laws of this country are not like the laws of Nazi Germany. A private individual or a private organisation cannot be obliged to display zeal in the pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority.
>
> The club having committed no wrong, the council could not use their statutory powers in the management of their property or any other statutory powers in order to punish the club. There is no doubt that the council intended to punish and have punished the club.

Lord Templeman was careful at the end of his judgment to emphasise that this case which was decided on its factual situation could not be interpreted to mean that a public body such as the Leicester City Council was under an obligation to permit the use of its property by a racist organisation or any other organisation that by words or actions breached either the letter or the spirit of the UK Race Relations Act 1976.

In the Court of Appeal [1985] 2 All ER 152 Ackner LJ and Sir George Waller had found in favour of the Council as had Forbes J at first instance. Ackner LJ looked at the matter mainly from the point of view of the reasonableness or otherwise of the decision of the Council. His view needs to be quoted in full as it appears at p 155:

> Can it be said in the circumstances of this case that no reasonable local authority could properly conclude that temporarily banning from the use of its recreation grounds an important local rugger club, which declined to condemn a South African tour and declined actively to discourage its members from participating therein, could promote good relations between persons of different racial groups? (see the well-known *Wednesbury* test: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). Forbes J was at pains to point out, as I certainly would wish also to do, that Courts are not concerned with the merits of the two rival views, no doubt equally honestly held, as to the value of severing sporting links with South Africa. I am fully prepared to accept that, even amongst those who feel strongly that sporting links should be severed, there may be some who could take the view that the club acted wholly reasonably in the action it took and should not have been expected to go further. But to accept the mere existence of such a school of thought does not establish that the council's decision was perverse and this is what the club is obliged to do to succeed under this head. Nor is the club's case advanced by emphasising that the council were imposing a sanction against members of the club for refusing publicly to indorse the reasonable views of the council and thereby interfering with the club's freedom of speech. The view which the council held as to the importance of severing sporting links with South Africa had clearly been fully considered by the council well before the events of 1984, and in view of the make-up of the population of the city it was a view which understandably was very strongly supported. It represented no more than that clearly recorded in the Gleneagles Agreement. In my judgment it would be quite wrong to categorise as perverse the council's decision to give an outward and visible manifestation of their disapproval of the club's failure, indeed refusal, "to take every practical step to discourage" the tour, and in particular participation of its members.

In his judgment agreeing with Ackner LJ, Sir George Waller expressed himself as having had difficulty in answering the question whether the Leicester City Council had acted in accordance with the principles laid down in *Associated Picture Houses v Wednesbury Corp.* He then went on:

> The club had done what it thought was right. The club consists of many members who may have different views about many things. The club can insist that members obey the rules of the club and there may be other unwritten rules which must be obeyed. But how far it can go in influencing what members do in their spare time is another matter. On the other hand, the council represent a population with a substantial proportion of citizens of Afro-Asian origin and they are concerned with the promotion of good relations between different racial groups. The council had asked for pressure to be exerted and it had not been. Were the council just to let it pass, or ought they to do more? . . . The purpose of the 1976 Act was to improve relations between different racial groups in this country and the council are entitled to have this in mind when exercising their discretion to grant a licence. If the Leicester Football Club accepted an invitation as a club to go to South Africa and as a result the council decided to refuse the club a licence, such a decision would be one with which it would be difficult for the court to interfere. The question which has concerned me is whether the position is the same when three distinguished members of the club go. Is it reasonable to punish the club for failing to try to stop them? If this country can freely enter into an agreement to "combat the evil of apartheid by taking every practical step to discourage contact . . . with sporting organisations . . . from South Africa", it is difficult to see how it could be unreasonable for a council in the position of Leicester City Council to take the steps which they did, even though a number of innocent members of the club would be affected. I have come to the conclusion that it is not possible to say that the decision of Leicester City Council was so unreasonable that no reasonable authority could ever have come to it. I would, therefore, dismiss this appeal.

This point of the *Wednesbury* test was dealt with rather cautiously by Lord Roskill in the House of Lords at p 1111 of his judgment. He said:

> None of the judges in the courts below have felt able to hold that the action of the club was unreasonable or perverse in the *Wednesbury* sense. They do not appear to have been invited to consider whether those actions, even if not unreasonable on *Wednesbury* principles, were assailable on the grounds of procedural impropriety or unfairness by the council in the manner in which, in the light of the facts which I have outlined, they took their decision to suspend for 12 months the use by the club of the Welford Road recreation ground.
>
> I would greatly hesitate to differ from four learned judges on the *Wednesbury* issue but for myself I would have been disposed respectfully to do this and to say that the actions of the council were unreasonable in the *Wednesbury* sense. But even if I am wrong in this view, I am clearly of the opinion that the manner in which the council took that decision was in all the circumstances unfair within the third of the principles stated in *Council of Civil Service Unions v Minister for the Civil Service.* The council formulated those four questions in the manner of which I have spoken and indicated that only such affirmative answers would be acceptable. They received reasoned and reasonable answers which went a long way in support of the policy which the council had accepted and desired to see accepted. The views expressed in these reasoned and reasonable answers were lawful views and the views which, as the evidence shows, many people sincerely hold and believe to be correct. If the club had adopted a different and hostile attitude, different considerations might well have arisen. But the club did not adopt any such attitude.
>
> In my view, therefore, this is a case in which the Court should interfere because of the unfair manner in which the council set about obtaining its objective. I would not, with profound respect, rest my decision

on the somewhat wider ground which appealed to Browne-Wilkinson LJ in his dissenting judgment.

As it stands this extract can be said to raise certain problems of interpretation as to the *ratio decidendi.* In his dissenting judgment Browne-Wilkinson LJ had posed the central question as being whether in their administration of public property a local authority could use its general powers to punish those with different views. His Lordship quoted from Watkins LJ in *Verall v Great Yarmouth BC* [1981] 1 QB 202 and from Denning LJ in the same case in the Court of Appeal [1980] 1 All ER 839, [1981] 1 QB 202. These two quotations both spoke strongly about freedom of speech as a constitutional right. Browne-Wilkinson LJ made the point that the constitutional freedoms of the person and of speech are not rights conferred by statute, but exist as fundamental constitutional norms except to the extent that they are partially prohibited or restricted. He therefore concludes at pp 158/159 that:

> When Parliament confers general discretionary powers on public authorities it cannot in general be taken to have contemplated that such discretions can be exercised by taking into account the lawful views of those affected by the exercise of the discretions or their willingness to express certain views. If in exercising such discretions these factors have been taken into account, the exercise of the discretion is unlawful since a legally irrelevant factor has been taken into account.

It is difficult to see what Lord Roskill is objecting to, particularly in the light of the quotations given above from the speech of Lord Templeman distinguishing the laws of England from those of Nazi Germany. Lord Roskill specifically states that he agrees with the views of Lord Templeman.

The other problem with the extract from Lord Roskill's speech given above is the case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935. That case is cited by Lord Roskill as classifying three sets of circumstances in which a Court will interfere, being illegality, irrationality and procedural impropriety. Lord Roskill then goes on in the extract given above to identify this third principle of procedural impropriety with the Leicester City Council going about achieving its objective in an "unfair manner".

The *Civil Service* case concerned the decision of the Government to exclude staff at an intelligence headquarters from being members of an outside trade union. There could only be an in-house staff association. In explaining the term "procedural impropriety" in that case, Lord Diplock said that it covered the observance of the basic rules of natural justice, failing to act with procedural fairness, and failure to observe prescribed procedural rules in the statute conferring jurisdiction. It will be noted that the word fairness does appear in Lord Diplock's classification; but with respect it is extending the concept of "procedural fairness" a long way by equating it with acting in an "unfair manner". This latter term as used by Lord Roskill appears to be getting close to identifying the question of procedural fairness with the fairness or otherwise of the result achieved.

The approach of Lord Templeman, which at least appears to be similar to that of Browne-Wilkinson LJ, is surely to be preferred. The question at issue was whether there was an abuse of power by seeking to use it in the particular circumstances of this case as a punishment for exercising lawful freedom, and not merely using an "unfair manner" of going about things in a procedural sense.

In all this there is an echo of the problem of the exercise of the powers of statutory bodies that has been before the New Zealand Courts recently in such cases as *Webster v Auckland Harbour Board* [1983] NZLR 646, and *NZ Stock Exchange v Listed Companies Association Inc* [1984] NZLR 699. These cases were discussed editorially at [1985] NZLJ 169 and dealt with the issue of a public body exercising its powers through administrative or contractual actions. The factual circumstances were of course quite different, but there is a similarity in the problem of how the matter should be approached. In the *Stock Exchange* decision, as distinguished from the *Webster* case, the Court of Appeal held that "it was fallacious to equate the actual conduct of a statutory body within its statutory sphere with the *exercise of a statutory power*".

Whether the judgment of Lord Roskill or that of Lord Templeman in the *Wheeler* case is taken as the yardstick Their Lordships would appear to have made no such distinction. The Leicester City Council may have had power to cancel or not renew a licence to use its grounds, but its actual conduct was considered by Their Lordships to be very relevant in determining whether the Courts could review what was on the face of it an administrative decision, and to reverse it because it was in some way to be categorised as unfair to the body affected.

In one sense what is involved in the *Wheeler* case, as most clearly seen in the judgment of Ackner LJ and Sir George Waller on the one side, and of Browne-Wilkinson LJ and Lord Templeman on the other, is a shift in perspective. Is the issue to be looked at from the point of view of the local body as to its powers, or is the proper viewpoint that of the private individual or organisation unfairly affected? Both Browne-Wilkinson LJ and Lord Templeman looked at the freedom of the subject, whereas Ackner LJ and Sir George Waller could be said to have concentrated their attention on how the local body exercised its authority. Just to emphasise that there is a danger in trying to make too rigid a distinction between these two approaches, the speech of Lord Roskill somehow seems to come to the same end result as Lord Templeman and Browne-Wilkinson LJ, while appearing to approach the matter from the powers of the local body point of view.

Perhaps the judgment of Lord Roskill can be best understood as a further example of a great change of emphasis that is taking place in the law. There appears to have been a marked shift from concentrating on the nature of the act or conduct complained of, to the end result achieved. It is most clearly illustrated in the way in which the term "negligence" has been replaced by the term "fairness" as the most popular one in current jurisprudence. Negligence can be said to refer to what was done by someone, whereas fairness relates more to the result for the party affected by what was done. This was analysed by J Cadenhead in his article " 'Negligence' in pursuit of fairness" at [1984] NZLJ 262. In Lord Roskill's judgment we would appear to have procedural impropriety in pursuit of fairness.

The *Wheeler* case and others all go to show that from a lawyer's vantage point there is more to the law and rugby than just keeping an eye on the ball and playing the game.

P J Downey

Injunctions and rugby tours: The Irish experience

By Vincent J G Power, BCL (NUI) LLM (Cantab)

In this short article, Vincent J G Power, BCL LLM, lecturer in law at University College Cork, Ireland recalls the Irish experience of trying to secure an injunction to stop a rugby tour of South Africa — a matter of considerable controversy here in New Zealand at the moment.

The recourse to injunctive relief to stop rugby tours to South Africa is neither new nor confined to New Zealand. The Irish High Court heard in 1981 an application by an Irish citizen for an interlocutory injunction to be granted to restrain the President and Secretary of the Irish Rugby Football Union (IRFU) as well as other members of the touring party, from travelling to South Africa (*John Lennon v Robert Ganley, Robert Fitzgerald* High Court (1981), reported in *Irish Law Reports* [1981] 84). The injunction, if granted, would also have restrained the defendants from associating themselves with Ireland by using the term "Irish" as a description of the party; adorning the shamrock; using the Irish tricolour flag or being present where the Irish National Anthem was played. The plaintiff contended that the proposed tour by the defendants was a breach by them, of the Irish Constitution and international law, as well as an infringement of his own constitutional rights.

O'Hanlon J dealing with the case in the days before the Irish Courts adopted the *American Cyanamid* test, Spry, *Equitable Remedies* (3 ed) 445, did not consider that there was either a substantial question to be tried or a breach of the Irish Constitution by the touring party. He said:

> If the IRFU were sending a team to play in any other country but South Africa it does not appear that the plaintiff would allege that they were entitled to describe it as an Irish team, or to have the fixture announced as one in which "Ireland" was taking part, or to act in any of the other ways he seeks to restrain by reason of the fact that the fixtures are taking part in South Africa. The defendants, and the players who are participating in the tour, have a prima facie constitutional right to travel abroad for the purpose of taking part in sporting fixtures in other countries as well as in Ireland if they wish to do so. They should only be restrained from exercising such right if it was in some way unlawful for them to act in the manner in which they seek to act. (p 85)

Nor did he accept that there was a breach of international law:

> . . . I accept that there has been widespread international condemnation of the practice of apartheid and racial discrimination. Accepting for the purposes of the argument that such practices constitute a breach of a basic norm of international law, it still falls short of saying that any State which maintains links, be they trading, diplomatic, sporting, or of any other kind with a country where apartheid is practised, is itself in breach of international law. I know of no rule of international law which compels a state to cease to have anything to do with a State where apartheid is practised, or even with a State which invades another State by force of arms and subjects it to its rule. Consequently I do not consider that the IRFU by maintaining sporting links with South Africa is in breach of international law by permitting trading relations to continue and be maintained with that country. (p 85)

The plaintiff who had delayed his application, was also unable to make out a prima facie case that any particular damage to his own rights or interest would:

> take place as a result of the tour, over and above the damage which he says it will cause to the good name of Ireland in the international community and to her trading links with some other countries. He does not contend that he has any economic interests personal to himself which will be affected in any way, nor does he suggest that he has any present intention to travel abroad to Africa or elsewhere in the foreseeable future and that his plans for doing so will be affected. (p 85)

A major stumbling block to the obtaining of any injunction is the question of enforceability of the order while the defendants are outside the jurisdiction of the Court (Spry, p 329), and this was sufficient to prevent the Irish Court from granting the injunction, as it would be "contrary to legal principle for the Court to make an order where it has no means of supervising the enforcement of the order, and calling in aid if need be the executive arm of the State to secure obedience to its decree, (Spry, p 86). Thus it may be concluded that even if the granting of such an injunction was in conformity with *moral principle* the ineffectiveness of the law meant that the Court could not grant the injunctive relief sought. This is, is not, the great divide which all of us face — the divide between law and morality? □

The Tour

By David Baragwanath, QC, of Auckland

The High Court decision to grant an interim injunction postponing, but not cancelling, the proposed All Black rugby tour of South Africa in July has been the cause of considerable political and newspaper comment. Most of this was misguided and some appeared to be malign. It was certainly an emotional issue. In this article David Baragwanath QC critically analyses the legal implications of the decisions on the question of standing, and subsequently on the interlocutory application. In each decision, he concludes, the reasons given might have been differently expressed if the Court had had more time for consideration. The problem, he suggests, is the principle that the Court will not make a declaration in the abstract — to deal, in other words, with hypothetical cases.

The background

New Zealand is one of the two great rugby playing nations in the world (the Welsh would say three); the other is South Africa. Following the bitterness of the Boer War – New Zealand's first instalment on its acquisition of independence – there followed an era of common membership of the old Empire and then the initial Commonwealth: Canada, Australia, South Africa, New Zealand, the United Kingdom and Colonies. The relationship was personified by Field Marshal Smuts: the Boer General, Oxford intellectual, lawyer and statesman who was Churchill's close military and political adviser for much of the Second World War. Common campaigning in North Africa and Italy was a further close bond between New Zealand and South Africa. For both colonial nations rugby appealed to the need for hard contact sport and competition which is deep within the national psyche of each. New Zealand has never won a series in South Africa; to the rugby player it is the Everest of his sport.

For many enthusiasts this simple picture has never altered. The defeat of Smuts' party after the war, the coming to power of the authors of apartheid, the systematic reduction of non-whites to a servile role, the oppressive Pass Laws and other analogues of Hitler's Nuremburg Race Laws – so eloquently described by Sydney Kentridge at the 1978 Auckland Triennial Conference – are seen as South Africa's problem rather than New Zealand's. Why, it is said, should sportsmen not play with South Africa when, after all, only some 30 of the 160 odd members of the United Nations are free nations; we trade and play sport with as many as possible; the invasion of Afghanistan still continues and yet the fleeting disapprobation of the Moscow Olympics has long evaporated: it was a great disappointment that the Communist bloc for the most part kept away from Los Angeles. There is undoubtedly something of a double standard. It was as recently as 1963 that Martin Luther King Jr wrote the devastating "Letter from Birmingham City Jail" – the classic indictment of racism within the USA – of which few New Zealanders have ever heard. New Zealanders with some 50% of our prison population consisting of the Maori people, who make up only 12% of the population overall, are in no position to be complacent.

To acknowledge a double standard is, however, no justification for doing nothing to seek some improvement. It has become increasingly clear that sporting boycotts of South Africa *have* had significant effect; even if the main apparatus of apartheid is still in full force. There has therefore developed in recent years a powerful body of world opinion that the evils of apartheid – in truth an institutionalised form of slavery – should be attacked by this means. The Gleneagles Agreement, to which New Zealand is party, requires its signatories to take all measures within their constitutional power to bring such pressure to bear.

In 1981 the then National Government, rejecting the approach of the previous Labour administration, granted visas for the Springboks to tour New Zealand. (Whether it is constitutionally open to a New Zealand Government to refuse any New Zealand group the right to invite visitors into New Zealand – in the absence of fear of civil disruption – and if so, in what circumstances, are matters which have received surprisingly little attention.) The tour was disapproved by many New Zealanders. A large number exercised their right of lawful protest; others elected to arm themselves, place glass on football fields, and resort to various forms of violence. There was considerable difference of opinion throughout the community and great bitterness – whether against:

> hypocritical lawbreakers who in the name of protecting civil rights in South Africa are depriving New Zealanders of theirs at home,

or against:

> selfish and insensitive tour supporters who ignore both the political damage to New Zealand throughout the world and the plight of the oppressed in South Africa.

Such was the background to the proposed All Blacks' tour of South Africa in 1985.

The Opposition

Conditions in South Africa had altered very little since 1981. While some limited franchise had been accorded to the so-called "coloureds", the predominant black population remained without political rights and subject to

physical and emotional abuse, leading with considerable frequency to frustration, reaction and not uncommonly, the death of black Africans. There was risk that the tour itself would inflame the problems. Accordingly considerable opposition to the proposed tour was expressed within New Zealand. The Government informed the Rugby Union that the tour would infringe the Gleneagles Agreement; a unanimous resolution of the House of Representatives urged the New Zealand Rugby Union not to proceed with the tour, and the Prime Minister made vigorous pleas to the same effect. The Rugby Union, in circumstances which require further consideration below, decided to proceed.

A group of Auckland lawyers, headed by Ted Thomas QC, thereupon considered what legal means might be available to stop it. The theoretical possibility of promoting legislation for the purpose was rejected: not only would it infringe the common law rights of New Zealanders to leave New Zealand at will — *Parsons v Burk* [1971] NZLR 244, 245 — but it would breach the express terms of article 12 of the International Covenant on Civil and Political Rights to which New Zealand has acceded. Instead they focused on the suggestion of Rod Hansen — that the lawfulness of the Rugby Union's conduct according to its own rules should be examined.

The Rules of the NZRFU

The New Zealand Rugby Football Union (Incorporated) is incorporated under the Incorporated Societies Act 1908. Like any artificial legal person its powers are limited by its empowering provisions, which in the present case include the following rules:

Objects

2 The objects of the Union shall be:
- (a) To control, promote, foster and develop the game of amateur Rugby Union Football throughout New Zealand.
- (b) To arrange international, trial and any other matches and tours which the Union may consider desirable. . . .
- (c) To do such other things as the Council may consider desirable to promote the interests of Rugby Football.

The standing point

The group of lawyers decided to challenge the tour decision on the grounds that the tour would infringe R 2(a). But to do so required the participation of plaintiffs with such "interest" in the proceedings as would be recognised as giving them standing to sue. Patrick Finnigan and Philip Recordon, as members of rugby clubs, themselves members of the Auckland Rugby Union, in turn affiliated to the New Zealand Rugby Union, took the bold step of authorising the use of their names as plaintiffs and subsequently giving the undertaking to accept personal responsibility for all losses by the NZRFU which was required in order to obtain an interlocutory injunction pending the trial of the action.

The NZRU applied to the High Court for an order striking out the proceedings on the ground that the plaintiffs lacked standing. The application succeeded before the Chief Justice who considered that:

> Where a local member is not a member of the New Zealand Rugby Union or is not deemed to be a member through the rules of any intermediary union and has pleaded no claim to be affected in any way by the decision of the New Zealand Union then he has in my view, no cause of action against the New Zealand Union to challenge a decision made by that Union.

On appeal, the Court of Appeal reversed the standing decision: its judgment is currently under further appeal to the Judicial Committee of the Privy Council. Whether alleged unlawful conduct by the NZRU can be restrained by grass roots club members, or only by its affiliate regional Unions is a question on which views may legitimately differ, as is apparent from the difference between the Chief Justice and the Court of Appeal.

Professor Wade *Administrative Law* (5 ed 1982), p 577 states:

> *The problem of standing*
> It has always been an important limitation on the availability of remedies that they are awarded only to litigants who have sufficient locus standi, or standing.
>
> The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies. No one else will have the necessary standing before the Court.
>
> In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to any one in particular. If no one has standing to call it to account, it can disregard the law with impunity. An efficient system of administrative law must find some answer to this problem otherwise the rule of law breaks down.

The Court of Appeal listed a series of factors as contributing to its decision to reverse the decision of the Chief Justice. The first of these was:

> Although not having contracts directly with the parent Union the plaintiffs as local club members are linked to it by a chain of contracts. They are part of the structure of the whole organisation. They are at grass roots level; but it is the players, who are all at that level, for whom basically the organisation exists. This at once distinguishes club members from mere followers of the game or other members of the public. Nothing in our judgment is intended to suggest that people in the latter categories could sue the Union on a complaint that it had acted contrary to its objects.

This reason taken alone, does no more than modify to a limited extent

the standing requirements of private law: the plaintiffs as members of the group of natural persons nearest to the artificial person of the NZRFU – although separated from it by the intermediate artificial legal person of the ARFU – should be permitted to seek redress against threatened conduct which is wholly outside the objects of the NZRFU and thus could not be ratified by it or its affiliates.

In *Turner v Pickering* [1976] 1 NZLR 129 at 141 Casey J recognised that there had been a liberalising of the Court's powers to intervene in the affairs of voluntary societies and stated:

> They have gone past the limitations of financial, commercial or employment interests which earlier authorities required the plaintiff to show before being entitled to the Court's assistance. It seems to be now established that the plaintiff can have enforceable rights of a contractual nature brought about by his membership of a voluntary association, including the right that its affairs will be conducted honestly and bona fide in accordance with its rules.

The former test of some private right of a proprietary character was superseded by the test of enforceable rights of a contractual nature. It may be contended that the Court of Appeal's decision does no more than shift the boundary peg a little further in conformity with its duty on occasion to modify the common law to do better justice.

More controversial is the further reason for recognising the plaintiff's standing – the public law analogy. As will be seen, this suggestion was of major significance in the later decision of Casey J. The Chief Justice had in essence characterised the standing issue as one of private law. The Court of Appeal however, gave as a factor in its judgment that the plaintiffs had standing:

> While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power – although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.

The decision primarily relied upon by the Court of Appeal as supporting its decision on standing was that of the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617. In that case, which was for judicial review pursuant to RSC Ord 53, the two claims for declaration and mandamus against the Board of Inland Revenue were described by Lord Wilberforce as to be considered:

> For present purposes, on the same basis, since a declaration is merely an alternative kind of relief which can only be given if, apart from convenience, the case would have been one for mandamus.

Their Lordships rejected "the heresy" that an application for such relief depended upon "a legal specific right to ask for the interference of the Court", adopting a remark by Professor Wasde in his fourth edition that if such test were correct "mandamus would lose *its public law character*, being no more than a remedy for a private wrong": per Lord Scarman at p 653. (emphasis added)

In that public law sphere the Court applies a broader standing test which:

> cannot . . . be considered in the abstract, or as an isolated point: it would be taken together with the legal and factual context. The rule requires sufficient interest *in the matter to which the application* relates . . . it does not remove the whole, and vitally important, question of locus standi into the realm of pure discretion. The matter is one for decision, a mixed decision of fact and law, which the Court must decide on legal principles . . . . (per Lord Wilberforce at p 630-631) (emphasis added)

Lord Diplock expressed the position as follows:

> Rules of Court made under these sections are concerned with procedure and practice only; they cannot alter substantive law, nor can they extend the jurisdiction of the High Court. But in the field of public law where the Court has a discretion whether or not to make an order preventing conduct by a public officer or authority that has been shown to be ultra vires or unlawful, the question of what qualifications an applicant must show before the Court will entertain his application for a particular kind of order against a particular class of public officer or authority seems to me to be one of practice rather than of jurisdiction. It has been consistently so treated by the Courts over the past 30 years.
>
> The rules as to "standing" for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges; by judges they can be changed, and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded. Those changes have been particularly rapid since the 1939-1945 war. Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today. (pp 638/639)

Their Lordships therefore expressed themselves plainly as addressing the issue of locus standi in public law.

It is implicit, and, in Lord Scarman's case, explicit, that the position is *different* in private law where the plaintiffs must possess a

personal legal right in order to have standing to sue.[1] There is thus a powerful argument that the Court of Appeal's characterisation of the Rugby Union's function as falling into an area between public and private law – and particularly outside private law simpliciter – was essential to this ground of its decision.

Whether such characterisation is correct is considered in the discussion of Casey J's judgment in the High Court which to a significant extent depends upon it.

Faced with the urgent need to give judgment almost immediately the Court of Appeal added a reason controversial even on an application of public law standards:

> In its bearing on the image, standing and future of rugby as a national sport, the decision challenged is probably at least as important as – if not more important than – any other in the history of the game in New Zealand.

While the importance of any decision bears heavily on the exercise of a discretion to grant or refuse declaratory or injunctive relief in respect of it, it may be doubted whether it goes to standing to sue if Lord Wilberforce's explicit rejection of the discretionary test is accepted. Lord Fraser also rejected it, although he appeared to recognise room for exceptional cases. Lord Diplock on the other hand spoke with approval of an "unfettered discretion in the Court to decide what is a sufficient interest" p 639; the Court of Appeal may have preferred Lord Diplock.

Given the importance of maximum certainty as an element of the Rule of Law (2) Lord Diplock's concept of discretion as to whether a right to sue will be recognised, as distinct from Lord Wilberforce's preference for judgment according to settled principles, is unattractive for the reasons given by Lord Wilberforce in *Small Businesses*. While a standing decision at public law may entail a mixed decision of fact and law, that decision should, it is suggested, be on the basis of specific legal principles.

It is not plain whether a particular principle in Lord Wilberforce's sense was applied by the Court of Appeal, or whether it preferred Lord Diplock.

It is by no means plain just what principle in Lord Wilberforce's sense was applied.

A similar comment may be made on the further reason – that:

> The decision affects the New Zealand community as a whole and so relations between the community and those, like the plaintiffs, specifically and legally associated with the tour. Indeed judicial notice can be taken of the obvious fact in the view of the significant number of people, but no doubt contrary to the view of another significant number, the decision affects the international relations or standing of New Zealand.

This certainly goes to discretion once standing is established, but hardly to standing, unless standing itself is treated – despite Lord Wilberforce – as discretionary. It is of course possible that these factors are treated as pushing the characterisation of the cause of action from private law, with its rigid standing requirements, to public law, which is less exacting. But if so, the reasoning is left to be inferred.

The Court of Appeal gave as its final reason for conferring standing on the plaintiffs the following:

> As a result of the disturbances accompanying the 1981 South African tour of New Zealand many citizens, including normally law-abiding citizens, were alleged to have gone too far when indulging in protest activity. The importance of preserving law and order was rightly stressed. The Courts applied the law impartially. There were numerous prosecutions many of them successful. It is now no less appropriate that the lawfulness of the Union's decision under its own constitution to arrange the proposed tour should be open to test in the Courts.

It may be that this factor is no more than an emphatic addition to factor 1 – the attractive proposition that private law should be developed by the judiciary so that there is no Alsatia. It cannot have been intended as a general liberalisation of standing at public law which would open the flood gates so far as to inundate the decision in *Gouriet v Union of Post Office Workers* (1978) AC 435, although Lord Diplock in the *Small Business* case confined *Gouriet* to the private law sphere, and thus advocated a considerable rise in water level.[3]

The Court of Appeal described its decision upon standing as a final one – not an interlocutory judgment. As a result the High Court was bound to find that a right to sue *did* – not *might* – exist. But the specific basis of the decision was not stipulated but left to be inferred from the Court's list of factors.

The High Court was as a result required to draw an inference as to why the plaintiffs had standing, which had not been specifically spelt out.

As a result of the Court of Appeal's decision the plaintiffs were of course permitted to pursue the action on its merits.

The High Court decision

The High Court action came on for hearing on 8 July before Casey J in the Wellington Court. On day three counsel for the plaintiffs confirmed that – as had been indicated in opening as a possibility – the hearing would not be concluded before the team was due to depart. They accordingly applied for an interlocutory injunction: to restrain the NZRFU and its councillors (including their servants and agents) "from proceeding with the proposed tour by the All Blacks of South Africa until such time as this action has been determined".

The interlocutory injunction is a remedy in every day use by the High Court in many centres within New Zealand. Its purpose is to preserve the rights of the parties until these can be fully investigated by the Court after the full hearing and the delay which this must commonly entail. Its disadvantage is that the injunction can itself cause injury – to the party against whom it is ordered: the mirror image of the failure to make the order, when the opposite party may be irrevocably injured. According to who eventually wins, the Court may be damned whether it does or does not issue an interlocutory injunction.

The Courts approach this problem by considering it in stages.

First, does the plaintiff have an arguable case? Secondly, if so where is the balance of convenience to be struck between the interests of the defendant if an injunction is wrongly issued, and those of the plaintiff if it turns out to have been wrongly refused?

The Court of Appeal had held that the plaintiffs had sufficient interest in whether the NZRFU failed to comply with its objects to be able to sue to restrain it from breaching them. The first question was logically a double one:

(i) what test does the law apply to whether there is threatened breach;
(ii) what did the evidence suggest was the answer to that test?

The first limb had been left open by the Court of Appeal and it therefore had to be considered by Casey J without opportunity to reflect at leisure upon his decision; the hearing continued into Saturday 13 July and an oral decision was required the same day because of the imminence of the team's departure. The burden placed on the Judge was quite unreasonable; whether a lesson can be learned for the future is considered below.

Casey J first considered the test commonly applied when questions arise whether a company or its directors are alleged to have acted beyond their powers: did the Council members act honestly and in good faith in furtherance of the fundamental object of controlling, promoting, fostering and developing the game of amateur Rugby Union Football throughout New Zealand. There are two elements of that test:

(i) The objective one of whether the tour could possibly be in furtherance of the objects;
(ii) The subjective one of whether the Council were motivated not by the objects but by extraneous considerations.

The judgement does not in terms address the former element but passes directly to the latter. It may not have been arguable that the tour could not possibly be in furtherance of the objects; whether the evidence did arguably go so far is not the subject of any finding.

As to the subjective element, the judgment finds that the evidence:

> Demonstrated an arguable case that when (the Council's minutes and records) are read as a whole, a pattern emerges of the majority of council deliberately shutting their eyes to the reality of the widespread and responsible public concern over the tour. And in doing that they closed their eyes to any genuine consideration of its effect on the welfare of rugby. In counsel's words, they became sidetracked into a defence of the right to choose those with whom the Union would play and a refusal to capitulate to threats or intimidation. . . . I reach this conclusion acknowledging that questions of the good of rugby were certainly raised at meetings, and both the Council and Mr Blazey (the Chairman) received a great volume of submissions and met delegations.
>
> The tenor of the discussion at the 30 May meeting about whether to accept the invitation seems to show a determination not to play into the Prime Minister's hands rather than any genuine desire to listen to what he had to say. On Mr Blazey's intimation that if he used the words "require and direct" the tour not to take place he would accept the decision . . . a letter was written by council in that point, and also asking the Prime Minister to state how New Zealand would be harmed by the tour. . . . The Deputy Prime Minister replied in a letter which contained clear confirmation of the Prime Minister's statement that the tour must not proceed, as amounting to "the directive, instruction or command" which the Rugby Union has said in the past it would respect. . . .
>
> In a memorandum to the Council on 9 April dealing with this letter Mr Blazey drew attention to the fact that the direction or command had no legal backing and that anything he said in 1981 to this effect could not be taken as a commitment for the future. . . . These remarks sit uneasily with his remarks noted at the meeting of 30 March. . . .

But the judgment finds only that there was a case that the Rugby Union had *shut their minds* to public concern and its effect on rugby; not that they *lacked honest belief* that the tour *was* in the interests of rugby, or that their decision was for some extraneous reason *other* than their own perception of what was in the interests of rugby. To close one's mind in this way may well be unreasonable, but it is another matter to say it involves bad faith – and nor did the Court so find. The conclusion is consistent with the opposite – a wholehearted belief that the tour was very much in the interests of rugby, and to capitulate to pressure to stop the tour would be to act contrary to the interests of rugby.

It may be that Casey J considered that the evidence *did* establish an arguable case of bad faith, but at a stage where no factual judgment could be made, as a matter of humanity couched his oral reasons for judgment in terms more protective of the Rugby Union's reputation than was strictly appropriate in law.

It would therefore be unfair to say more than that on the *expressed* reasons it is therefore suggested that His Honour was in error in treating these findings as constituting "an arguable case in respect of the decision based on the normal test of good faith applicable to voluntary and incorporated societies".

What had been found rather satisfied a quite different test – that applicable to decision makers exercising *public* functions, such as statutory bodies and tribunals. Whether any such test was appropriate for the Rugby Union was something possibly hinted at by the Court of Appeal in its decision on the plaintiffs' standing. ("This case falls into a special area where, in the New Zealand context a sharp boundary between public and private law cannot realistically be drawn.")

Casey J turned to this possible different approach in a later part of his judgment:

> I feel I must have regard to the unique importance of this decision in the public domain and the effect it could have on New Zealand's relationships with the outside world and on our community at large . . . such a situation required (the Union) (or any other in a similar position)

to exercise more than good faith in reaching its decision; *it must* also *exercise that degree of care* which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectation of the public.

Broadly speaking, on this basis *the Council must* act *reasonably* as well as honestly, paying regard to relevant considerations for the benefit of New Zealand Rugby and must not be influenced by irrelevant matters in its decision. The effect is to strengthen the case which I have found may exist under the less onerous view of the Council's obligations previously discussed. I do not agree with (counsel for the Union) that by reaching this conclusion I have placed the plaintiffs in a better position than somebody whose standing arises under contract only. It is the nature of the decision and the elements of great public interest which give rise to *this extra obligation to be careful* in reaching it, not the relationship of the person who wants to see it observed. (emphasis added)

Several points require considerations:

(i) When and why does a private sporting body become subject to the obligations of statutory bodies?
(ii) What is the nature of those obligations?
(iii) Is the decision correct on the facts found by the Court.

The decision to characterise the NZRFU as exercising functions which subject it to public body standards of conduct is of immense importance. There can be no total distinction between bodies who are subject to public law remedies and those who are not. The criminal law is public law par excellence; the rule of law requires that all be subject to it — public and private alike. The public policy which recognises the general interest of permitting all citizens to seek work within their own area of qualification or experience accounts not only for the concept of unlawful restraint of trade but for the developing "right to work" which will be enforced against any body which controls admission to a particular sphere of work: *Stininato v New Zealand Boxing Association* [1978] 1 NZLR 1.

There is a substantial argument for characterising certain of the Rugby Union's functions in this way. There can be little doubt that the Court would apply *Stininato* by analogy to give relief against unjustified blacklisting of a player wishing to play what is in many ways the national sport, even though as an amateur sport no-one can earn a living by playing rugby.

It is however, a long step to treat the NZRFU as having become generally subject to civil public law remedies: for it to lose a private body's constitutional entitlement to act unreasonably is a consequence of considerable dimensions. There is no close analogy to assist the application of standard techniques of judicial lawmaking; there must be a significant prospect that the decision will not survive future scrutiny in this or similar jurisdictions without qualification. Casey J should never have had to deal with such an issue without ample time for reflection, and the procedures which required that of him demand urgent reappraisal.

The second point is also one of difficulty. Settled principles of administrative law required that a statutory body act "reasonably"; but in a very restricted sense of that word. "Unreasonable" in this sense means:

(a) The body took into account in its decision some material consideration which it was legally wrong to consider;
(b) It failed to pay regard to a mandatory consideration (*Associated Provincial Picture House Limited v Wednesbury Corporation* [1984] AC 14)
(c) The decision is inexplicable except on the basis that the body has misconceived its functions (*Edwards v Baristow* (1956)

The fact that many or most people would regard any decision as in fact quite unreasonable does not affect its legal validity: *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL).

The right to decide is not that of the Court, which may consider the decision one it would never have made and thus "unreasonable" in that sense, but of the body. The Court can intervene only if it is *unlawful*; and many decisions "unreasonable" by the standards of a critic are perfectly lawful: *Secretary for State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. In the present case Casey J found that:

> The plaintiffs are on strong ground when they say that such an attitude spread so widely among all sections of the community must inevitably tarnish the image of the game and lead to a drop in support and interest and a reduction in potential players . . . It is not my task to resolve these issues at this stage. All I say is that on the material before me the plaintiffs have established what I consider to be a strong prima facie case that the decision and tour will not promote, foster and develop the game in this country.

There was clearly an arguable case that on an application of the *Wednesbury* test the NZRFU failed to pay regard to what must have been a mandatory consideration — whether the strong opposition to the tour would make a decision to tour contrary to the best interests of rugby. The decision could on this basis have been remitted to the Union for reconsideration according to law with or without an interlocutory injunction. If the further decision were then to tour it would none the less be lawful. Alternatively, if, as the Chief Justice considered on the evidence before him the decision on reconsideration would inevitably have been to proceed, the discretion might have been exercised against requiring reconsideration although the Court will be very slow to accept the contention that "the result is obvious from the start": compare the natural justice case of *John v Rees* [1970] Ch 345 p 402. But the Court did not follow this route.

Nor did the High Court expressly find an arguable case that no decision to tour could possibly be reached by a Union acting unlawfully. While the judgment found "a strong prima facie case that the decision and tour *will not* promote, foster and develop the

game in this country" it did not in terms conclude that the *Edwards v Bairstow* test was arguably satisfied. It may be Casey J considered that such a conclusion must follow, in which event the decision would be "reasonable" in the restricted sense described above. But as expressed the judgment describes the *Court's* conclusion, which is by no means the same as what the *Rugby Union* could have legitimately concluded and in the absence of an express conclusion to this effect the proper inference may be that the decision was not in fact unlawful as being "unreasonable" in the relevant sense — however foolish it may in fact have been.

Nor, *pace* the High Court, was there any legal duty enforceable by law to act with greater *care* as Casey J considered. The duty to exercise that duty of care which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectation of the public entails "unreasonableness" in any conventional sense only when there is a *tort* claim — for injury for the personal interests of the plaintiff — as in the developing tort of negligent exercise of statutory power: *Takaro Properties v Rowling* [1978] 2 NZLR 314 (CA).

The introduction of the concept of care into the test of lawfulness of a decision to tour is, it is submitted, inappropriate. Careless or careful, the Rugby Union either was or was not entitled to tour, and it could not acquire or lose that power by acting casually or after deep thought. It is submitted that this part of the decision is erroneous.

A further point arises at the stage of the balance of convenience or hardship. The judgment states:

> On balance only between (the parties), if I do not grant the injunction the interests of rugby which the plaintiffs are seeking to protect are likely to be affected by the tour going ahead, but to what extent is necessarily speculative and long term. The available evidence suggests no immediate drop in numbers which could be attributed to this decision or the tour. I have already pointed out that the plaintiffs cannot show any personal detriment of a material kind, and they can still proceed with their action for a declaration.

It continued to consider the consequences if the injunction were granted, which included: " . . . a real possibility that it might not take place . . ." as was in fact the result.

Casey J concluded that the factors pointing in favour of the tour "would weigh the balance . . . against the grant of the injunction sought". But the injunction was nevertheless issued:

> in the wider sphere of the exercise of my discretion. . . . The interest of the public and of the nation in not having the tour go ahead is a most potent factor. That interest has been recognised by the Court of Appeal. The tour is contrary to a clear direction from the Government because of the harm it would do to our national interests; to the unanimous resolution of Parliament for the serious harm it would do to New Zealand interest at home and abroad; and to the spirit of the Gleneagles Agreement to which the country is fully committed. There is also the risk of violence and bloodshed — even loss of life — to black Africans so eloquently testified to by Mr Stofile.

On the basis that there was indeed an arguable case, these are legally relevant and factually powerful and telling points in favour of the exercise of the discretion in favour of the injunction.

It is perhaps a pity that constraints of time did not permit Casey J to answer in advance the ill-conceived, inaccurate and constitutionally offensive personal attacks on the Judge which followed the judgment.

Far from paying undue respect to the views of the Government, the Judge was bound by constitutional convention to accept its advice as to what are New Zealand's international obligations; specifically as a result of its being party to the Gleneagles Agreement. It would be both indecorous and unlawful for Her Majesty's Judges to adopt some policy as to foreign affairs at odds with the policy of Her Majesty's Ministers whose function it is to make and administer such policies: *Blackburn v Attorney-General* [1971] 2 All ER 1380. (It may be doubted whether the Resolution of Parliament had any greater significance than as evidence of public disadvantage if the tour proceeded: it possessed no legal status.)

It does not follow that having been informed of such policy the Court was bound to give judgment so as to promote it; the present case was concerned with New Zealand domestic law and the statement of public policy as to foreign relations was simply a factor among others to be weighed, although in the circumstances a potent one.

Once again, further time would have permitted the Judge to spell out that the decision had nothing to do with the common law right of New Zealanders to leave this country but was solely to do with the lawfulness of the Union's conduct in terms of its rules.

Conclusion

It is suggested that the Court of Appeal decision as a judgment in private law is correct, although including propositions of public law not necessary to the decision which may present problems for the future. Perhaps it would have been expressed a little differently, given further time for reflection. Whether the High Court's conclusion in private law was correct is unclear as the test stated was not specifically applied. Various of its conclusions at public law are less than specific, or a matter of controversy.

Overall, the pressures on both Courts were nothing short of deplorable, in view of the fact that the intention of the Union to tour had been well known for years. It is possible that with adequate time to consider the matter further the Judge would have reconsidered his decision; it is certain that an opportunity to appraise the whole of the evidence for and against the claim and to reserve judgment, with the opportunity for either party then to go to the Court of Appeal, would have been both fairer to His Honour and less productive of speculation, in such an important matter, of what might have been, so far as the losing party was concerned.

As the judgment points out, the responsibility for the rush is not that of the plaintiffs, who acted promptly once the actual decision

continued on p 228

Case and Comment

What is the effect of crossing a cheque "account payee only"?

Two High Court judgments on the same point delivered within five weeks of each other come as a surprise. The coincidence becomes remarkable when both actions are by finance companies against the same bank (although not the same branch), and both arise from frauds connected with the purchase of second-hand trucks. From the legal point of view, the two decisions are interesting because they involve a point not hitherto litigated in New Zealand and because they come to different decisions on the basis of similar facts. The question before the Court in both cases was whether a bank is liable if it credits the account of a customer with the proceeds of a cheque on which someone else is named as payee and which has been crossed "not negotiable account payee only". The widespread use of that crossing makes the point an important one.

The first of the two judgments to be delivered was that of Hillyer J in *Commercial Securities & Finance Ltd v ANZ Banking Group Ltd* (High Court, Auckland, judgment 14 August 1984, A 591/82). The fraud was carried out by a Mr Robinson, who owned a company called Auckland Cartage (1976) Ltd. He arranged finance from Commercial Securities & Finance Ltd, ostensibly on behalf of two of his employees, to enable them to buy trucks from the company. In fact, the employees were Mr Robinson's sons-in-law, and the trucks were already subject to instruments by way of security. The finance company drew three cheques for the amounts to be advanced, all made out to Auckland Cartage (1976) Ltd and crossed "not negotiable account payee only". The cheques were endorsed on behalf of the payee and Mr Robinson paid them into the account of Alf Wyatt Ltd, another company owned by him, whose business had been taken over by Auckland Cartage (1976) Ltd. The finance company never received the ownership papers of the trucks, which were later repossessed by the holders of the instruments by way of security. It obtained a judgment against Mr Robinson for fraud, which remained unpaid, because Mr Robinson became bankrupt and the company went into liquidation.

The action against the bank was for conversion of the cheques. It was clear that conversion had taken place. Since the cheques had been obtained by fraud, the finance company remained the true owner as drawer and the bank's action in collecting the proceeds for an account other than the payee's was to the company's detriment. However, a bank can escape liability for conversion in such circumstances if it can bring itself within the ambit of s 5 of the Cheques Act 1960, which requires it to establish that it had acted "in good faith and without negligence". No question of any lack of good faith arose, so that the only issue was whether the bank had been negligent. It is generally accepted that the onus of proof is on a bank seeking the protection of the section, so that the bank had to show that it had not been negligent. The evidence established that the bank had made no inquiries as to the ownership of the cheque at all, and that its own manual of instructions directed staff to carry out certain procedures which were intended to clarify the question of title to cheques in these circumstances. Evidence was given by a senior officer of another trading bank that it was common practice for inquiries as to a customer's title to cheques crossed "not negotiable account payee only" to be made, whenever these were deposited into an account other than the payee's. There was also some evidence that Alf Wyatt & Co Ltd was known to be in financial difficulties.

The decision was that the bank had been negligent, which meant that it was unable to claim the protection of s 5 and was therefore liable for damages for the loss caused by its conversion of the cheques. The disobedience of the manual of instructions was not seen to be crucial to the decision that there had been negligence, although it was a factor to be taken into account, but more weight was attached to the evidence which indicated that the bank had not acted in accordance with established banking practice. The other factor which was considered to be

continued from p 227

to tour was announced. Nor is the Union fairly to be criticised for the timing of the announcement; no-one is required to make decisions at a time suiting the convenience of those who would like to obstruct them.

The problem, it is suggested, is the principle that the Court will not make a declaration in the abstract: in the present case, before the actual decision to tour was made. It is suggested that the Rules Committee be invited to consider whether in such cases there should be a discretion in the Court to entertain an action, notwithstanding that no right is immediately in jeopardy; with the corollary that a plaintiff who fails to take advantage of the opportunity will not be heard to complain if the Courts do not drop all other business when the crisis duly emerges.

The pressures on the Courts and the parties, the possibility of error through haste and the unfair criticism of a respected Judge would, it is hoped, have been avoided if such procedures had been in place. □

1 The very distinction between public law and private law has been much debated and challenged. As to that issue, which is beyond the scope of the present comment, see Harlow: *"Public" and "Private" law; Definition Without Distinction* (1980) 43 MLR 241; Samuel *"Public and Private Law: Private Lawyers in Response"* (1983) 46 MLR 558; Merryman "The Public Law – Private Law Distinction in European Law" (1968) 17 *Journal of Public Law* 3; and the Symposium on the public-private law distinction in American law in (1980) 130 UPaLR 1289-1609.

2 Finnis *Natural Law and Natural Rights* Clarendon Press (1980), p 270.

3 See Nott *The Use of the Relator Action in Present Day Administrative Law* (1984) PL 22.

important was the "account payee only" marking. The judgment relies on passages in Bright, *Banking Law and Practice in New Zealand* (2 ed) p 163; *Halsbury's Laws of England* (4 ed) vol 3, p 99; Chorley, *Law of Banking* (6 ed), 133 and in the judgment of Scrutton LJ in *Underwood v Bank of Liverpool* [1924] 1 KB 775, 793, all of which indicate that English authority accepts that such a crossing places an obligation on the collecting bank to make inquiries whenever a cheque with an "account payee only" crossing is lodged not in accordance with the drawer's instructions, ie in an account other than the payee's, and that a failure to do so amounts to negligence.

The judgment of Davison CJ in *New Zealand Law Society v ANZ Banking Group Ltd* (High Court, Wellington, A 224/83) was delivered just over a month later, on 21 September 1984, which meant that the earlier judgment was not available before a decision was reached. The fraud in this case was carried out by a solicitor, Mr Calkin, who was also a director of a company called Tina Colliery Ltd. He obtained finance from Broadlands, which he said was for the purchase of two trucks by the company from Meyer Freightlines Ltd, another company with which he was involved. Broadlands was to become owner of the trucks and then sell them on hire purchase to Tina Colliery Ltd. Mr Calkin handed over completed hire purchase agreements and registration certificates showing the company as owner, in return for two cheques representing the purchase price of the trucks, which were made out to "Tina Colliery Ltd or order" and crossed "not negotiable account payee only". Mr Calkin paid the cheques into his trust account, from which he then misappropriated the proceeds. It was later discovered that the trucks were owned by the Australian Guarantee Corporation, which had sold them on hire purchase to another company with which Mr Calkin was involved, Mid Island Transport Ltd, which had not paid for the trucks. The registration certificates were false and the guarantees on the hire purchase agreements forgeries. Broadlands made a claim against the Solicitors' Fidelity Guarantee Fund, which was settled by the Law Society on the basis that any rights which Broadlands might have against the bank were assigned to it.

Again, it was clear that the bank had converted the cheques, no question of any lack of good faith on its part arose and the issue which remained to be resolved was whether it had been negligent. However, this time the decision was that there had been no negligence, which meant that the bank could rely on the statutory defence to escape liability for the conversion. As in the *Commercial Securities* case, there was no evidence that the bank had made any inquiries before crediting Mr Calkin's trust account with the proceeds of the cheques. Since it was the same bank, the same manual of instructions directed that inquiries should have been made, but there was one important difference in the facts. The cheques had been paid into a solicitor's trust account and there was evidence which established that it was current banking practice in New Zealand for banks to collect the proceeds of cheques made out to others for the credit of solicitors' trust accounts without making any inquiries, even if the cheques are crossed "not negotiable account payee only".

The judgment places the same importance on the manual of instructions as did the earlier decision, ie, that it was a factor to be taken into account, but that disobedience of those instructions did not necessarily mean that there had been negligence. However, there was a difference in the importance attached to current banking practice. It was considered to be relevant, but the issue of negligence was decided using a different approach, which was derived from a recent decision of the Privy Council concerning the negligence of a solicitor: *Edward Wong Ltd v Johnson, Stokes & Master* [1984] 1 AC 296. That decision is to the effect that following current practice is not necessarily the same as acting without negligence and formulates the following test:

> first, does the practice . . . involve a foreseeable risk? If so, could that risk have been avoided? If so, were the respondents negligent in failing to take avoiding action? (p 306, per Lord Brightman)

The question of negligence is one which is always to be determined on the basis of the facts of each case, and it is suggested that it is possible to reconcile the two decisions, since there is an important distinction in their facts. In the *Commercial Securities* case the bank had acted contrary to current banking practice, while in the *Law Society* case its actions had been in accordance with established practice. There is another difference, in that there was some evidence that the customer in the *Commercial Securities* case was known to the bank to be in financial difficulties, while no question surrounded the solicitor in the *Law Society* case. However, Hillyer J made it clear that it was the bank's failure to comply with current banking practice which was the more important fact, while Davison CJ considered Mr Calkin's reputation as merely one factor to be taken into account.

While it is possible to reconcile the two decisions by distinguishing the facts in this way, there still remains an important difference in the emphasis placed on the "account payee only" crossing. Hillyer J pointed out that the bank had disregarded the drawer's instructions in not collecting the cheque for the credit of the payee's account, which meant that it would have to demonstrate that it had acted prudently, and the authorities on which he relied all indicate the importance of the existence of such a crossing in determining whether a bank had been negligent. Davison CJ, on the other hand, sees it as merely raising a question in the mind of the banker, relying on a passage in the judgment of the Privy Council in *Universal Guarantee Pty Ltd v National Bank of Australasia* [1965] 2 All ER 98, 102, per Lord Upjohn. On the basis of the English decisions, which are discussed in *Paget's Law of Banking* (9 ed), 348-349 and by Davies in "The Effect of Crossing a Cheque A/C Payee Only" (1967) 7 *Australian Lawyer* 33, it is suggested that the approach in the *Commercial Securities* case is to be preferred, especially since that is probably also most in accordance with the expectations of those who use the crossing, no doubt believing that it means exactly what it says.

Johanna Vroegop

Bill of Rights Auckland Seminar commentaries

The Legal Research Foundation Inc held a seminar on the general topic "A Bill of Rights for New Zealand" in Auckland on 16 August 1985. This followed a similar organised by the New Zealand section of ICJ in Wellington on 10 May 1985. Copies of papers at the proceedings can be obtained from the respective organisations, the Legal Research Foundation, C/- Law Faculty, University of Auckland, Private Bag, Auckland, or The Secretary, International Commission of Jurists, PO Box 9142, Wellington. At the Auckland seminar there were commentaries on some of the papers which had been pre-published. The commentaries on the papers however were not included in the booklet. Most of them stand on their own and are now published as a further contribution to the debate and discussion on this most important legal topic. The contribution to the seminar by Mr Paul East, the National Party spokesman on Justice is to be published separately as an article next month.

Jerome B Elkind comments on the Paper of Professor Keith on "A Bill of Rights for New Zealand? Judical Review Versus Democracy"

Professor Keith was once opposed to a Bill of Rights. He now accepts its desirability and feels tempted and does not quite resist his temptation to quote Emerson on consistency. But it is the sovereign right of every thoughtful person to undergo a change of mind and no one should be taxed with a charge of inconsistency for having done so.

My own response is to utter amen and welcome a convert to the fold. But despite his participation in drafting the Bill of Rights, an activity which should earn him, but probably will not earn him, the admiration and gratitude of many New Zealanders, his conversion does not appear to have been a complete one. His paper purports to be a discussion of the desirability of a Bill of Rights, but it is really an assurance that the current draft does not concede too much power to the Judges. He is indeed speaking to the concern of many New Zealand lawyers. But the impression that we get is that he is saying to us "you see, it is not so bad after all". In fact the draft is constructed so as to avoid giving too much away and in that respect it is flawed. It is flawed in substance. Yet so far the debate has swirled around the question whether a Bill of Rights is desirable. Politicians have condemned the Bill of Rights largely on the strength of notions about presumed substance – notions about what the Bill of Rights ought to contain. But this is not an analysis of the draft.

Time does not permit a detailed analysis now. My own work on the Bill of Rights, which has been tentatively entitled "A Standard For Justice" will appear in about six months time and will contain a clause by clause analysis of the Draft Bill as well as an alternative draft. But of course it will present my own views rather than attempt to analyse Professor Keith's views as presented in this paper. About that, there are a few points I would like to make.

The differences between us are not meant to imply inadequacy in drafting. It is in fact a brilliant drafting exercise for what it sets out to achieve. There is rather a difference in philosophy. As a constitution maker, Professor Keith has not travelled far enough or fast enough. He has taken the first step in his journey of 1,000 miles. But I feel that he has terminated his journey after their first 500.

The discussion provided in the subtitle of the paper "Judicial Review Versus Democracy" never eventuates. The only semblance is found in his conclusion. He apologises saying that "[i]t is undoubtedly the case that a Bill of Rights like that proposed will restrain democratic processes in some cases". Thus he restates the fears that many New Zealanders have about a Bill of Rights. But unlike many of the Bill's critics, he realises that a Bill of Rights can restrain some of the excesses of democracy in the interests of other important values, including the protection of minorities and he concludes that judicial enforcement of a Bill of Rights can enhance democratic process and values and strenthen proper governmental process.

The only thing with which I can directly disagree is the apology that the proposed Bill of Rights will restrain the democratic process. It arises from a misconception of democracy which is quite popular in New Zealand. The misconception is that democracy is rule by the majority and little more. Hart calls this fallacy "moral populism". Democracy is rule by the people and, at its best, it represents a delicate balancing of interests. It recognises boundaries which even a majority cannot overstep as against a deeply affected minority. A Bill of Rights will aid the democratic process by placing legal restraints on the irrational forces that sometimes dominate public opinion and influence the State. The same forces turn revolutions into dictatorships, patriotism into chauvinism and democracy into tyranny of the majority. Perhaps Professor Keith and I are saying the same thing. I

The lawyer in society today: An outsider's view

By Gordon Graham, Chairman and Chief Executive of Butterworths Group, London

The following paper was given on 20 May 1985 as the keynote address to the Third Section of the IBA Conference on General Practice held in Madrid. The article surveys the position of lawyers in public estimation in a number of countries including New Zealand. The author notes the universality of the problems that lawyers have as a profession in presenting themselves and their work in socially valuable terms. Gordon Graham also acknowledges the remarkable extent to which self-criticism is a mark of the legal profession.

An invited outsider to a professional conference enjoys privileges. He also carries burdens. The privileges include ease of overview and non-involvement. The burdens include trepidation over one's lack of qualifications and apprehension that one may not really understand the issues. I thus see myself in danger, on the one hand, of being rash through over-simplification and, on the other, of being brash through under-estimation.

Legal publishing

I shall ease myself into the shallow end by first offering my rather tenuous credentials. I work for a fairly well-known company, which publishes the law in a dozen countries and whose welfare is totally bound with that of the legal profession in the English-speaking world.

A legal publisher is one of the few laymen who meets a lawyer professionally when the clock is not running. We seek neither retribution, vindication nor counsel – only the privilege of transmitting your wisest thoughts. We need you as readers as well as authors. We are nothing without you. We are daily aware of how the ever-mounting mass of legislation crowds upon you. We see it as our duty to be of some help to you in this regard and with this end in view we employ as editors hundreds of lawyers who see explaining the law as a less nervous, if no less demanding, way of life than practising it. We have, in brief, a backstage view of the legal theatre.

As to personal qualifications, I can offer only a 45-year-old intention to have become an advocate. I was one of the last of the last generation to enjoy, or suffer, in Scotland which was its last bastion, a purely classical education. A regimen of Latin, Greek, English, Mathematics, exercise, porridge and cold baths was calculated to deliver few survivors to the country's universities, and those who made it were expected to enter one of the three great traditional professions – the church, medicine or the law.

Of the seven who went up from my ancient grammar school in 1937, five took medicine. Knowing them as I did, I resolved there and then that I would consult physicians only when *in extremis*. My sixth fellow student, a son of the manse, made the predictable choice. I had some high-falutin reasons for choosing the law, but in retrospect I see that I hoped it would indulge my tendency to be talkative. I was aware, even then, that unsuccessful lawyers can become politicians, which I did not find unattractive. The events of 1939 diverted me to soldiering, that fallback profession to which youngest sons and failed scholars were consigned in the days of Empire. But for this, I am sure I would have become a member of the IBA and would be sitting among you today, more carefree, better informed and more respectable.

Publishing, to which I have devoted most of my professional life since 1946, is one of the neo-professions and holds international conclaves similar to yours in pleasant cities like Madrid at pleasant times of the year. Publishers are inclined, on such occasions, to tell themselves what good chaps they are. They would not engage in the rigorous self-examination which your programme reveals. Neither, I suspect, would chemists or engineers. Certainly politicians would not. But doctors and churchmen might, and, I would venture, should, take an interest parallel to yours in the efficacy of their societal role – in, as your Conference theme states, "Maintaining Standards and Services in a World of Change".

The challenge of adaptation

To this outsider, it appears that the legal profession, of all the professions, old and new, faces in this last quarter of the twentieth

turn to the politicians to obtain practical guidelines on the costs involved.

The hard pragmatic fact, is that without detracting in any way from the principles contained in the Bill as the Supreme Law in our society, we simply do not have the vast economic resources of the Justice system available in either Canada or the USA. The birth of the Bill of Rights is surely going to impose great increases in litigation and judicial time. In the criminal area the problems are going to arise both in terms of cost to the taxpayer via the legal aid system and indeed to the individual litigant as well. The criminal law has always cherished the need to avoid appreciable delay in proceedings and this too must surely be threatened if the Bill were to come into effect.

The over-riding principle I suggest is that we must always take care, in attempting to protect the rights of individuals in this way to guard against putting the law even further beyond the reach of the ordinary individual or surely the system will merely self-destruct. Hence in considering the operational aspects of the Bill of Rights a straight pragmatic approach is going to be called for.

The range and scope of the provisions of the draft Bill

I agree with David Williams when he endorses the view that the draft Bill has a sound theoretical base because it concentrates on the "fundamental procedural" rather than the so called "substantive" rights. I do not really know whether all of the rights contained in the draft can be so clearly classified into one category or the other. A close perusal for example of cl 16 dealing with rights on arrest seems to me to contain material that could be classified as both "procedural" and "substantive" for example:

> The right to refrain from making a statement to the Police and to be informed of that right; or
>
> The right to be released on reasonable terms and conditions unless there is a just cause for continued detention.

In addition cl 17 deals with the minimum standards of criminal justice and amongst the provisions there for example:

> The right if convicted of an offence whether punishment is varied between commission of the offence and sentencing to the benefit of the lesser punishment; or
>
> Subsection 2 of the same clause setting out the jurisdiction of the New Zealand Courts in effect.

It appears to me that several of the provisions of the Bill are a type of hybrid right rather than falling into one of the two classifications articulated by Professor Ely of Harvard in the book quoted by David.

Supposing and accepting that the Bill is bound to include a certain degree of "substantive content" then there is, a real risk of it containing provisions that simply may not be appropriate as individual values change over future years. The classic example given by Professor Ely is the ill-fated 18th Amendment dealing with views in American Society on the subject of temperance.

In New Zealand there are several current examples of this under discussion at the moment. One need only think for instance of the abortion debate surrounding the current ss 182 and 183 of the Crimes Act or of the subject of euthanasia or of homosexual law reform concerning itself with ss 140 and 142 of the Crimes Act. One can easily visualise how difficult it would be if provisions affecting these rights too closely were included in the draft Bill. Indeed I note the Minister himself in the commentary accompanying the draft is concerned with the criticism levelled against the 1963 Bill introduced by the then National Government on the question of whether the draft would crystalise an order of values that "may not be appropriate in the future".

So that in basic terms I agree with David's comments that the Bill should attempt as far as possible to avoid the difficulty outlined above and concentrate on fundamental procedural rights.

However, playing the devil's advocate, assuming that the Bill does stay solely with the "fundamental procedural" rights I would still suggest that we would be faced with reams of litigation for instance in attempting to resolve conflicts between the provisions of the very Bill itself. This of course would lead to inherent uncertainty. As an example one again can take the subject of abortion:

> *Clause 14*
> sets out what is termed the right to life that "No-one shall be deprived of life . . .".

This is a question that has exercised the Courts in Canada because of course in the words "no-one" it is implicit that the "foetus in the womb" be accorded some rights. That debate I pause to comment could easily be re-born here if the Bill were brought into force.

However essentially one also has to consider that economic and social rights are in effect *human rights* and there is a very big question that has to be asked whether some attempt should be made to include them therefore in any Bill of Rights for New Zealand.

There is equally no doubt as far as the range and the scope of the Bill is concerned that greater power and greater demands are going to be placed in the hands of the judiciary and that much more is going to be expected of them. For the cynics or the sceptics in this regard it is interesting to note the point made by Sir Robin Cooke in his article referring to the Canadian experience, that the reality of the situation is that, in fact very few pieces of Legislation in the end are struck down.

The increase in the tasks of the judiciary as a whole are not only desirable but it seems to me they must also be inevitable. The real question it seems to me is whether or not in New Zealand our system can cope with the increase in judicial resources that is going to be involved.

Content, style and structure of the rights contained in the Bill

Clearly many of the rights enumerated in the draft are firmly based on existing law or statute and the Courts are already dealing with many of the more controversial subjects covered by them and reproduced in the draft. Examples – the rights on arrest to be informed at the time of the reason for it. These are covered in s 316 of the Crimes Act. A habeus corpus procedure obviously readily being employed

here.

The right to a fair and public hearing recently endorsed by the highest Court in this country the Court of Appeal.

But despite this and despite the relative simplicity of the language there is still the potential for large amounts of litigation.

Interpretation

If the draft Bill is to become Supreme Law in this country then obviously the Courts are going to have to develop distinct principles of interpretation. This will evolve over the years and one must hope that the benefit of the Canadian experience will at least reduce to some extent the volume of litigation. Clearly also the broader the approach taken by the Courts compared for instance with a narrow legalistic view would appear to me to be the better. One must also endorse the "purposive" approach of really looking at and balancing conflicting interests. I merely point out that this is not a strange task certainly to the High Court at the present time faced as it has been in several instances with review applications in fields that previously may have been somewhat foreign to the particular Judge dealing with them.

Limitations contained in the Bill

By and large Mr Palmer seems to have opted for the approach illustrated by art 3 with regard to limitation provisions namely an intermediate type of model containing a single limitation to be applied as appropriate to each step of the separate rights contained in the draft.

Adapting and organising to prepare for the new role

It is here that I personally have the greatest reservations as to whether New Zealand at the present time is ready for and able to cope with the birth of the Bill of Rights. David has listed some four or five steps that he feels would have to be taken by way of preparation.

(a) A massive educational effort

In this he includes the judiciary and suggests that they would really have to "go back to school". I doubt whether this would be the case certainly if recent topics they have had to consider by way of Applications for Review are any indication of what may happen.

(b) The Universities

Clearly any role that they could play in assisting in training future lawyers in terms of the proposed Bill would be of assistance and the same comment is bound to apply as far as the media are concerned.

(c) Procedural aspects of the Bill

In this area several crucial areas would obviously need to be looked at. The first and perhaps the most obvious is that there would be a pressing need for considerably more Judges in making more judicial time available to consider the issues.

The questions of delay and cost I have already mentioned and I do not elaborate on those but one feature that perhaps may well be overlooked is a modification that is clearly seen in the United States and Canada that of "plea bargaining". Obviously as proceedings become more costly it is going to be a greater temptation to cut corners and take easier ways out, something which certainly in the past has been apparent in the criminal area of our system of criminal justice.

As far as the Appellate Courts are concerned David [Williams] stresses certain fears that they would have to at least evolve some sort of screening mechanism similar to the Supreme Courts in Canada and the United States. On my understanding of the situation this has already been done and thus increased volume would again raise arguments as to whether the Privy Council should be retained to adjudicate on these matters and also whether the Appellate Courts should be split into Civil and Criminal jurisdictions again with the increased cost to the system involved. In addition it appears to me that there would be a need for more lengthy judgments from the High Court in the first instance to enable the Court of Appeal to consider the matter properly as part of its screening process. And one is bound to ask finally at the end of this day how these restrictions in effect on an individual's right to appeal really do fit in with the spirit of cl 17(D) which clearly establishes a right to appeal to a higher Court.

Conclusion

It seems to me that the concept of the Bill of Rights is clearly much more relevant today than it was in 1963 and in my view it is to be, in theory at least, applauded as indeed is the way in which the various clauses have been phrased. However what is of course, and I accept this as a purely pragmatic view, is to recognise that there is a real problem in being able to put into operation this type of Bill in the New Zealand context. It must mean a greater amount of interpretive legislation. It must mean greater costs to both the State via the legal aid systems and in other ways and also to the individual litigant. It must lead particularly, if in the criminal area of pre-trial provisions are going to be retained, to greater delay, and that the principal question is how are the judicial resources going to be made available to cope with the increase in volume.

In the operation of the Bill of Rights one has enshrined the ideal of protecting the rights of the individual. As I said in my introduction the system would self-destruct if because of the sheer volume of cost the law was to be placed well beyond the reach of the ordinary citizen. Mr Palmer's "navigation lights" are all very well but they would be no use if a fog bank of litigation were to screen them from view. □

Mr C A McVeigh comments on the paper of Mr D A R Williams on "Some Operational Aspects of the Bill of Rights"

By way of introduction I would like to say that, bearing in mind the distinguished stable from which Mr Williams emanates, I am the father of four daughters; if I had a son, it was always my intention to christen him "Russell" and send him to Auckland to practice law.

Let me say at once that I have nothing but the highest respect and admiration for Mr Williams' well researched, scholarly and concise survey on what might loosely be termed the operational aspects of the Bill. My task, as I perceive it, is to comment either constructively or critically on this formidably lucid

treatise.

I have only ten minutes – so I shall eschew any attempt to emulate Mr Williams' scholarship and will instead be brief. I intend to devote my time to looking at the Bill from the point of view of one who will (hopefuly) be practising in the Courts where this Bill, if enacted, will be tested and shaped.

For shaped, of course, it will be by the minds, personalities, and prejudices, of the judicial officers whose task and duty it will be to interpret and apply it.

I want to say that I am in favour of this Bill of Rights. There will be those, of course, who say it does not go far enough – and those who take a contrary view. It is not part of my brief to examine that issue – except to comment in passing that, as one of the counsel involved for the appellants in *Gilmore and Others v NWSCA* (the Clyde Dam Case) I would have been happier had there been a clause providing for the freedom of litigants not to have properly obtained judicial decisions overturned by retrospective legislation – but alas it's too late for that I presume.

I am in favour of the Bill for one main reason. Dr Bill Hodge, in an article in the June 1985 edition of Recent Law made the point that those of us – mainly lawyers – who had lived through the last few years of executive administration in New Zealand could not have helped being (and I forget his exact words) but I think he said "uneasy" at some of the actions of the previous administration. In my view this is a commendably terse understatement.

There are even more compelling reasons why a lawyer feels happier with a Bill of Rights. It diverts even more of the decision making process – or, to give it its crude name, "power" into an arena he or she understands – namely, the Courts. To have the cutting edge of executive power blunted on the wheel of litigation is grist to the lawyers mill. Not only will I be able to argue s 5(j) in an attempt to persuade a Judge that recklessness does not involve foresight of an inevitable probability but now I can also tell him that the enactment may infringe cl 6 of the Bill; in the Small Claims Court apparently, if cl 25 is to be taken at its face value.

But in this new-found potency that the Bar in New Zealand may feel – there are certain hidden gin-traps

The Bill is extremely, and deliberately, broad in its wording. For example, see cl 25; and therefore interpretation will place the entire burden of its application four-square in the lap of the judiciary. And here I part company with Mr Williams for I do believe that substantive rights in this Bill are involved (not just procedural rights) and that value judgments will inevitably have to be made.

For all of the 100 plus Judges in New Zealand, there will be – I venture to suggest, as many different interpretations of such phrases as "unreasonable search and seizure" (cl 19); "fundamental justice" (cl 14); "disproportionately severe treatment" (cl 20); "freedom to impart opinions of any kind" (cl 7).

I agree with Mr Williams when he says that the Bill, and its interpretation, will "involve a new role for the judiciary" and will call for a "more imaginative style". I don't however necessarily agree with Sir Robin Cooke in his address to the International Commission of Jurists Conference in Wellington on 10 May this year when he said: "On the surface the Bill would add significantly to the role of the Judges. In practical result it would add much less."

In my view it will add considerably to their role. For now, not only can the Judges (and that is all the Judges including, I add, the Small Claims Court) measure the actions of individuals and organisations against a relevant statute, but they can now measure the very Act against the Supreme Law. The Courts will inevitably assume a much higher profile in the political arena. Imagine the hue and cry that would follow if a District Court Judge were to declare invalid a popular and politically important piece of legislation dealing with members of a motorcycle club having an Easter Seminar at Otorahanga on the grounds that it infringed cl 10.

Yes, the Judges will become much more part of the political process. They will have to learn to cope with this in many ways. Their traditional immunity from comment will take a severe battering and, in this regard, I refer you to the very pertinent comments of Dr Paul Harris of Victoria University at the International Commission of Jurists Conference.

While I presently have the utmost faith in the New Zealand judiciary at the moment, and in their admirable track record in recent times of providing a stable and impressive bulwark against excessive abuses of power – that is not to say that this will always be the case. Again, the very hope that Sir Robin Cooke expressed that political appointments in New Zealand were not just unlikely but virtually unheard of is based upon the very thing that this Bill seeks to formalise – convention. There is nothing to say that this practice will continue – and in my view, everything to suggest that an unscrupulous administration could endeavour to boost its falling stocks by appointing those who were more likely to gild its poltical lilly.

There is a growing academic and professional disquiet in the United Kingdom at the direction the Courts in that country are taking on matters of civil liberties. Among the cases that have engendered such disaffection are:

> *Sang* [1972] 2 All ER 1222 – which excluded the defence of entrapment in England (cf *Lavalle* [1979] 1 NZLR 45);
>
> *Holgate-Mohammed v Duke* [1948] 1 All ER 1054 in which, in effect, the House of Lords held that the police could arrest a person for questioning, interogate that person for some hours, and then release him (cf *Blundell v Attorney-General* [1968] NZLR);
>
> And most recently of all, the Court of Appeal in *R v Plymouth Magistrates Court ex Driver* [1985] 2 All ER 681, which declined to follow our Court of Appeal in *Hartley* [1978] 2 NZLR 199 by deciding that a person who had, in effect, been kidnapped in a foreign country for the purposes of de facto extradition had no remedy in his home country to challenge that illegal foreign arrest.

I cite these only as examples of how a judiciary can perpetrate decisions which infringe civil liberties in ostensibly the most blunt way and in which, on occasions, they have not followed our more enlightened New Zealand Courts. Beware I say, the judiciary may not always be

those we would wish to serve us or our clients' interests.

I approve of the Bill also on the grounds of the proliferation of litigation that will inevitably follow which will undoubtedly suit me, and those of my ilk, practising at the Bar. But I would wish to add a caveat here. Our libraries will definitely have to expand. Mr Williams refers to the use that would have to be made of Canadian Reports. The High Court Library at Christchurch takes only the Dominion Law Reports (and digests, annotations and so on). I am reliably informed that the Reports of Canadian Criminal Cases run to seven or eight volumes per year, 90% of which now contain challenges to the prosecution based on their Charter.

I also approve of the Bill for a much more fundamental reason. There is presently before the House a Bill which gives a whole new meaning to the word "draconian". I refer to the Powers of Search (Internal Concealment) Bill which, as you will know, gives wide powers to the police officers and customs officials to detain persons suspected of concealing hard narcotics internally or within their body cavities. After submissions had been made to the Select Committee, and without an opportunity being given to comment, new provisions were inserted in the original Bill of the most horrendously sweeping kind. Those provisions provided that on an ex parte application to a District Court Judge, or on a subsequent appeal to a High Court Judge against any such detention order, the detainee and his counsel were not to be told of the grounds put forward in support of the detention order. Indeed, the Bill provides that on any appeal, and while such evidence is being given, counsel representing the detainee is to be excluded from the Court. As things stand, I, on behalf of my client am bound by any such law if enacted. If this Bill is passed, however, I can challenge those provisions before a dispassionate, politically neutral tribunal under cls 18, 20(2) and (3) and 21 of the Bill. It is to be welcomed that defence counsel would be able to do this and will bring into play, in graphic form, the matters mentioned by Mr Williams in his discussion on cl 3 of the Bill.

Finally, it is exactly 100 years since Professor A V Dicey delivered his lectures as Vinerian Professor of English Law at Oxford University and published them (in 1885) under the name "Introduction to the Study of the Law of the Constitution". In my view it is entirely appropriate that on the centenary of the publication of this seminal work we should in New Zealand, be debating the introduction of a Bill of Rights in this country.

This Bill is brilliant in its conception. I hope that, if enacted, it will be just as compelling in its execution. □

Nancy Dolan's comments on the paper "Bill of Rights a Woman's Perspective" by Frances Joychild, Prue Kapua and Shayne Mathieson

The writers have drawn attention to the fact that many women have good reason to distrust the Court system. It is an important fact in the context of a discussion about the proposed Bill of Rights ("the Bill"). I support their contention that there is significant discriminations against women throughout the legal system. However, as they point out, there can be no single "woman's perspective" on the Bill. I will try to provide another perspective by indicating the positive aspects of the Bill.

According to the analysis of the writers, the Bill will not improve the lives of most women, because it does not deal with the most pressing issues, and it will be interpreted by Judges who have no real understanding of women. Parliament is described as a "fairer forum" than the judiciary, and therefore the place where law making supremacy should remain. The central thrust of the paper is that the Courts are of little value to women.

It is true that the Bill would not, in itself, effect significant improvement in the lives of most New Zealand women. It will be but one new component in an existing political social and legal system. However, an alternative view would be that the Bill should not be rejected on the basis that it cannot do everything. To combat discrimination we have to take sustained and diverse action in many forums *including* the Courts. The Bill may prove to be a useful addition to our legal rights.

The writers contend that Parliament is a "fairer forum" than the judiciary. They point to the fact that there are more women MPs than women Judges, to the merits of electoral accountability, and to the political skills women have acquired. In contrast Judges are characterised as being virtually incapable of making decisions other than on the basis of their gender-based social attitudes. The writers refer to important but limited areas of law. They concluded that, as the Courts have little to offer women, the Bill is of correspondingly low value to women.

The comparison may be too simplistic. The political process could also be viewed with some scepticism by women. It could be argued that few women hold positions of real political power, and that an election is unlikely to be won or lost on women's issues. The other political factors described by the writers have not prevented governments in recent years from introducing or passing legislation which would or did directly and adversely affect women. There are notorious examples to be found in the areas of immigration, the use of natural resources, and "economic stablisation". As administrative bodies proliferate, we can expect the lives of women to be increasingly affected by their decisions. Women have a very real interest in setting limits to government action, and that can only be achieved if there is flexible and clear law and a robust judiciary.

Many women welcomed the strong stands taken by the Court of Appeal and by the High Court in recent years in relation to some of those contentious issues, and to the suggestion by the Court of Appeal that there are some fundamental rights beyond the reach of Parliament. Justice Kirby of the Federal Court of Australia discussed that suggestion in an oration on the Australian Bill of Rights on 9 December 1984, reproduced in *Civil Liberty* 1985 Vol 116, p 10. He notes that Australian judges have not articulated those points as clearly as has the New Zealand Court of Appeal and says:

> Perhaps too, our governments have not been as inclined, as the testy and resolute Sir Robert Muldoon, to press and tax the

> Courts and to force through legislation which offended the judges' basic notions of civic rights. The Courts in New Zealand have been vigorous and assertive in the past few years.

My point is that women are affected by the large national issues of the day, and by the increasing impact of Government in all its forms on our lives. The judiciary has taken some brave stances in relation to those issues, based on fundamental principles of law. Those Judges cannot be fairly characterised as weak captives of their gender-based social attitudes. The writers assessed the probable performance of the judiciary in relation to the Bill by reference almost exclusively to family law and rape law. I suggest that a fair assessment would include the cases of major public importance in the areas I have referred to.

Other tribunals in the legal system have been used imaginatively by women in recent years. I refer to one example: the Waitangi Tribunal. The Te Atiawa women played a crucial role in the case relating to the proposed outfall in Taranaki. It was a striking victory for them. In the recent Waitangi Tribunal hearing relating to the Manukau Harbour it was a woman who provided the dedicated leadership in an application which resulted in various public and private bodies being called to account. In the process various novel legal situations were created. Not all of those were desirable, and procedural refinements must be made. The decision would not be all that the applicant desired. Nevertheless a substantial achievement was the use of an "imperfect" legal device to extend the accountability of those bodies. and to place Maori interests squarely on their agendas. The legal system does have flexibility which can be of great benefit to women. We have a corresponding responsibility to develop and use it.

I have referred several times to the need for flexible and clear law. Many women would see the advantage to be gained from the clarity and brevity of the provision in the Bill prohibiting discrimination in the basis of sex. It may be possible to use it in situations not covered by the existing legislation. It has the advantage of enabling us to base a case *squarely* on the issue of discrimination. And that may be the real lesson New Zealand women can learn from the experience of American women, referred to by the writers.

The writers discuss the jurisprudence of the 14th Amendment. The problem with the 14th Amendment is that it was never designed to deal with sex discrimination. The complex jurisprudence which developed as a result was partly due to the inherently unsatisfactory situation where women's rights were assessed in the context of other values, for example privacy. The Court could not simply look at the facts of a case and determine whether they revealed discrimination against women. Some of the legal tacticians of the women's movement apparently preferred the ambiguity. Sylvia Law, in "Rethinking Sex and the Constitution" in *The University of Pennsylvania Law Review* 1984 Vol 132 says, p 981:

> many who worked to develop constitutional doctrine to support reproductive freedom emphasised rights of privacy, physican discretion and the vagueness and uncertainty of the criminal laws prohibiting abortion. The decision to de-emphasise sex discrimination in the reproductive freedom cases reflected a judgment that privacy was a more conservative and hence stronger constitutional tool than sex-based equality.

Proponents of the proposed Equal Rights Amendment ("ERA") drew attention to those factors, and described the advantages to be gained from having a constitutional tool which enabled cases to be brought *explicitly* on the basis of sexual discrimination. One such proponent, Laurence Tribe, Professor of Constitutional Law at Harvard University drew attention to the difficulties involved in drawing any conclusions about the merits or otherwise of the ERA from the 14th Amendment. His testimony before the House Committee on the Judiciary relating to ERA is reported in *Harvard Civil Rights — Civil Liberties Law Review* Vol 19, No 1 Winter 1984. He says:

> The real question must be how best to incorporate the fundamental justice of sexual equality – not sexual identity – into our constitution. To link the often compromised jurisprudence that has responded to the tragedy of race discrimination to that which should respond to the quite distinct, even if not wholly unrelated tragedy of sexual discrimination would be to cripple both while liberating neither.

It is difficult to know how accurate one can be in drawing anything of relevance for our situation in New Zealand. However, many women here would support the Bill on the same basis that many American women supported the ERA: it will establish a clear and unqualified principle of law.

We cannot view the Bill through completely rosy spectacles. The writers of the paper rightly point to the difficulties ordinary women already have in obtaining access to the legal system. Justice Kirby in the oration I have referred to mentioned the risk that an Australian Bill of Rights would become "the obsessive plaything of wealthy and articulate middle Australians, of corporations able to afford the best lawyers and of groups with access to legal aid". The proposed Australian Bill is linked to proposals for an expanded Human Rights Commission which will promote community education and explore underlying problems of discrimination. The problem of access to the legal system is a vexed one, and one which is by no means limited to this area of law. Ultimately it is not a reason for not passing progressive legislation, but unless access to the system is increased, the Bill will be of limited value and relevance. Similarly, there must be education of the community, the judiciary and the profession.

Some critics of the Bill argue that many of its provisions already exist in various forms in common law and statute law. That is not true in relation to the provision dealing with sexual discrimination. Its very lack of qualification, its clarity and brevity may provide a new and valuable addition to legal rights for women. □

Bill Hodge's comments on the paper by Professor F M Brookfield on "The Bill of Rights as Fundamental Law in the light of the Canadian Experience" [abridged]

May I begin with one or two preliminary points. First, may I say that David Williams in his presentation, p 79 mistakenly referred to Professor Ely of Harvard. May I correct that reference to Dean Ely of Stanford.

The second point that I should make at the outset is my great indebtedness to a Masters thesis, recently presented to this Faculty of Law by Mr Paul Rishworth of Russell McVeagh. The title of this thesis is "The Canadian Charter of Rights and Freedoms: Implications for a Bill of Rights in New Zealand". I wholeheartedly recommend this thesis, particularly to the Attorney-General and the supporters of a Bill of Rights for New Zealand. The thesis is especially useful and is sufficiently up-to-date to deal with the Canadian Supreme Court's decision in the matter of the religious freedom of the Big M Drug Mart to trade on a Sunday, (See [1985] NZLJ 231). That decision of course will be one of the main reasons for opposition to the New Zealand proposals.

Professor Brookfield, p 150 and Mr Justice Cooke in his judgment in the *New Zealand Poultry Board* case, noted by Professor Brookfield, p 151 used the hypothetical example of torture, I think, to reach some rock-bottom common denominator of the fundamental, through revulsion, to illustrate the pervading or pervasive judicial power to void the act of a sovereign. Professor Brookfield uses that example to suggest that an amendment to a subsequent Bill of Rights could be thrown out by the Court if it attempted to provide for torture, while Cooke J in the *Poultry Board* case used the example to illustrate that certain laws of the sovereign Parliament might be struck down by the Courts.

The purpose of these references, by a Professor and a Court of Appeal Judge, is to legitimate the undemocratic principle of judicial review, and introduce a proposal which would in some measure put the Judges over Parliament, that is a propsoal to give Judges the custody of a fundamental law which they will apply when necessary to strike down statutes.

Professor Brookfield is I think softening us up for the radical proposals to come by saying "Don't be afraid of it – we've got it already. We have had it and we will continue to have it." I don't deny the potentiality of that power in the sense of *Bonham's* case as decided by Chief Justice Coke in 1608. But torture is too obvious. Allow me to change the hypothetical. Let me substitute slavery instead of torutre for that unthinkable parliamentary act which a Cooke or Coke might strike down. Now we have an example which does in fact touch on existing case law and existing Bill of Rights.

How does slavery interesect with a Bill of Rights? For three quarters of a century after its introduction, the US Bill of Rights, the first ten amendments to their Constitution, coincided with and made no impact on those ten or eleven states which enshrined slavery in the laws of their jurisdictions. Slavery in other words was not a violation of the Bill of Rights. Why not? Because the Bill of Rights was a mechanism that could not be understood except in a federal context.

The point that I will be making here is that the Bill of Rights was made necessary by federalism. The first United States Bill of Rights was actually a condition subsequent to ratification of the constitution by the States. In other words the States said "we will agree to this Constitution if the delegates to the First Congress agree, subsequent to ratification and immediately upon coming together as Congress, to adopt a restraint upon that Congress in its federal role," that is a Bill of Rights re federal power; not regarding state powers.

That federal bargain made the first stage possible and the second stage necessary. The second stage of course is the Civil War, and the Civil War Amendments – most familiar the Fourteenth Amendment and its Due Process clause which did apply the first eight amendments more or less completely down to state level to be available to litigants in state Courts against the individual states.

Thus the first two examples of Bills of Rights can only be understood in a federal context, the first after a revolution and the second, after a civil war. I would now submit that what motivated Canada in 1981 to propose and eventually adopt a Charter of Rights cannot be understood unless its federal context is taken into account.

I arrived in Canada in late 1981 and I could detect no particular search for fundamental principles of justice which Professor Brookfield refers to. What I did detect was a concern for the Canadian nation–state and its federal integrity. Thus, the real beginning of the entrenched Charter of Rights in Canada is a referendum held in Quebec on 20 May 1980 and the undertaking by Prime Minister Trudeau on 14 April 1980. The referendum, you might recall, was the so-called "sovereignty-association referendum" put before the people of Quebec asking them whether they opted for mere association with the rest of Canada or not. The answer, which was a surprisingly firm negative, 60% being against separation, must have been based on an acceptance of the undertaking of Prime Minister Trudeau that "his Government promised to interpret a vote of no to sovereignty association as a vote for the rebuilding of the Canadian Federation."

The other leaders of the principal Canadian parties, the Honourable Joe Clark himself a former lawyer, leader of the Conservative Party, and Ted Broadbent a former law school Dean, leader of the New Democratic Party, joined in with Mr Trudeau in celebrating the confirmed Canadian unity in pledging a new federal arrangement which would give greater protection to peoples of the individual provinces.

My first point about a Charter of Rights as a fundamental, therefore, must be that the three primary examples, the Bill of Rights which controls the American federal government, the Bill of Rights which controls the American state governments, and the Canadian Charter of Rights have been adopted in a situation of a particular political system, and in each case a federal political system. If those be the necessary sine qua non then none of those preconditions are present in New Zealand at the moment.

My second fundamental point relates simply to the present organisation of Parliament and many points which Geoff Palmer has illustrated in his book *Unbridled*

Power. That point is the imbalance between the legislative branch and the executive branch, that is the law-making function of the Executive-in-Council. The developments of recent history are that the executive as a law maker, by regulation power, by press conference and the midnight law making of Government in Council have resulted in a tremendous imbalance between the open debating chamber of the House and the secret cabal of Cabinet. That is of more pressing importance in terms of breaches of fundamentals in this country at the moment.

I should now like to go on very briefly to certain individual or particular aspects of the Charter of Rights as we will be developing it in this country. In particular I would start with ss 6 and 8 which provide for freedom of religion and manifestations of religious practice. The first point is that we are now seeing beginnings in New Zealand of a tidal wave of Protestant fundamentalism. Their capacity to litigate a church state issue will be considerable. If listeners are not familiar with ch 16 of *Mark* I suggest that will be a fundamental source of litigation under these clauses.

The second point, as demonstrated in Canada, is that the Sunday trading laws will go. That has been upheld on behalf of the religious freedom and religious conscience of the Big M Drug Mart by the Supreme Court of Canada on 24 April 1985. Readers wishing an analysis of that decision based on its federal content are referred to Mr Rishworth's thesis. On the opposite side we will certainly have challenges to religion in areas endorsed by the New Zealand state such as schools as in the case of *Rich v Christchurch Girls* [1974] 1 NZLR 1. Another question under this heading is whether the Queen can remain "defender of the Faith" (that is the Anglican Protestant Christian faith per s 2 of the Royal Titles Act 1974). I can see the headlines in the weekly press now as the headline writers exclaim "Royal Shock. Palmer strips Queen".

Under s 7, Free Expression, we will have a series of challenges to existing statutes including the defamation laws, including contempt of Court, including restraints on advertising, including restraints on commercial speech, including significant attacks on the indecent Publications tribunal as well as the film censor, and other less obvious matters such as the limitation on electoral spending under s 139 of the Electoral Act which is a clear violation of free speech. To say nothing of such matters as the Immigration Act putting a tag on the free speech of certain visitors.

Under s 10 the freedom of association points are quite clear in the case of *UK v Young, James & Webster* [1981] IRLR 408, but less obviously the ability of the registrar and the FOL to prevent the formation of breakaway unions under s 168 will be frustrated. Under s 11 the freedom of movement clause will be litigated against the Social Welfare Department who now have policies to restrain unemployed persons from keeping a benefit if they move to certain remote areas. And of course the freedom to leave New Zealand will be of great interest to the American District Court in Dallas, Texas.

Under s 12 the freedom from discrimination based on sex will certainly be litigated in the homosexual law reform area and I refer to the familiar American case of *Baker v Wade* (1982) 553 F Supp 1121. Any cases of positive discrimination or affirmative action will certainly be questionable under this section.

In conclusion I would say only that sanguine predictions that a Bill of Rights really won't make much difference are, I think, naive. The only safe prediction that can be made is that no one can predict the sea change that will overtake the New Zealand legal system. We will be as surprised at the results as the Americans who wrote their first Bill of Rights in 1790 would have been had they lived to see it used to protect the right of a pregnant woman to terminate her pregnancy: *Roe v Wade* (1973) 410 US 113. □

Recent Admissions

Barristers and Solicitors

Alston, B L S	Auckland	13 September 1985
Ayres, W R	Auckland	13 September 1985
Barwick, P A	Auckland	13 September 1985
Caughey, C M	Auckland	13 September 1985
Chalmers, P N	Auckland	13 September 1985
Cropp, M A	Auckland	13 September 1985
Eade, A J	Auckland	13 September 1985
Earwaker, R J	Auckland	13 September 1985
Esler, L B	Auckland	13 September 1985
Franicevich, J E	Auckland	13 September 1985
Graham, H J	Auckland	13 September 1985
Gunn, E J	Auckland	13 September 1985
Harland, M	Auckland	13 September 1985
Lintott, C A	Auckland	13 September 1985
Lowe, S B	Auckland	13 September 1985
McArthur, G C	Auckland	13 September 1985
McElwee, M A	Auckland	13 September 1985
McMeekin, P	Auckland	13 September 1985
McMeekin, S T	Auckland	13 September 1985
Martin, J E	Auckland	13 September 1985
Mathieson, G R	Auckland	13 September 1985
Moorman, D G	Auckland	13 September 1985
Quinn, M J G	Auckland	13 September 1985
Short, N W G	Auckland	13 September 1985
Sparling, C	Auckland	13 September 1985
Stephenson, B W	Auckland	13 September 1985
Stewart, B N	Auckland	13 September 1985
Thomas, A O	Auckland	13 September 1985
Thompson, K M	Auckland	13 September 1985
Towers, G B	Auckland	13 September 1985
Wallace, P J	Auckland	13 September 1985
Windmeyer, J M	Auckland	13 September 1985
Winkelmann, H D	Auckland	13 September 1985
Wright, P J	Auckland	13 September 1985
Young, C D L	Auckland	13 September 1985

The lawyer in society today: An outsider's view

By Gordon Graham, Chairman and Chief Executive of Butterworths Group, London

The following paper was given on 20 May 1985 as the keynote address to the Third Section of the IBA Conference on General Practice held in Madrid. The article surveys the position of lawyers in public estimation in a number of countries including New Zealand. The author notes the universality of the problems that lawyers have as a profession in presenting themselves and their work in socially valuable terms. Gordon Graham also acknowledges the remarkable extent to which self-criticism is a mark of the legal profession.

An invited outsider to a professional conference enjoys privileges. He also carries burdens. The privileges include ease of overview and non-involvement. The burdens include trepidation over one's lack of qualifications and apprehension that one may not really understand the issues. I thus see myself in danger, on the one hand, of being rash through over-simplification and, on the other, of being brash through under-estimation.

Legal publishing

I shall ease myself into the shallow end by first offering my rather tenuous credentials. I work for a fairly well-known company, which publishes the law in a dozen countries and whose welfare is totally bound with that of the legal profession in the English-speaking world.

A legal publisher is one of the few laymen who meets a lawyer professionally when the clock is not running. We seek neither retribution, vindication nor counsel – only the privilege of transmitting your wisest thoughts. We need you as readers as well as authors. We are nothing without you. We are daily aware of how the ever-mounting mass of legislation crowds upon you. We see it as our duty to be of some help to you in this regard and with this end in view we employ as editors hundreds of lawyers who see explaining the law as a less nervous, if no less demanding, way of life than practising it. We have, in brief, a backstage view of the legal theatre.

As to personal qualifications, I can offer only a 45-year-old intention to have become an advocate. I was one of the last of the last generation to enjoy, or suffer, in Scotland which was its last bastion, a purely classical education. A regimen of Latin, Greek, English, Mathematics, exercise, porridge and cold baths was calculated to deliver few survivors to the country's universities, and those who made it were expected to enter one of the three great traditional professions – the church, medicine or the law.

Of the seven who went up from my ancient grammar school in 1937, five took medicine. Knowing them as I did, I resolved there and then that I would consult physicians only when *in extremis*. My sixth fellow student, a son of the manse, made the predictable choice. I had some high-falutin reasons for choosing the law, but in retrospect I see that I hoped it would indulge my tendency to be talkative. I was aware, even then, that unsuccessful lawyers can become politicians, which I did not find unattractive. The events of 1939 diverted me to soldiering, that fallback profession to which youngest sons and failed scholars were consigned in the days of Empire. But for this, I am sure I would have become a member of the IBA and would be sitting among you today, more carefree, better informed and more respectable.

Publishing, to which I have devoted most of my professional life since 1946, is one of the neo-professions and holds international conclaves similar to yours in pleasant cities like Madrid at pleasant times of the year. Publishers are inclined, on such occasions, to tell themselves what good chaps they are. They would not engage in the rigorous self-examination which your programme reveals. Neither, I suspect, would chemists or engineers. Certainly politicians would not. But doctors and churchmen might, and, I would venture, should, take an interest parallel to yours in the efficacy of their societal role – in, as your Conference theme states, "Maintaining Standards and Services in a World of Change".

The challenge of adaptation

To this outsider, it appears that the legal profession, of all the professions, old and new, faces in this last quarter of the twentieth

century, an unquestionably unique challenge to adapt itself without damaging itself. This challenge is seen in increasingly intense public scrutiny; in legislation so complex that loopholes become more important than substance; and in societies in which the distinction between the law-abiding and the law-breaker is no longer clearcut.

In the economically advanced countries, your problem has been compounded, on the one hand, by the consumer society, which questions the value of every service it buys, and, on the other, by the beneficiaries of the welfare state, who see legal advice as the last professional service which is not paid from taxation. Payment for many things is now invisible. But, as they say in the United States, there are no free lunches. Legal fees remain very visible and consequently contentious in a society whose purchase of consumer goods and tangible services are made painless by credit cards, but who regard parting with cash for legal services as a polite form of extortion.

You are inherently vulnerable to criticism because those who use your services mostly do so when they feel they have no choice. They come unwillingly to your door and, for most people, only for a small range of small crises, such as being fired, arrested, divorced or when buying a house or contemplating death. Your living in these essential transactions is, meanwhile, threatened by a movement towards, or back to, amateurism, mediation, conciliation or arbitration, the renewal, as it were of the role of the village elders. The threatened ending of the conveyancing monopoly in the United Kingdom is one of many symptoms of a decline in the mystique of legal practice.

Unfortunate publicity

Television has contributed to this by creating stereotypes, and making the be-wigged and gowned lawyer into a caricature. The increasing tendency towards marketing or advertising legal services will dismantle the mystique even further. And this may well be for the best, because mystique has less and less place in a society where everyone claims to be an expert in something.

You are also (unfairly) vulnerable, it seems to me, to the malign influence of a tiny minority of your profession, whose interest in their income overshadows their devotion to the law. The arrival of a Melvin Belli at the Union Carbide plant in Bhopal does damage to the world image of the legal profession. In the UK, publicity over the *Glanville Davies* case or the recent BBC libel case, when legal fees of a million pounds were incurred to settle damges of £150,000, make people wonder if "lawyers" in general do not have it too easy.

Every sector of society has its less admired members. We have some crooked publishers. But, the legal profession, which by definition is identified with ethics; which controls admission to its ranks; and which undertakes to discipline its erring members, is more vulnerable to the erosion of its moral image than any other, including the church and medicine, which tolerate doubtful borderlands for quackery and evangelism, to which there is no legal parallel.

Public image

On the assumption that your public image is a barometer of the climate in which you practice, I asked my colleagues in half a dozen countries this question; "Is the legal profession more or less respected than it was ten years ago, and, in each instance, why?" The answers, on which a number of people were consulted in each country, were by no means constant. In only one of the six countries was it affirmed that the legal profession is today more respected than it was ten years ago.

If my random and limited survey means anything, you may care to plan your next meeting in that country to see if they know something that their colleagues in the other five do not. The country in question is: New Zealand. The reason adduced is that the profession there has "accommodated reform very readily and indeed is sometimes accused of being too keen on change". As an example, my New Zealand colleagues cite the introduction of Universal Accident Compensation in the early 1970s, which deprived lawyers of that field of practice, but much of the pressure for which came from the legal fraternity. The New Zealand public's confidence in lawyers, according to a 1982 poll, was rated at 36%, well above parliament at 14%, and trade unions at 10%, but below doctors at 59% and the police at 55%.

South Africa

My colleagues in another southern hemisphere country, isolated politically more than geographically, report that there has been no change in public attitudes to lawyers in the past ten years, and maintain that the respect there, especially for the judiciary, is high, because of its independence. Lawyers in South Africa are respected for their readiness to speak out against injustice, and the rest of us would say that they have plenty of scope for this.

For example, the South African Association of Law Societies recently expressed alarm over a statement by the Minister of Law that 300 persons had been detained without trial since the beginning of this year and reaffirmed its belief in the principle that no person should be punished until sentenced by a Court after a fair trial. A banner headline in the *Natal Mercury* 25 April covers a story announcing that the Supreme Court at Pietermaritzburg had set aside a decision by a Durban Magistrate to refuse bail and criticised a section of the Internal Security Act as "making serious inroads into the traditional role of the Courts". We must observe that the legal profession in South Africa receives little credit for its independence in the press of the world.

Australia and Britain

My advisors in Australia report that the legal profession at all levels is less respected than it was ten years ago and attribute this decline partly to cases of prosecution of solicitors and the implication, in the course of these prosecutions, of the judiciary. One District Judge is serving sentence; another is being prosecuted; and a High Court Judge has been committed to stand trial on charges of attempting to pervert the course of justice. This sort of thing must be like a member of one's family becoming disgraced. Every lawyer is like Caesar's wife. The New South Wales Law Society must perceive this, because it runs an annual Law Week to improve the public image and relations of the legal professsion.

A decline is also observed in the United Kingdom, attributed to a variety of factors. It is felt that the Benson Commission of 1979, and the earlier Hughes Report on the practice of law in Scotland did not produce much in the way of reform and that the profession did not find this unwelcome. The British public, in so far as they give it any thought, is probably not enthusiastic about the divided profession; has resented the conveyancing monopoly; and would like to emulate American plaintiffs in damages for personal injuries, but hesitates over the cost of pursuing its claims in the Courts.

North America

The consensus among my Canadian colleagues is that there has been a slight decline in public esteem for lawyers in that country, but they add that, in their opinion, that esteem has never been terribly high, except for the judiciary. For example, there was "almost religious" veneration expressed on the death of Chief Justice Bora Laskin last year.

My responses from Canada were the most penetrating, detailed and irreverent. "There is a long history", says one Canadian Butterworthian, "of the public perceiving the lawyer as a parasitic shyster". Another adds: "The Community has permitted lawyers to regulate and discipline themselves for more than a century, which must bespeak some measure of public trust". "Lawyers", says another, "are viewed as members of an esoteric guild with the combination of fear, envy and admiration that this implies". "Lawyers", sums up another of my Canadian colleagues, "are more important than ever; and inevitably one respects those whose services, however distasteful, are necessary".

The Canadian responses cite few specific reasons for the "slight decline", which cannot be said of the United States, where, dating back to Watergate, lawyers are seen increasingly in the vulture role, benefiting from the sufferings of others and even subverting the legal system for their private benefit.

The general consensus in the United States is that there are too many lawyers and too high a proportion working for corporations whose interests they are paid to serve. Being apparently the most litigious country in the world, a high proportion of the population comes into contact with lawyers.

I had an experience of my own recently, when we were sued by an ex-employee, whom we had treated with excessive generosity. Our attorney explained that this was a "Strike suit", one designed to get damages, irrespective of justice, on the calculation that a settlement would cost less than the legal fees incurred in going to Court.

Legal self-criticism

My respondents in this fragmentary and subjective survey all made clear something that the theme of the Conference affirms – that the most rigorous strictures on the legal profession everywhere are passed by the legal profession. Bill Whitehurst, President of the Texas Young Lawyers Association, recently quoted a survey which asked Americans to list institutions in which they had high confidence. Lawyers finished last in the list of 13 – below Congress, and "That", he said "really hurts". (Quite the reverse in New Zealand.) Whitehurst goes on to say that in his opinion "the reputation of lawyers will never change significantly ... theoretically, 50% of all who go to the Courthouse lose. Usually that is because of a lawyer on the other side. So they leave mad at both lawyers, one for losing and the other for winning".

It may be, as Whitehurst implies, that lawyers face an insurmountable difficulty to being loved, but then one thinks of individuals who, in one's own direct observation, have proved this to be fallacious – small town solicitors who are unfailingly available to the aged, or who look after the miniscule affairs of the lonely or the ill, to be rewarded more with affection than money. There are lawyers, prominent and unknown, who are champions of the underdog.

In the United States, men such as Oliver Wendell Holmes, Clarence Darrow or Ralph Nader are seen as folk heroes. In the United Kingdom, where, as elsewhere, the judiciary is regarded as a higher life form, Lord Scarman is a hero to many black people and Lord Denning to many married women over his stand on their property rights. It is perhaps a pity that the law societies cannot identify the entire profession more with their members battling for the oppressed.

Fees and incomes

I asked a number of other questions. For example, are lawyers delivering what the public wants? Are they sufficiently involved in the public weal? Do they regard themselves as something apart? Are there fewer or more applicants to enter the profession than it can accommodate?

I have time to report the answers to only one other question, to which all my respondents gave similar answers: "How do people feel about lawyers' fees and incomes?" People generally believe that lawyers earn too much. One of my lively Canadian respondents comments, "Of course, the national sport here is not hockey, but envy". However the average lawyer in Canada earns only a modest $46,000 a year. All six countries also report that there is much public misapprehension on this subject. There is probably a case for better public relations, again on the part of the law societies, which seem to be often regarded as unduly conservative bodies. The median income of the profession is not generally excessive.

I must apologise to this international audience that my little survey was so narrow. It did not include any European, Asian or Latin American country. My guess would be that the findings in Europe would resemble those in the UK, and that the status of lawyers in the less economically developed countries is less subject to the winds of change. In India, the Asian country which I know best, having lived there for ten years, I suspect that the historical discontents with the law – the passage of time before any case is settled and the social gulf between lawyers and their clients – take precedence over any erosion of standards.

Range of the law

There is another side of our changing world, which came first to my mind when your Chairman, David Andrews, invited me to speak to you. You not only have the social pressures I have so far discussed to contend with, but the enormous pressure from the diversification and extension of law into fields in which the majority of your clients are not interested – and of which for that majority you need no

continued on p 248

Unfair competition in New Zealand

By A F Grant, an Auckland practitioner

In view of the new political emphasis on the economic benefits of competition this article is of particular interest in dealing with the trend of the law to regulate forms of competition that are considered to be unfair. The author considers such areas of the law as conspiracy, passing-off, copyright and intellectual property remedies among others. He sees a need for an expression of existing remedies to provide a greater degree of protection from unfair competition.

Introduction

It is only in recent times that significant attempts have been made to suppress forms of unfair competitition.

A comparison of the present state of the law with the law as it stood in 1844 when Blackstone edited the 21st edition of his Commentaries (the last edition which he edited) is quite revealing: the law of patents is dealt with in one sentence; copyright (which was then for a period of 14 years) is described as "the right", which an author may be supposed to have in his own original literary compositions . . .", the only reference to trade marks is in a footnote; there is no reference in the index to the tort of passing-off nor, of course, to the laws concerning confidentiality, registered designs or to such economic torts as intimidation, unlawful interference with business interests and the like.

In the succeeding 140 years both Parliament and the Courts have steadily developed the law so that it accords more with the requirements of the times. In England and New Zealand the regulation of undesirable practices has been achieved in a piecemeal fashion by the creation of individual remedies for different problems. The rigidity of the resulting structure is such that the Courts have often had to strain the interpretation of some of the remedies almost to breaking point in order to achieve a just result. Elsewhere, a more generalised approach has been adopted. In Europe, those countries which adopted the Code Civil can regulate business practices on the basis of a clause which enables compensation to be granted for "unlawful" and "immoral" acts. In other European countries such as Germany, Austria, Switzerland, Norway, Greece and Spain civil remedies against competition have been developed by the Courts.[1]

In America, unfair methods of competition in or affecting commerce have been declared illegal, by s 5 of the Federal Trade Commission Act (1976) USC para 45(a)(1) and the Courts have created a tort of unfair competition.[2]

Australia has in s 52 of its Trade Practices Act 1974, a measure of control over anti-competition practices. The section provides that:

> a corporation shall not, in trade or commerce, engage in conduct that is misleading, or deceptive or is likely to mislead or deceive.

Elsewhere in that statute further prohibitions are laid down. Although these provisions are aimed more at consumer protection than anti-competition practices, they nevertheless assist in the suppression of a number of undesirable practices which can allow manufacturers to compete unfairly in the market place.

The limited nature of the provisions of the Trade Practices Act has led to attempts to persuade the Courts to declare the existence of a general tort of unfair competition. Encouraging signs were initially given concerning the existence of such a remedy [3] but these have recently been destroyed by the High Court in *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (unreported 22.11.84). The High Court in the *Moorgate* decision was uncompromising in its declaration that there should be no such remedy, and there can be little likelihood that the High Court with its present composition will reverse its stand. But in leaving the door of unfair competition securely locked, it indicated that the doors of other remedies should be opened further. The Court exhorted the judiciary to adopt a "flexible approach" to existing remedies "when such an approach is necessary to adapt them to meet new situations and circumstances".

There has been no reported case in New Zealand in which the Courts have been asked to determine the existence of a general tort of unfair competition but the Courts are unlikely to be able to avoid the debate.

Before considering the desirability of creating a tort of unfair competition it is helpful to see the way in which existing remedies have been developed and whether they are capable of sufficient adaptation to provide adequate future protection for unfair competition practices. Some of the more interesting potential remedies are copyright, unlawful interference with business interests, intimidation, conspiracy, confidentiality and the one which shows the most potential, passing-off.

Omitted from this list are those remedies which have established parameters and which are unlikely to see much development in the foreseeable future such as slander of goods, deceit, injurious falsehood, interference with contractural relations, Anton Piller Orders, and the statutory protection given to designs, trade marks and patents. Nor is the equitable remedy of breach of fiduciary duly referred to, it being too large a topic to consider here.

Copyright

At the beginning of this article Blackstone's definition of the law of copyright was given:

> The right which an author may be supposed to have in *his own original literary compositions* . . . .

The unfairness of restricting copyright to literary and related works became apparent in the 20th century. Authors of such works received substantial protection whereas authors of non-literary works, and in particular authors of very valuable industrial designs, received no protection unless the designs themselves were capable of being the subject of a patent or a registered design.

By the Designs Act 1953 provision was made for the protection of some "new and original" designs but the scope of this Act has always been so narrow and the duration of the protected term so short that it is of advantage to only a few. A registered design can be protected by the Act for a maximum period of 15 years.

One of the most important developments in recent New Zealand copyright law occurred with the 1974 decision in *Johnson v Bucko* [1975] 1 NZLR 311. In this case the Court held that an industrial design of the most ordinary and uninspiring sort (it related to a design for a lavatory pan connector) was an "artistic work", and therefore capable of protection within the framework of the Copyright Act. The *Bucko* decision was expanded significantly in the recent decision in *Wham-O MFG v Lincoln Industries* [1981] 2 NZLR 628 (Moller J); and [1984] 1 NZLR 641 (CA) where it was held that wooden models of a product, moulds, dyes and even the finished products themselves (they were frisbees) were "artistic works"; each mould or dye was additionally an "engraving"; and the finished plastic product itself was an "engraving". The effect of this decision is that almost all industrial products are the subject of copyright.

This is a remarkable turnabout. In the 1590's Shakespeare had no copyright in his plays; his earnings coming solely from ticket sales to the performances. In the 1980's the wheel had turned so far that not only are books, plays, music, records and works of art protected but so too are films, computer programmes,[4] and almost every manufactured article available within the community. No-one can copy these works until the expiration of the period of copyright which is usually for the lifetime of the author and a further period of 50 years.

There is no system for depositing copyright work and thus there is no possibility in many cases of ever knowing if a work is actually protected by the Act and, if so, when the protection will cease. Another remarkable anomaly which has been created is that whereas the device which is the subject of a patent can only be protected for a period of 16 years and the subject of a registered design for 15 years, a device which is not capable of being patented and which is not registered under the Designs Act can be protected for a lifetime of the author and for a further period of 50 years after his death. Professor Burns has said that, [1981] EIPR 313:

> The Courts seem to have been forced to exaggerate the range of the law of copyright simply because no unfair competition doctrine existed.

If a more general remedy had been available the Courts might have been able to avoid the remarkable distortions which have had to be made to the law of copyright and which are now having to be remedied in the Copyright Bill which is before Parliament.

In the Bill the definition of copyright materials is expanded to include "models" and the term of copyright for designs which must have been applied industrially is limited to 16 years. Industrial designs will therefore receive protection for a similar period to that given to patents (16 years) and registered designs (15 years) without the need for any formal system of deposit.

If the Bill becomes law, the Copyright Act will apply to virtually all artistic, utilitarian and industrial objects within the community. These changes are the logical outcome of recent judicial innovation and are to be welcomed. The Copyright Act 1956 has been a helpful vehicle for the protection of industrial designs and the major anomaly which has resulted from the Courts' use of it to protect such works (the length of protection) is reduced in the Bill to a much more sensible period.

Unlawful interference with business interests

This is a tort of recent creation and to which the Court of Appeal has given its approval. In the recent case of *Van Camp v Aulsebrooks* [1984] 1 NZLR 354 Mr Justice Cook said of the tort of unlawful interference with business interests:

> It is a recognised tort in New Zealand although its boundaries will receive closer definition as cases emerge and we see insufficient reason for discarding a judicial remedy which from time to time may be useful to prevent injustice.

This tort may provide a useful remedy for some unfair competition practices but in the absence of any workable guidelines to show its parameters it is too early to say how helpful it will be. In the *Van Camp* case it was said that:

> the essence of the tort is deliberate interference with the plaintiff's interest by unlawful means. If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far.

Most manufacturers have as a primary motive the making of money rather than a desire to hurt a rival manufacturer and as it is only in the latter circumstances that the tort will apply, it seems likely that this particular remedy will not be of much assistance in suppressing unfair conduct.

The Court of Appeal's formulation on this aspect is much more onerous than some other Courts would have it. For instance, Mahon J in *Coleman v Myers* [1977] 2 NZLR 225 at 294 said that:

> In most cases involving this form

of liability the defendant will have been primarily seeking to further his own economic interests, but that motivation is irrelevant once there is established the commission of an unlawful act accompanied by a concurrent purpose to cause economic loss to the plaintiff.

A further difficulty with the tort is the restrictive interpretation which has usually been applied to the term "unlawful means". As is mentioned below, the Courts have not extended its meaning to the point where "unalwful means" necessarily equates with "unfair means".[5] In summary, the major shortcomings of the tort are that:

1 If the defendant's motive is not so much to damage the plaintiff's business as to improve his own, the tort probably does not apply.
2 The means employed by the defendant must be "unlawful" — a term which does not necessarily equate with "unfair".

Conspiracy

The tort of conspiracy, at present an unused and somewhat ill-defined remedy,[6] can be used to restrict some unfair competition practices. The tort consists in the agreement of two or more persons to do an unlawful act or to do a lawful act by an unlawful means. A company is able to conspire with its directors[7] so that in the usual marketing dispute where one company is enjoined in unfair competition with another, it is possible for the plaintiff to sue the company as a first defendant and its directors as further defendants and co-conspirators.

The requirement that the conspirators should do an "unlawful act" or use "unlawful means" is, however, a problem because as mentioned above the Courts have been reluctant to equate "unlawful" with "unfair".

In the *Van Camp* case the Court of appeal reserved its opinion on whether misuse of confidential information constituted "unlawful means" for the purpose of the tort of unlawful interference with economic interest and the fact that the Court did so, appears to indicate a willingness to consider a more expansive interpretation than has traditionally been given to it.

The torts of conspiracy and unlawful interference with economic interests are similar in their requirement that there should be the use of "unalwful means" and it is therefore likely that they will either grow together or languish together. To the extent that "unlawful means" is interpreted as "unfair" so the tort of conspiracy, in particular, will become a more common remedy.

Confidentiality

It is not appropriate here to say much of this new remedy. The steady stream of case law has created its own quite substantial jurisprudence.[8]

In essence, Courts are willing to act far more readily to suppress the unfair utilisation of trade secrets. At present, the criteria for the intervention are:

(i) The information must have "the necessary quality of confidence about it".
(ii) The information must have been imparted in circumstances importing an obligation of confidence.
(iii) There must have been an unauthorised use of the information.[9]

The increased standards which are being imposed by the Courts can be seen from the cases relating to the use by former employees of customer lists. Whereas their traditional attitude was to allow an employee with an attentive memory to walk off with a customer list in his head,[10] the same employee nowadays runs a real risk that he will be restrained, at least by New Zealand Courts, in the use which he can make of that information.[11]

The willingness of the Courts to grant orders for exemplary damages as an additional penalty is another helpful development which strengthens the hand of those who seek to restrain unauthorised disclosure of trade secrets.[12]

The long-term stability of an industrialised community requires that the Courts should intervene to protect trade secrets and the Courts appear to be well aware of this. Where "unfair competition" arises from the use of confidential information, the Courts have shown that they are prepared to expand the remedy where appropriate so as to restrain the use of such information.

Passing-off

The ambit of this tort has increased so dramatically in recent times that its title "passing-off" is now a misnomer.

In the 19th century its application was restricted by the belief that it applied only to the property which an individual had in a distinctive name or mark. This is the "classic" form of the tort (Lord Diplock's term) — *Erven Warnink v J Townend & Sons* [1979] 2 All ER 927.

That principle was later reformulated and it was said that the tort applied not so much to a distinctive name or mark but to the *goodwill* which a proprietor possessed in the product — *A G Spalding & Bros v A W Gamage Ltd* (1915) 32 RPC 284. It was this reformulation which has expanded the tort far beyond its classic form and into realms where a more accurate name would be "unfair trading" — *Erven Warnink v J Townend & Sons* (supra).

It took the Courts some time to realise the significance of the reformulation of the tort. In one direction, it led to a prohibition on non-competing traders from falsely suggesting that their business was in some way connected with another. So that for example Harrods, which by its articles of association was unable to engage in money lending, was able to stop R Harrod Limited from doing so — *Harrods Ltd v R Harrod Ltd* (1923) 41 RPC 74.

In another direction, it led to the supression of misrepresentations as to the origin of goods or services. The first significant case in this line of authority concerned the growers of champagne in France *(Bollinger v Costa Brava Wine Co Ltd* [1961] RPC 116) in which the English High Court allowed them the monopoly right to the name Champagne. It was followed by the sherry case, *Vine Products Ltd v Mackenzie & Co Ltd* [1969] RPC 1; the whiskey case, *John Walker & Sons Ltd v Henry Ost & Co Ltd* [1970] 2 All ER 106; and the Advacaat case, *Erven Warnink v J Townend & Sons* (supra).

In the second in the series, the sherry case (supra) Cross J said:

I agree entirely with the decision in the Spanish champagne case — but as I see it, it uncovered a piece of the common law or

> equity which had till then escaped notice — for in such a case there is not, in any ordinary sense, any representation that the goods of the defendant are the goods of the plaintiff's, and evidence that no-one has been confused or deceived in that way is quite beside the mark. *In truth the decision went beyond the well-trodden paths of passing-off into the unmapped area of "unfair trading" or "unlawful competition".*

When this series of cases reached the House of Lords in the Advocaat case (supra) Lord Diplock said:

> This is an action for "passing-off", not in its classic form of a trader representing his own goods as the goods of somebody else, but in an extended form first recognised and applied . . . in the Champagne case.

After outlining the facts he continued:

> These findings of fact . . . seem to me to disclose a case of unfair, not to say dishonest trading of a kind for which a rational system of law ought to provide a remedy to other traders whose business or goodwill is injured by it (p 9316).

Lord Diplock reformulated the tort as possessing five essential elements and he suggested that Judges should lean on the general side when applying them:

> . . . The increasing recognition by Parliament of the need for more rigorous standards of commercial honesty is a factor which should not be overlooked by a Judge confronted by the choice whether or not to extend by analogy to circumstances to which it has not previously been applied, a principle which has been applied in previous cases where the circumstances although different had some features in common with those of the case which he has to decide (p 933f).

As Fleming says:

> The scope of the tort has been increasingly expanded to reach practices of "unfair trading" far beyond the simple old-fashioned passing-off. . . . Today any misrepresentation for any purpose as to the origin of the goods or services which the defendant proposes to or does deal in or employs in the course of business, constitutes an actionable wrong.[13]

There is insufficient scope in this article to show how readily the New Zealand judiciary has been prepared to accept this call to expand the law and only three illustrations will be given. In the *Lion Red* case (unreported, High Court Auckland, 5.12.83, A No 1157/83) Mr Justice Vautier said that the:

> present law is indeed, I think, epitomised in the statement of Lord Fraser in the Advocaat case — ". . . the plaintiff is entitled to protect his right of property in the goodwill attached to a name which is distinctive of a product or class of products sold by him in the course of his business" (p 25).

In the *McBean* case (unreported, High Court Auckland, 5.11.82, A No 150/82) Mr Justice Jeffries said:

> This case is not one of the classic form "passing-off" cases but nearer to the extended form as referred to by Lord Diplock in *Erven Warnink v Townend.* It may possibly be a fraction beyond even those cases. One of the great values of *Warnink* if I may with respect say, is that it recognises the passing-off action is undergoing change, having clearly now departed from its classic form. The direction may be towards a general unfair competition action but I do not regard this as such a case.

And in the *Crusader Minerals* case (unreported, High Court Wellington 6.9.84, A No 156/84) Jefferies J was confronted with a defendant which had adopted in New Zealand a name which was similar to the name of an Australian company, the latter not being well known here. The most recent English case, *Budweiser*[14] has adopted what has been criticised[15] as an unduly severe standard concerning the extent of local reputation which an overseas plaintiff must possess before being able to stop a local manufacturer using its name. New Zealand and Australian Courts have been prepared to grant injunctions with much less evidence of local reputation[16] and Jeffries J granted an injunction to the Australian plaintiff saying that the *Budweiser* decision:

> still does not necessary provide a solution for us. Our path is being laid by such cases as *Fletcher Challenge* and the judgment of Casey J in *Esanda.*

In short, the tort of passing-off is undergoing a most interesting phase of development and there is sufficient scope for the remedy to become of such general importance within the community as will cause it to rank second in the field of torts after the law of negligence.

Unfair Competition

The major criticism of the concept of "unfair competition" is that while it sounds attractive, its attractiveness is superficial and it is too vague. It is said that a society which has as its economic cornerstone the principle of freedom of competition ought not to give to the Courts an instrument of such potential force which is so imprecise. The opposing argument says that the degree of commitment to free enterprise principles is reflected in a country's competition laws. Business arrangements which lead to a reduction of competition will normally be outlawed and to maintain an economic balance, acts which are likely to lead to unfair competition must also be curtailed.

What then does the concept of unfair competition involve? In America, the tort was created in *International News Service v Associated Press* (1918) 248 US 215 where the issue before the Court was whether a newspaper could re-publish its rival's news items as its own. The Supreme Court, in finding by a majority, that there was a tort of unfair competition did not provide any satisfactory analysis of the remedy. Speaking for the majority Mr Justice Pitney said:

> (the) defendant, in appropriating (the news) and selling it as its own is endeavouring to reap where it

> has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorised interferance with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped. . . . The transaction speaks for itself, and a Court of equity ought not to hesitate long in characterising it as unfair competition in business.

"Reaping without sowing" as a basis for the tort is so broad a principle that if applied at all literally it would stifle all economic growth since few ideas are ever novel. As Mr Justice Brandeis said in his dissenting judgment:

> That competition is not unfair in a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labour and expense of the first adventurer: but the law sanctions, indeed encourages the pursuit.

One of the reasons given by the Australian High Court in the *Moorgate* case (supra) for rejecting the notion of a tort of unfair competition was the imprecision of the American tort. Dean J quoting from a 1976 American decision *Jacobs v Robitaille* (1976) 406 F Supp 1151, said that the concept of unfair competition was:

> a "child of confusion" which has spawned a body of law that lacks in judicial definition and scope.

And a recent Canadian report on the protection of trade secrets has said that since 1938 the tort of unfair competition in America has been "a legal argument of last resort".[17]

Defining "unfair competition"

The statutory definition of unfair competition in America is contained in s 5 of the Federal Trade Commission Act (1976) 15 USC para 45(a)(1) which reads:

> Unfair methods of competition in or affecting Commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful.

The weakness of such a formula is that it lacks any definition of "unfair methods of competition" or analysis of the nature of the conduct which it is considered should be prohibited. On the other hand, the lack of any definition allows the judiciary complete freedom in the interpretation of what should be prevented.

Professor Burns has provided a suggested wording for a tort of unfair competition:

> It is unfair competition wilfully and without lawful excuse to cause damage to another by appropriating the trade values of others or by misrepresenting their own or others' trade values ([1981] EIPR 312).

This formula seeks to analyse unfair competition as the appropriation of "trade values", a concept which is not defined and which may seem to many to be rather difficult to understand in the absence of any statement of its intended parameters.

So far as New Zealand is concerned it would be undesirable for a statutory tort of unfair competition to be created until there has been full discussion concerning the ambit of the concept and the formulation of any proposed statutory provision. This course is bound to take a considerable period of time. The present need is that the known shortcomings of the present law should be remedied and not that there should be a substantial re-drafting of the law to proscribe all forms of undesirable business ethics, including those which are not yet generally recognised as such.

If the law of passing-off is interpreted as the utilisation by one person of the goodwill of another, most of the present shortcomings in the law can be overcome by giving a wider interpretation to the concept of "goodwill".

The following are a selection of statements made by various Judges, all of which suggest that the underlying principle for the law of passing-off is in fact the wrongful utilisation by one person of the goodwill of another (see also *Warnink* and other statements quoted earlier in this article):

> (The right, the invasion of which is the subject of passing-off actions, is) the property in the business or goodwill likely to be injured by the misrepresentation — *A G Spalding & Brothers v A W Sausage Ltd* (1915) 84 L J Ch 449 at 450 (Lord Parker).

> The cases in which the Court has restrained passing-off in the popular and usual sense are merely instances of the application by the Court of a much wider principle, the principle being that the Court will always interfere by injunction to restrain irreparable injury being done to the plaintiff's property. *Samuelson v Producers Distributing Co* [1932] 1 Ch 201, 210 (Romer LJ).

> The false representation of which a plaintiff can complain need not necessarily have been made to the plaintiff and may have been made either in relation to the plaintiff's goods, his services, his business, his goodwill or his reputation. Indeed, I am of the opinion that the categories in this regard may still be open and that the development of new or altered practices in business in trade or in professions may in the future result in further classes becoming apparent. If in fact such a misrepresentation is made and as a result of such misrepresentation the plaintiff suffers damage, the right of action arises. *Henderson v Radio Corp* [1960] SR (NSW) 576, 598.

> The rationale of the action (for passing-off) is that the law will not permit the plaintiffs' legitimate business interests to be prejudiced by the exploitation of another person of the plaintiffs' goodwill — *Lyngstad v Anabel Products Ltd* [1977] FSR 62 (Oliver J).

The object of the law's intervention into the arena of trade or business is preservation of a trader's or businessman's goodwill from an appropriation by another trader or

businessman" — *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* [1981] NSWLR 196 at 204 (Powell J).

"The unlawful appropriation of goodwill" as the basis for the tort has the difficulty for some that it begs the question about the legal nature of goodwill. If goodwill can only be associated with "property" questions arise as to whether the present legal categories of "property" are wide enough. For example, is a man's name his property? Or his mannerisms? Are fictitious creatures property?

The tort of passing-off is formulated in terms which are wide enough to protect these things and although the legal basis for doing so may not be theoretically pure, the results are fair. A similar problem arose with the law of confidentiality. The debate as to whether the basis of the remedy was in equity or in property has not, however, restrained the Courts and they have proceeded to create a well-entrenched and effective remedy, albeit of an uncertain theoretical foundation.

If the law of passing-off can protect "goodwill" without becoming stultified by dry arguments over the legal status of this property to which the goodwill is attached, the tort of passing-off will be able to cope with a large area of business practice which is encompassed within the common understanding of "unfair competition".

The following are some of the attributes of a person which are capable of being the subject of goodwill:

His name.
His appearance and mannerisms.
His voice.
The labelling on the goods which he makes.
The distinctive shape of any containers used for the product.
The names and trading styles which he uses in his business.
Aspects of his business which he is reputed to possess.
Fictitious characters which he has created.

Goodwill and locality

The most important difficulty with the concept of goodwill is that Courts have historically said that it is localised, but in today's world it is unfair to restrict goodwill to an individual locality. As Whitford J said recently in *Stringfellow v McCain Foods Ltd* [1984] FSR 196:

> Experience in these Courts alone has shown that in recent years there has been a vast extension in the field of franchising. The grant of right or rights of user by the owners of well-known names in connection with products . . . is a common place of today.

The fact that a manufacturer in country A, who has a well-known mark there which he has not exploited in country B, does not mean that he may not wish to do so in future.

As an illustration, the owners of Harrods' department store in London have only operated one store under that name but it is nevertheless well-known throughout the world. In recent times there have been at least three traders in Auckland who have adopted the Harrods' name and distinctive script, all of whom have essentially sought to trade off the goodwill of the department store. If this use had been permitted by the New Zealand Courts, Harrods would have suffered very substantial losses if it decided to utilise its name directly in New Zealand either by having its own store here or by licensing others to use it. In fact, the ownership of Harrods has recently been secured by new owners who intend to franchise the name throughout the world and to realise the potential of the goodwill which exists in that name (*The Times*, 13 March 1985).

Less well-known companies and individuals should also have this right. It is not acceptable for unscrupulous people in one country to adopt, for example, the names and trading styles of those in another country so as to prevent the original owners from reaping the tremendous rewards which a successful international licensing campaign can achieve.

The Warnink Formula

The five characteristics which Lord Diplock said in the Advocaat case must be present to establish the tort of passing-off are:

1 A misrepresentation.
2 Made by a trader in the course of trade.
3 To prospective customers.
4 Which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably forseeable consequence).
5 Which causes actual damage to a business or goodwill of the trader by whom the action is brought.[18]

The first requirement that there must be a "misrepresentation" is the key element in the formula and it ought to be interpreted broadly, as the Australian and New Zealand Courts have been doing — and more broadly still. In this way those who possess goodwill in one country will be able to profit from it elsewhere. In the example given earlier, a person in country A who has a valuable product name there should be able to stop people in country B from using the name in that country when they are doing so only because they anticipate that the reputation of the name in country A will spill over into country B and there will be valuable *future* goodwill. This can be achieved by categorising as a "misrepresentation" the use of the name by the user in country B.

It should also be borne in mind that it is not a requirement of the formulation that the purchaser should be deceived. Lord Diplock's formula does not require this as the underlying purpose of the tort is not so much the shielding of consumers from deception but the protection of a person's goodwill.

Conclusion

A general remedy against "unlawful competition" will probably not achieve its intended purpose, at least in the short term. This is because the lack of guidelines in an area of such economic importance is likely to result in considerable judicial caution.

The various intellectual property remedies which have been developed in recent years to provide protection against forms of conduct which can broadly be described as "unlawful competition" are likely to continue growing. In the field of trade secrets, it appears that the law of confidentiality will continue to expand to meet current expectations of proper standards of secrecy. If the

law of passing-off does not develop sufficiently, the tort of conspiracy and possibly the tort of unlawful interference with business interests may expand to meet the resulting need.

However, this is unlikely as the tort of passing-off has the capacity to become a remedy which will meet a broader range of unfair business practices than it reaches at present. If this country's Judges follow the exhortation of the House of Lords and of the Australian High Court to adopt a flexible approach to existing remedies it is likely that the law of passing-off will continue to grow.

It is possible that a renaming of the tort of passing-off might provide a more favourable environment for its development. If it was re-named "unfair trading", a far more accurate name for it at present, the restrictions which are associated with the term "passing-off" would not retard the tort's development. Already some textbook writers refer to passing-off as being synonymous with unfair competition or unfair trading and the use of a more accurate description for the tort is likely to assist its growth.

The principles which underlie existing remedies, particularly passing-off, are sufficiently broad to justify the hope that a judiciary intent on suppressing all forms of unfair competition will be able to achieve that end. If, however, the *Warnink* principles are found not to be wide enought then there would be a discrete remedy in respect of unfair competition since there is general agreement at present that the existing laws are not wide enough to embrace all the forms of protection which are desirable and the present debate is simply concerned with the issue of whether the existing common law remedies are capable of expanding to meet the recognised need. □

1 See Cornish *Unfair Competition? A progress report* 1972 JSPTL 126.
2 *International News Service v AP* (1918) 248 US 215.
3 Eg *Hexagon Pty Ltd v ABC* (1975) ALR 233, 251-252 *Testro Bros v Tennant* (1984) 2 IPR 469.
4 Eg *Apple Computer Inc v Computer Edge* (1984) 53 ALR 225; *National Law Journal* 21.1.85, p 20 (*The Worldwide Legal Status of Software Protection*).
5 See generally Heydon, *Economic Torts* (2 ed) p 66.
6 The potential for this tort as a remedy for unfair competition is referred to by N S Marsh 53 *The Trade Mark Reporter* 2 (February 1963) 114.
7 *R v Blamires Transport Services Ltd* [1964] 1QB 278; Heydon, *Economic Torts* (2 ed) p 15.
8 Eg Wise, *Trade Secrets & Know-How Throughout the World* Vol 2 (Vitoria); Gurry, *Breach of Confidence* (Clarendon Press) 1984.
9 Gurry (op cit) p 4.
10 Gurry pp 68-69, 95-97, 201-203.
11 Eg *SSC&B: Lintas v Murray* (14.10.81); *Probe Productions Limited v Profile* (27.5.81); *Group Rentals v The Appliance Shoppe* (5.7.82); all unreported.
12 Eg *Wood R Mitchell Advertising Ltd v Tilley* unreported, Prichard J 18.8.83.
13 *The Law of Torts* (6 ed) 674. See also Brett, *Unfair Competition — not merely an academic issue?* 1979 EIPR 295.
14 *Anheuser-Busch Inc v Budejovicky Budvar* [1984] FSR 413.
15 Eg 1984 EIPR 279.
16 Eg *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* [1981] 1 NSWLR 196; *Esanda Ltd v Esanda Finance Ltd* [1984] FSR 96; *Keg Restaurants Ltd v Brandy's Restaurant,* unreported 16.11.83.
17 Institute of Law Research & Reform, Edmonton *Protection of Trade Secrets,* February 1984 p 33.
18 *Warnink* [1979] 2 All ER 932, 933. This formula is not to be treated as having statutory force or as constituting an exhaustive definition of passing-off; *My Kinda Bones Ltd v Dr Pepper's Stove Co Ltd* (*The Times* 26.11.81) per Slade J.

continued from p 241

knowledge — but in which you have to be versed within the definition of general practice. I was amazed when I first read the range of topics on which you will be deliberating for the next few days, and this led me to wonder whether one of the obstacles to tackling the societal issues is merely finding the time necessary to devote to them.

You have 22 divisions, each of which you are now about to survey in a distinctly self-interrogatory way. They do not even include my own favourite specialisation, which is the law of copyright. I suspect that you may have a problem parallel to that of publishers, who, under pressure to cater for the simultaneous multiplication and fragmentation of knowledge, compounded by the revolution in information technology, develop so many specialisations that they seldom come together to study the general issues. To use the example best known to both of our professions, legal publishers cannot, should not, claim their goals are fulfilled because they provide speedy and authoritative legal literature, if they distance themselves from black sheep activities such as censorship, piracy or pornography. If I correctly detect similar pressure on you, you have my sympathy and understanding.

We both struggle with our images. Ask anyone for the best known quotation about a publisher and he will quote either Byron or Thomas Campbell, and as a Scotsman I hope it was the former, who said: "Now Barabbas was a publisher". And of course the public's favourite quotation about lawyers is from Henry VI Part II: "The first thing we do, let's kill all the lawyers".

Conclusion

At this point in drafting my remarks, I realised that I had exhausted my time; read what I had written; looked through my source papers, and reached the conclusion that David Andrews and I had this assignment the wrong way round. I should have been asking him to write a book on this subject, which is manifestly beyond the scope of a speech. I had intended to develop the thought that your profession is also a business, and that what you are facing is, in a sense, a marketing and management problem. Here again you are in the same boat as publishers, whose publications on good management always seem to outstrip their ability to practice it. But the first thing to do is to put it into words.

I now have to face the fact that far from delivering a keynote for your deliberations, I have barely offered a prelude. Then I comfort myself with the thought that my role is really synthetic, and probably superfluous, because you have sounded your own keynote not only in the programme you are embarking upon, but in what is manifest in the legal profession everywhere today to the most casual observer; self-examination and self-criticism are seen as the way to the higher standards of training, service and conduct which you have set for yourselves. □