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The Index

For some centuries the Curia of the Roman Catholic Church had an Index of Prohibited Books. This no longer exists as such, although the recent statement of warning and censure about a book on liberation theology indicates a continuing concern with doctrinal orthodoxy.

Legal textbooks do not have quite the same problems to face. The system works in reverse. The positive judicial quotation of a text, or more often a paragraph from a text, establishes the legal authority of that particular formulation of the principle of law there enshrined as being, in a sense, "orthodox". Perhaps there is a place in the law for an Index of Approved Texts – although by and large it can be said that is what *Halsbury* already tries to be.

Turning from such serious questions of Indexes, or Indices for old-fashioned Latin purists, to something by way of light relief, attention is drawn to the article by an English solicitor J B Hodge in *The Law Society's Gazette* for 19 February 1986 at p 517 on "The Index; Not the Book". This is a delightfully witty piece that should be read in full and the following quotes from it are intended to encourage a reading of the full article.

The author begins with a story I'd read before about someone seeing an index entry to "Dr Johnson – his great mind". The reader looked up the page reference in great expectation only to find the statement: "Dr Johnson said he had a great mind to have oysters for dinner."

Before quoting further from the article it is perhaps only just to engage in a little antipodean criticism. Mr Hodge takes a couple of light-hearted jabs at Polynesia and Western Samoa. Suffice it to say that the *New Zealand Law Journal* is published in a part of Polynesia. (I notice my *Concise Oxford Dictionary* (1974 reprint) defines Polynesia as "Small islands in Pacific Ocean east of Australia". And I thought the general editor of the Oxford dictionaries, Mr Burchfield, was a New Zealander!) And as for Western Samoa I am sure that, despite the presumptions of Mr Hodge to the contrary, any of the 26 legal practitioners in that country would be delighted to have the opportunity to file an answer to a divorce petition issued out of the High Court Registry of Bloomsbury, or wherever in the sceptred isle they do that sort of thing. And finally Mr Hodge should be aware that here in Polynesia the Judges read the *All England Law Reports*, and they treat the judicial *obiter* therein expressed in just the way he says is done in England.

So what does he have to say? Basically he contends that an index is more interesting than the book in which it is contained. He founds his argument on two basic authorities – *Rayden on Divorce* and the *All England Law Reports*.

In *Rayden* he points out:

> It cannot be pure coincidence that in the index we find 'Sexual Intercourse' coming next after 'Seven years absence', or 'Adultery' coming immediately before 'Advancement'. It seems right that 'Appeals' should follow '*Anton Piller* order', and the juxtaposition of 'Bigamy, Birth Certificate and Blood Test' seems most appropriate. '*Dum Sola et Casta*' sounds like an aria from Rigoletto. 'Insanity' follows 'Inordinate sexual demands'. When I was at school we were taught that it was another activity that led to insanity!

Then he really gets into his stride by a detailed analysis of the index of cases considered in the *All England Law Reports*, and finds he can draw important and serious conclusions from that index. He reminds the reader of the cryptic information provided to punters in various racing journals regarding the horses' previous form, and notes that in the table of cases the situation is reversed so that we can learn how a judgment has fared later in the judicial stakes.

By way of illustration here are a couple of paragraphs to show what can be got by careful and judicious reading of an index.

> The great cases, were they horses, would have before their names 1.1.1.1. Instead, like *Donoghue v Stevenson*, they have been applied, applied, applied, applied, considered, – *dictum* applied, *dictum* applied – an almost perfect record. In 50 years never distinguished or criticised, let alone overruled. Not so *Wachtel v Wachtel*; after being applied eleven times it was considered four times, the *dicta* explained three times: it was then explained twice and considered four times before finally being followed once. . . .
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> *Conway v Wimpey (George) & Co Ltd* has never done well; it has been distinguished on each of five occasions. At least it was a consistent runner. Not so another horse from the same stable *Conway v Rimmer*, which though applied twice seems to have lost form, achieving thereafter one considered three *dicta* applied, two *dicta* considered and one *dictum* followed, only to end up ignominiously by being explained. . . .
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> Finally, there are some who start well and seem to be going well only to fall at the last fence. *Chambers v Goldthorpe* was applied three times but was then overruled. No doubt the bookies were pleased.

Indexes however are not only entertaining – they are useful, indeed essential. Publishers know that providing pages of detailed information by way of tables and indexes is an expensive and time-consuming job. But without them our legal textbooks would not have the value and serve the basic function that they must as the lawyer's tools of trade.

P J Downey

Case and Comment

Quasi — absolute liability under the Immigration Act 1964

In *Murray v Ongoongo,* [1985] BCL 1843 (unreported) D had been prosecuted for "overstaying", contrary to s 14(5) of the Immigration Act 1964, in that he had remained in New Zealand from 1 January 1979 until 14 July 1983, after the expiry of an extended temporary permit to enter New Zealand. There had in fact been a number of purported further extensions of the permit, until 31 December 1982, but these were invalid because granted after the extended permit had expired, and in this context it is held that such invalidity means the extensions are of no effect (*Bendile v Dept of Labour* [1982] 2 NZLR 763).

D had thus committed the actus reus of the offence throughout the period specified, but the charge was dismissed in the District Court because D had (initially) remained in reliance in good faith on purported extensions made by the proper authorities. In the High Court, however, Hillyer J held that such a belief that a permit had been extended was not a defence, even in relation to the period to which the belief related.

Hillyer J concluded that this was the proper interpretation of s 14(5) of the Immigration Act 1964, as substituted by s 4(2) of the Immigration Amendment Act 1976. The 1976 version of s 14(5) expressly provides than an overstayer commits an offence "whether or not he knows" that the permit has expired and that no further extension has been applied for or granted. Nevertheless, the District Court Judge held that D's positive (but mistaken) belief in the existence of an extension was not covered by s 14(5), so that a defence of lack of mens rea was available. Hillyer J rejected this, holding that D was "clearly" within the terms of s 14(5) in that "no extension had been granted, and he did not know that". His Honour saw no distinction between "knowing or not knowing that an extension has not been granted and thinking that an extension has been granted, if one has not been".

Mens rea and absence of fault

In fact these states of mind may be distinguished, the difference sometimes being expressed as being between "simple ignorance" and "mistaken belief", and where a defendant claims to have forgotten an essential fact the Courts have sometimes, but not always, thought that the difference may be important: for example, compare *Bello* (1978) 67 Cr App R 288 and *Russell* [1985] Crim LR 231. Moreover, a strict interpretation of "knows" in s 14(5) would mean that it merely excluded a defence that D was not sure of the true position: cp *Crooks* [1981] 2 NZLR 53 CA.

More substantially, it seems clear that D's mistaken belief in the existence of an extension was entirely reasonable, but Hillyer J further held that the defence of "absence of fault" recognised in *Civil Aviation Dept v MacKenzie* [1983] NZLR 78 was not available, and to this extent the offence was one of "absolute liability". This again followed from His Honour's interpretation of s 14(5): the exclusion of a defence of absence of knowledge was "not reasonably capable" of an interpretation which would allow a defence in this case.

No doubt ambiguity may be in the eye of the beholder, but it is submitted that the mere exclusion of a defence of "not knowing" a fact is well capable of being read as allowing the possibility of a defence in the case of a positive belief to the contrary, when it arises without fault and is based on official action, or other reasonable grounds. This last factor is at the heart of debates about the "subjective" or "objective" assessment of criminal culpability, and the unanimous view in *MacKenzie* that "absence of fault" rather than "traditional mens rea" was the appropriate test for the offence in that case.

It is therefore suggested that the reasoning of Hillyer J is suspect, although support for his conclusions may be found elsewhere. First, the 1976 version of s 14(5) was enacted in response to *Labour Dept v Alouha* [1975] 1 NZLR 507, where Mahon J held that the offence required a "guilty mind", so that it was a defence that there was evidence raising a reasonable doubt that D was "unaware" that the permit had expired, because he "thought" from experience that an extension had been "arranged" by another. This judgment does not clearly require any positive belief in an extension, nor truly "reasonable" grounds for such a belief, although in *Kumar v Immigration Dept* [1978] 2 NZLR 553, 557, Richardson J assumed there had been reasonable grounds, but immediately highlighted the obscurity of the position by explaining that, under the 1976 legislation:

> where honest belief in the existence of permission ... might be raised, mens rea has been expressly excluded.

Subsequently, however, Richardson J felt able to assert that, since 1976, "honest belief on reasonable grounds" was excluded as a defence: *Moevao v Dept of Labour* [1980] 1 NZLR 464, 477 (although in *Malungahu v Dept of Labour* [1981] 1 NZLR 668, 669, ambiguity is reintroduced by the proposition that what is no longer required is "mens rea"). These dicta were cited by Hillyer J, and the one in *Moevao* does support his conclusion, although this is slight as there is no explanation of the inclusion of "reasonable grounds" in the description of the outlawed defence.

Second, although they seem to remain a forbidden source for a Court seeking the meaning of an Act, the Parliamentary Debates confirm that it was intended that the offence be one of "strict liability", and that a mistaken belief based, for example, on legal advice, should not be a defence: NZPD vol 408 (1976), at 4321-2, 4561. So it seems that the judgment in *Ongoongo* gives effect to the "true intent" of the legislation, and to that extent is "right", but the readiness of the Court to find the defence of absence of fault to be "clearly" excluded is disquieting.

Absence of fault and other defences

In *Finau v Dept of Labour* [1984] 2 NZLR 396 CA (noted by John Hannan, (1985) 9 Crim LJ 249) it was held to be a defence to a charge under s 14(5) that it had been impossible for D to leave New Zealand, there having been no absence of due diligence on D's part. In *Ongoongo* this was distinguished on the basis that, although D (reasonably) believed he had a permit to stay, he had been able to go. D's defence was the impermissible one of lack of mens rea, and there was no impossibility or any other basis for holding that he was not responsible for the actus reus. This confirms that there may be offences to which, by judicial construction, there is no defence of lack of mens rea, absence of fault or lack of negligence, but to which there may be other narrower common law defences, such as impossibility or necessity: cp *Civil Aviation Dept v MacKenzie* [1983] NZLR 78, 81. It also illustrates the dubious nature of the distinction.

Autrefois acquit

Hillyer J added the comment that if D's defence succeeded he would be able to remain indefinitely, and that a further charge of overstaying could be met by a plea of autrefois acquit (by implication, even though the later charge related to a period when there was no purported extension, and when D knew the true position). This view arises from *Malungahu v Dept of Labour* [1981] 1 NZLR 668 CA.

There, before the 1976 legislation, D had been acquitted of overstaying because there was reasonable doubt as to mens rea, and was then charged with overstaying after the date of that acquittal. It was held that the acquittal barred the second charge, which was of the same offence, because the offence under s 14(5) is a single offence whch continues for so long as an offender remains in New Zealand, without a break, from the expiry of a valid permit. The offence "cannot be artificially split into two parts", by informations referring to different periods of time (see *Dept of Labour v Latailakepa* [1982] 1 NZLR 632, 636). Somers J also suggested that the acquittal barred the allegation of the essential fact that D remained from the expiry of the permit, but this ignores the reason given for the acquittal, and may be doubted.

But in *Finau v Dept of Labour* [1984] 2 NZLR 396 CA, it was held that, in the absence of fault, so long as it is imposible for an overstayer to leave the offence is not committed, or is not "complete", so that D should be acquitted if such impossibility subsisted for the period of the charge. If, however, D remains after it becomes possible to go, the offence is then complete; and even if the previous impossibility has led to an earlier acquittal, this only bars a charge referring to the earlier dates when leaving was held impossible (and if, as might be necessary, the second charge includes that earlier period as well as a later one, the autrefois defence applies only to the former period).

The way in which *Malungahu* is dealt with is unsatisfactory. Richardson J noted that in that case an essential element of the offence had always been absent because the permit was invalid, but that was not the basis of the decision; and the same is perhaps true of a statement by Somers J to the effect that the charge in *Malungahu* wrongly alleged a "new offence" commencing on the date of the previous acquittal. Cooke J was content to dismiss *Malungahu* on the basis that it did not involve any question of impossibility, but this does not seem to provide a coherent distinction on the autrefois issue. If an acquittal on the ground of impossibility does not bar a later charge for remaining after cessation of the impossibility, the same should be true where there was absence of mens rea or fault, should that be a defence.

It might perhaps be argued that the latter (when not expressly provided for by statute) provides a defence but does not prevent the offence being "complete", but such a conceptual distinction between impossibility and absence of fault seems to make no sense, and is hardly consistent with the reasoning in *MacKenzie,* or the classification of impossibility as a common law "defence" (cp *Tifaga v Dept of Labour* [1980] 2 NZLR 235).

Where an offence is a continuing offence there is much to be said for the view (perhaps implicit in *Finau*) that two charges relating to different dates do not charge the same "matter", or the "same" offence, for the purposes of the autrefois principle (cp Crimes Act 1961, s 358). Should D continue an offence after a conviction or acquittal there seems to be no good reason for holding further proceedings to be barred, and unjustified splitting of the prosecution case can be adequately and appropriately controlled under the Court's powers to prevent abuse of process.

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The Duties of a Bank Customer

The decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 (an appeal from Hong Kong) will not be welcomed by banks. The Privy Council was given an opportunity to extend the circumstances in which the loss

resulting from a forged cheque is borne by the customer and not by the bank, and did not take it. Instead, the decision confirms that the risk of paying out on a forgery of its customer's signature continues to rest largely with the bank.

The relevant facts are simple. A dishonest accounts clerk employed by the company forged the managing director's signature to cheques totalling HK5.5m, all of which were paid by the bank. The forgeries were carried out over a period of five years and remained undiscovered for that time because the clerk was trusted and because the company's internal control system was inadequate to prevent or discover fraud. The question to be decided was whether the company's laxity in this respect meant that it should bear the loss resulting from the forgeries, or whether the bank should, on the basis of the fundamental principle that a forged signature is not authority for a bank to debit its customer's account, since it is not a mandate from its customer.

The case did not come within either of the two established exceptions to this principle, one of which is where the customer draws a cheque in such a way as to facilitate the forgery, which was the effect of the decision of the House of Lords in *London Joint Stock Bank Ltd v Macmillan* [1918] AC 239, and the other where the customer discovers that forgeries are being carried on, but does not inform the bank, which was established by another House of Lords decision, *Greenwood v Martins Bank Ltd* [1933] AC 51. The bank argued that the circumstances in which the customer bears the loss should be widened, in that there should be a duty on the customer to check its bank statements and notify the bank of any unauthorised debits, and, also, a more general duty to conduct its business in such a way as to prevent forged cheques being presented to the bank, and that breach of either duty should relieve the bank of liability. The bank's argument was firmly rejected, which is in line with the decision of the New Zealand Court of Appeal in *National Bank of New Zealand Ltd v Walpole & Patterson Ltd* [1975] 2 NZLR 7.

Alternatively, the bank sought to rely on a clause expressly incorporated into its contract with the company, which provided that, if the customer did not object to a bank statement within seven days of its receipt "the account shall be deemed to have been confirmed". The Privy Council stated that (at 959) "[c]lear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation on the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts", and considered that the clause in this case was not sufficiently clear. As far as the writer knows, it is not the practice of New Zealand banks to include clauses of this kind in contracts with their customers.

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Estoppel per rem judicatam in tax cases

Gregoriadis v Commissioner of Inland Revenue [1985] BCL 1689, is concerned with the application of the principle of estoppel per rem judicatam. The principle was explained by Richardson J as follows:

> Where a final judicial decision has been pronounced by a Court of competent jurisdiction any party to that litigation is estopped in any subsequent litigation as against any other party to the earlier proceedings from disputing or questioning the first decision on the merits (Spencer Bower and Turner, *Res Judicata,* 2 ed, p 9). In a case such as the present in order to find an estoppel per rem judicatam there must be:
>
> (i) identity of parties;
> (ii) identity of subject matter; and
> (iii) sufficient co-extensiveness of the standard of proof.

It is the second requirement – identity of subject matter – that has been the most difficult to satisfy. This is well illustrated by the case of *Maxwell v CIR* [1962] NZLR 683. The taxpayer had been acquitted of charges of wilfully making false income tax returns. The Commissioner then issued amended assessments, pursuant to the then equivalent of s 25 of the Income Tax Act 1976, on the basis that, in his opinion, the taxpayer's returns were fraudulent or wilfully misleading.

The taxpayer claimed that the Commissioner was estopped by the Court's judgment in the prosecution proceedings from asserting that the taxpayer was liable to pay the tax assessed. The Court of Appeal, however, held that estoppel did not apply because, inter alia, the question in the two cases was different: in the criminal proceedings the question depended on the proof of an objective fact; in the recovery proceedings the question depended upon the proof of a subjective matter, that is, the opinion of the Commissioner. This is a fine point. The questions as to whether a taxpayer wilfully made false returns and whether the returns are fraudulent or wilfully misleading are very similar. And the substance of the issue in the latter case is scarcely affected by the fact that the question depended on the opinion of the Commissioner.

In the present case, the Commissioner had successfully brought evasion charges against the taxpayer in the Magistrates' Court. The taxpayer appealed and the Supreme Court allowed the appeal on the basis that certain evidence that had been admitted in the Court below was inadmissible. In the meantime, as a result of the outcome of the prosecution in the Magistrates' Court, the Commissioner had assessed the taxpayer for penal tax. The taxpayer objected. After some preliminary proceedings on another issue, the case came before Quilliam J in the High Court where the issue was whether the acquittal on the prosecutions debarred the Commissioner from charging the taxpayer with penal tax. Quilliam J held that it did not and that the taxpayer was chargeable. However, in the Court of Appeal (Richardson and Somers JJ and Sir Clifford Richmond) it was held that the matter was res judicata and the appeal was allowed.

Judgment of the Court was delivered by Richardson J. His Honour was particularly concerned with the requirement that in order to found an estoppel per rem judicatam there must be identity of subject matter. In his view, the same point was the basis of both actions:

> [t]he critical fact which it was necessary to decide, and which was actually decided as the groundwork of the decision on the prosecution was whether the returns were false. The Commissioner failed on that issue and . . . he is precluded in these penal tax proceedings from tendering evidence to the contrary.

His Honour also considered the requirement that there be sufficient co-extensiveness of the standard of proof. The problem in tax cases is that there is no one standard. In a prosecution, it is "beyond reasonable doubt". However, as His Honour pointed out:

> where the civil onus is applicable the degree of probabilty required to establish proof may vary and will depend on the gravity of the allegation.

His Honour concluded that:

> [i]n principle we see no justification for denying the doctrine of estoppel per rem judicatam where the standard of proof in later proceedings closely approximates the standard in the earlier proceedings. In the present case, too, the acquittal of the appellant did not turn on the standard of proof but on the absence of admissible evidence. Had the standard been a simple preponderance of probabilities the Commissioner would still have failed.

One other point should be noted about this case. It is an established principle that, where a statute imposes a duty or confers powers, the doctrine of estoppel cannot prevent the carrying out of the duty or the exercise of the powers. This principle is particularly relevant in the situation where the Commissioner has given a ruling or undertaking on which a taxpayer, in taking a certain course of action, has relied and the Commissioner has then changed his mind and, to the detriment of the taxpayer, acted in disregard of his ruling or undertaking: see, for example, *CIR v Lemmington Holdings Ltd* [1982] 1 NZLR 517.

However, it does not apply in the present situation. As Richardson J pointed out:

> [t]he appellant does not challenge the exercise of the power to make assessments. What he does say is that for the Commissioner to attempt to introduce evidence designed to establish that the returns were false is to challenge the finding against him in the prosecution proceedings. There is no reason why estoppel per rem judicatam should not be available.

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Books

High Court Forms

By P G S Penlington QC and Judge A A P Willy

Published by Butterworths, Wellington. Price $81.00

Reviewed by Hon Mr Justice Barker

The High Court Rules came into force on 1 January 1986. Over the preceding months, the attention of the legal profession was drawn to the new approach to civil procedure found in the new Rules. Seminars and articles endeavoured both to explain the different strategies and to re-educate lawyers brought up on the Code of Civil Procedure.

The new Rules affect all those who have occasion to draft any documents for any High Court litigation. Consequently, practitioners will welcome a book which offers practical guidance in the use of the forms required to be used in both common and unusual aspects of litigation. From the filing of proceedings and defences, through interlocutory applications, on to judgment and execution, a precedent is supplied for every situation likely to be encountered. The unmet need for many years for a text to assist practitioners in this regard is fulfilled admirably; the authors' meticulous attention to detail and their attention to relevant legal principle command one's admiration.

Mr Penlington QC and Judge Willy (before his appointment to the Bench) have both been involved in a variety of civil litigation. They are therefore well qualified to produce this scholarly and painstaking work which will provide indispensable resource material for all pleaders. Many a case is won or lost in the stages of preparation. More precisely put – careful preparation will indicate to counsel whether a case is likely to be won or lost. The use of these forms and a study of the accompanying material will undoubtedly enhance the overall standard of preparation and draftsmanship.

Every foreseeable need of the user is covered. For example, there is cross-referencing with the old Code and a preliminary section on how to use the work. Of particular value is a concise statement of the principal changes effected by the new Rules. The authors also summarise the main elements in the underlying philosophy of the new Rules; eg the requirement to state issues precisely, the move away from a strict adversary approach and greater intervention by the Court.

Each of the 160 forms is accompanied by an appropriate annotation, including, where necessary, a succinct reference to relevant case law. Of great practical use will be the sections on summary judgment, notices to admit facts and pretrial conferences and directions. In these areas, the Rules break new ground.

Meticulous care has been given to every precedent and the user warned of possible hidden "traps for young players". For example, the section on interrogatories points out that much of the existing law relating to grounds upon which a party may object to answering interrogatories may have been swept away by r 284 which stipulates only limited grounds of opposition. The authors list a number of common objections under the old regime which may no longer be valid. Also, the comments on the new ability to determine issues of law or fact before trial are helpful.

The new Rules represent a significant law reform. Of course they are not perfect and the Rules Committee is anxious to receive feedback on their operation and suggestions for improvement. The learned authors have captured the spirit of the new Rules; their work will go a long way in ensuring that the experiment proves successful. In particular, the work will help alter the thinking of many whose intuitive reaction to an urgent problem was grounded on the old Code.

In recommending this book to barristers, solicitors and Court officers, I echo the view of Hon Sir David Beattie in his foreword; authors accepting responsibility of this kind deserve the thanks of the profession; they have left an enduring publication for New Zealand lawyers. □

Offensive weapons

By Don Mathias, LLM(Hons), PhD, Barrister of Auckland

In this article Dr Mathias looks at the way the Courts have interpreted the 1981 legislative provisions regarding possession of an offensive weapon. He divides the offences into two categories that he describes as the original offence and the confrontation offence. He also describes the law in other jurisdictions, and finally raises a series of questions as areas of concern.

In 1981 Parliament passed new provisions for the offence of possession of an offensive weapon; these came into effect on 1 February 1982 and they are contained in s 202A of the Crimes Act 1961 (inserted by s 48 of the Summary Offences Act 1981) which replaces s 53A of the Police Offences Act 1927. Section 53A had been law since 1956, and was similar to the relevant provisions of the Prevention of Crime Act 1953 (UK). Section 53A created a single offence in these terms:

> (1) Every person commits an offence who, without lawful authority or reasonable excuse, the proof of which shall be on him, has with him in any public place any offensive weapon. . . .
> (7) For the purposes of this section, the expression "offensive weapon" means any article made or altered for use for causing bodily injury, or intended by the person having it with him for such use; but does not include any tool of trade in the possession of any person in the course of his employment or while he is going to or returning from his work.

Two offences were created by the 1981 legislation, one in s 202A(4)(a), which may be described as the "original" offence because of its close similarity to the former provisions of s 53A, and the other in s 202A(4)(b), which can be termed the "confrontation" offence for reasons which will appear below. The *original* offence imposes liability on every one

> who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon or disabling substance: s 202A(4)(a).

The definition of offensive weapon for the purposes of the *original* offence is

> any article made or altered for use for causing bodily injury, or intended by the person having it with him for such use: s 202A(1).

Apart from the extension to disabling substances, defined in s 202A(3), the only departure from the s 53A offence is the omission of the expression "the proof of which shall be on him", the effect of which, at least in proceedings on indictment, is to remove that burden of proof from the accused.

Confrontation

The *confrontation* offence imposes liability on every one

> who has in his possession in any place any offensive weapon or disabling substance in circumstances that prima facie show an intention to use it to commit an offence involving bodily injury or the threat or fear of violence: s 202A(4)(b). It is a defence to a charge under subsection (4)(b) of this section if the person charged proves that he did not intend to use the offensive weapon or disabling substance to commit an offence involving bodily injury or the threat or fear of violence: s 202A(5).

The definition of offensive weapon applicable to the *confrontation* offence is broad:

> any article capable of being used for causing bodily injury: s 202A(2).

The original offence

(a) Categories of weapon

Section 202A(1) retains a distinction recognised at common law between weapons offensive per se, and weapons which are offensive because of the intention of the person who has them with him. In *R v Petrie* [1961] 1 WLR 358, decided under legislation similar in this respect to s 202A(1), the Court of Criminal Appeal held that an article which is offensive per se is an article made or adapted for use for causing injury to the person, and gave examples of a cosh, a knuckleduster and a revolver.

The category into which a given article fits is a question of fact, and some articles, such as knives, will be equivocal. In *Petrie*, counsel for the Crown conceded that a "cut throat" razor is not an offensive weapon per se. A folding knife (although "fearsome") was held not to be offensive per se in *Mareva v Police* (High Court, Auckland, Heron J, M1745/84).

But a flick-knife would readily be found to be offensive per se: *Gibson v Wales* [1983] 1 All ER 869 DC, where Griffiths LJ said "there is no reasonable alternative" to that view. However a broader view of the use of flick-knives is pointed to in *Archbold* (42 ed) at para 19-250, where their utility to a person working with wet weather gear and safety harnesses leaving only one hand free is cited.

Notwithstanding considerations such as those, judicial notice of the offensive per se status of flick-knives was taken by the Court of Appeal in *R v Simpson* [1983] 3 All ER 789.

Does this open the door for a judicial classification of articles as either offensive per se or not, in a like manner to the English Courts' categorisation of offences for the purposes of the "defence" of intoxication which followed *DPP v Majewski* [1977] AC 443? Although the common law delineation of defences is not always disastrous it is often open to criticism (one thinks of the mistake of law defence, the unreasonable mistake of fact defence, automatism, and the grossly neglected defence of necessity) and it may be preferable for an inflexible classification of articles to be imposed, if it is to be imposed at all, by the Legislature rather than by the Courts on a case by case basis.

(b) Consequences of the classification

The category into which the article falls is all important in a case, because if it is offensive per se then the prosecution does not have to prove that the defendant had it with the intention of using it to cause bodily injury, and furthermore it is no defence for the defendant to show that he lacked such an intention: *Davis v Alexander* (1970) 54 Cr App R 398.

In that case the defendant had possession of a sword-stick which was found by the justices to be offensive per se; it was also found that he had no reasonable excuse for having it with him at the time (his explanation that he was just taking it home from having it repaired was rejected – he had been found with it in the early hours of the morning walking home from a party), and that he had no intention of using it to cause injury. The Divisional Court remitted the case to the justices with a direction to convict, Parker LCJ holding that

> once they found that it was an offensive weapon per se, and I think they were clearly right in so finding, and found further that there was no reasonable authority or reasonable excuse for the respondent having it with him, then it automatically followed that he was guilty of an offence.

Thus the classification of the article is crucial, while the actual difference between articles in terms of their capacity for causing injury may be slight, or it may not follow the classification at all. A knuckleduster (offensive per se) is relatively innocuous compared with a folding knife with a "fearsome" blade (not offensive per se).

(c) Lawful possession and subsequent use

An article may be used as a weapon without having been previously – even immediately before its use – carried as an offensive weapon. In *Rewiti v Police* (High Court Wellington, Quilliam J, M355/84) a beer bottle broke during a struggle and the defendant picked up its jagged neck and pointed it at the complainant. The defendant's conviction under s 202A(4)(a) was quashed, for the same reasons that Mahon J applied in *Police v Smith* [1974] 2 NZLR 32 where a patron of a pie cart picked up a table knife with which he was about to eat his meal, stood up and walked with it towards the proprietor in a threatening manner. The rationale is that the legislation is aimed at the carriage of offensive weapons in a public place, not at their use (which is covered elsewhere in the criminal law: the various forms of assault, for example, or even s 48 of the Crimes Act 1961 which may justify their use). Without a prior unlawful carrying of the weapon as a distinct act there is no separate possession offence.

(d) Intimidation

An assailant may carry a weapon not offensive per se with him intending not to use it to cause bodily injury but rather to use it merely to intimidate people. Such a person is not guilty of possessing an offensive weapon: *R v Rapier* (1980) 70 Cr App R 17, CA. It would be different of course where the weapon was offensive per se because his "innocent" intent would be irrelevant. Clearly this result may be inappropriate from the social-danger point of view: is the person who carries a folding knife with which to scare people potentially more dangerous than a person who carries a knuckleduster merely as a curiosity and not intending to use it?

(e) Exceptions to liability

Once it has been proved that the article is an offensive weapon under s 202A(1), and that the defendant had it "with him" in any "public place" (not defined in the Crimes Act 1961 in respect of this section), then the defendant will be guilty in the absence of lawful authority or reasonable excuse. In summary proceedings the burden of proof of lawful authority or reasonable excuse will probably be on the defendant, to the standard of on the balance of probabilities, as a result of s 67(8) of the Summary Proceedings Act 1957: *Watts v Police* (1984) 1 CRNZ 227, 229.

Presumably a reasonable excuse would include an intention to destroy an article offensive per se (this going beyond a mere lack of intention to use it to cause bodily injury) or an intention to deliver it to the police for destruction. Where the defendant is under threat of imminent and immediate attack it might, on the facts, be reasonable for him to carry a weapon for his protection, although such an excuse would apply very rarely: *R v Peacock* [1973] Crim LR 639 CA, and the defendant must not "over prepare": *Bradley v Moss* [1974] Crim LR 430 DC.

The confrontation offence

(a) Its purpose

The wider definition of offensive weapon given in s 202A(2) could include almost anything. It applies to offences against s 202A(4)(b), which arise where the circumstances in which the defendant is found indicate "prima facie" an intention to use the article to commit an offence involving bodily injury or (and why only in respect of this offence?) the threat or fear of violence.

It is thought that the purpose of the Legislature in creating this second offence is to deal with confrontation situations where one or more weapons are involved. The added seriousness of confrontation is matched by the wider definition of offensive weapon in s 202A(2), and by the extension of its application to "any place" in contrast to "any public place" (to which s 202A(4)(a) applies). Also, there are no express powers of search and seizure applied to s 202A(4)(b), in contrast to the application of those powers in s 202B to the offence under s 202A(4)(a); this would be because in a confrontation involving weapons the need for a search is otiose.

If this interpretation is correct, it would be wrong in principle for the prosecution to allege an offence against s 202A(4)(a) where a weapon

is offensive per se merely to avoid the defence of lack of mens rea which otherwise would have been available under s 202A(4)(b) and (5). Although there is nothing expressed in the legislation to prevent the prosecution from taking that course, the Judge could exercise his or her discretion to amend the charge so as to avoid an injustice in an appropriate case.

(b) "Prima facie"

The "defence" provided in s 202A(5) is really an elaboration of the expression "prima facie" in s 202A(4)(b). It is thought that the kind of "prima facie" meant here is what is referred to in *Cross on Evidence* (3 NZ ed) at p 29 as presumptive evidence. It would be stronger evidence than that which is required at a preliminary hearing to commit a defendant for trial – such evidence need only be sufficient to give rise to a permissible inference of guilt, notwithstanding an equally permissible inference in favour of innocence.

In other words, s 202A(4)(b) requires evidence which is stronger than what was referred to in *R v Puttick* CA 46/85 as "pure speculation" on equally strong inferences; it must be sufficiently strong for the Court to be able to conclude that, in the absence of further evidence, the intention required had been proved beyond reasonable doubt.

(c) Two hurdles

What is the position where the defendant was preparing to use a weapon in self defence and he is charged under s 202A(4)(b)? Does he have the burden of proving that justification, or does the prosecution have to exclude that possibility once it is raised in the course of evidence? It is possible that the position could be quite complex. The prosecution must establish a prima facie case in the traditional sense of overcoming the "no case to answer" submission.

That could be called the first hurdle. But even after that hurdle, can the defence elect to call no evidence and submit that there is not proof to the standard required of beyond reasonable doubt? On first impression it appears that such a submission is untenable, until allowance is made for the special sense in which the expression "prima facie" is used in s 202A(4)(b). If that does mean, as is suggested above, "evidence which is conclusive in the absence of further evidence" (the second hurdle), then there is still room for dismissal of the charge where the level of proof achieved by the prosecution falls between the hurdles of "a case to answer" and "evidence conclusive in the absence of further evidence".

Returning, then, to the question of self defence: it can be argued that if the matter of self defence is raised in evidence (usually by the cross-examination of prosecution witnesses), the prosecution must exclude it in order to avoid falling between the two hurdles. A complicating consideration in summary proceedings is s 67(8) of the Summary Proceedings Act 1957, which may effectively place self defence on an equal footing with the lack of mens rea defence in s 202A(5) as a matter for the defence to prove.

The fact that a weapon is offensive per se should not of itself give rise to a sufficiently strong inference of an intent to use it to cause bodily injury or the threat or fear of violence to overcome even the first of the hurdles. It is thought that such an inference would properly be drawn, if at all, from the particular confrontation in question, and that at the second hurdle the same approach is appropriate.

The law elsewhere

By comparison with legislation in some other jurisdictions, s 202A is relatively complex. In Canada the question as to what articles are offensive weapons is determined by declaration by order of the Governor in Council pursuant to s 82(1) of the Criminal Code, RSC 1970 c C-34. The offence is set out relatively simply in s 83:

> Every one who carries or has in his possession a weapon or imitation thereof, for a purpose dangerous to the public peace or for the purpose of committing an offence, is guilty. . . .

In interpreting and applying this and its antecedents the Courts have encountered questions similar to those considered in other jurisdictions. The distinction between use of an article as a weapon and innocent prior possession of it was considered in *R v Flack* (1968) 4 CRNS 120, BCCA, where it was held that the unpremeditated use of a weapon was not enough to convert lawful possession into unlawful possession.

On the question of whether an intention to use the weapon for defence is sufficient to render its possession innocent, in *R v Nelson* (1972) 19 CRNS 88, OCA, it was held that all the circumstances must be considered even though the Court may believe the defendant's explanation. These circumstances include the nature of the weapon, how it was acquired, the circumstances under which he had it in his possession, his explanation, and the use to which he actually put it.

Another example of an extremely simple enactment on this subject is s 6(1)(e) of the Vagrancy Act 1966 (Victoria). This provides that any person shall be guilty of an offence who

> is found armed with an offensive weapon or instrument unless such person gives to the Court a valid and satisfactory reason for his being so armed.

Thus to a large extent the subject is left to the common law, and the Supreme Court of Victoria has shown no hesitation to look at what has happened in other jurisdictions. In *Wilson v Kuhl* [1979] VR 315 SCV, McGarvie J referred to cases decided in England, South Australia, Western Australia and New Zealand when determining whether in Victoria a person who suddenly uses a weapon of which he had until then lawful possession is guilty of unlawful possession of it. Holding that such a person is not, McGarvie J followed Mahon J's approach to the interpretation of a criminal enactment capable of construction either for or against the defendant, in *Police v Smith* (supra).

In the course of his summary of the Victorian common law, McGarvie J covers the familiar points (not all of which are decided in the same way as in other jurisdictions) weapons offensive per se render the possessor's intention irrelevant; in respect of other offensive weapons an intention to merely threaten injury is sufficient to attract liability; even a harmless imitation pistol is probably an offensive weapon when used to scare someone (notwithstanding *R v Carroll* [1975] 2 NZLR 474); a distinction is drawn between offensive

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Nelson District Law Society — Centenary 1885-1985

The opening years

By J A Doogue, President of the Nelson District Law Society

On the weekend of 9-11 August 1985 the Nelson District Law Society celebrated its centenary. The Chief Justice, the Attorney-General and the President of the New Zealand Law Society were among those attending. At the opening ceremony two of the speeches were by the Nelson President Mr J A Doogue, and a senior practitioner Mr W J Glasgow. Mr Doogue's gives an account of the early history of the Society.

On behalf of the Nelson District Law Society I have pleasure in welcoming you all, particularly our visitors from out of Nelson, to the centenary celebrations of the Society.

Lawyers had an early impact on the life of Nelson. One of the directors of the New Zealand company responsible for the formation of the new settlement was Mr H S Chapman, later His Honour Mr Justice Chapman, who presided at the first Supreme Court sessions to be held in Nelson.

The first settlers arrived in Nelson in November 1841. Three months or so later on 6 March 1842 a member of the Inner Temple Mr H A Thompson arrived on the barque *Brougham* to be Police Magistrate, bringing with him the first whiff of justice according to law, or nearly law, as the case may be. It is recorded that to overcome his lack of civil jurisdiction he hit upon the expedient of taking informations in cases of debt as for criminal offences and that "some very remarkable proceedings in this respect took place". Mr Thompson was killed in 1843 in the Wairau incident.

First Nelson solicitor

Mr John Poynter, the first Nelson solicitor, was admitted to the profession on 29 August 1842. He had arrived in Nelson about March 1842 on the *Fifeshire*. He later bought the wreck of that vessel and is said to have done very well out of it. He went on to become District Land Registrar and subsequently Resident District Court Judge.

His Honour Mr Justice Richmond was the only Supreme Court Judge ever to reside in the city having his home and headquarters here from 1867 to 1875. Whilst we welcome the Chief Justice on his first formal legal visit to our City, he has not yet offered to live here.

Inaugural Meeting

The inaugural meeting of the Society was held on Wednesday, 12

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and defensive weapons so that possession of a weapon for self defence would not be an offence (in contrast to the very narrow limits within which this may be permissible in English common law).

Clearly the Courts are capable of applying the principles distilled from the case law in ways appropriate to their own jurisdictions. It may be that the New Zealand Legislature could have made much briefer provision for the prohibition on the possession of offensive weapons and left the Courts with the job of applying it in ways appropriate to local conditions.

Areas for concern

This brief overview of s 202A raises questions to the appropriateness of our present law. Should the classification of an article as a weapon offensive per se be left to the Courts to deal with on a case by case basis or should the Courts, or the Legislature, define in advance a list of weapons offensive per se?

In the case of weapons offensive per se, should there nevertheless be a defence of lack of intent to use the weapon for causing bodily injury or the threat or fear of violence? Should the mens rea of the offence always include an intent to commit an offence involving threat or fear of violence? Should specific provision be made protecting the right to use force in self defence or defence of another by allowing the carriage of weapons in certain situations?

Could the difficulties surrounding the offence against s 202A(4)(b) have been avoided by a simpler enactment which gave the Courts greater scope for application of the common law? □

August 1885. At that date the City of Nelson had two daily newspapers, the *Colonist* and the *Nelson Evening Mail*, each being penny papers. In this day of advertising it is perhaps of interest to note that both of them contained advertisements by Pitt & Moore, Roger W W Kingdon, and Adams and Kingdon, of money to lend.

Pitt & Moore has been in existence since at least 1866 and still carries the same name. Glasgow Son & Tidswell can trace its origins to R W W Kingdon, and Fell & Harley to Adams and Kingdon, and Fell & Atkinson who were also in existence at that time. "£25,000 and upwards to lend in any sums to suit borrowers from 7%" was Adams and Kingdon's daily advertisement at a time when £120 would buy you a four-roomed cottage in Alton Street and £1,650 would buy 7 acres and a new four-roomed house close to town.

There was a report in the same paper of Tuesday's civil cases with claims ranging from £1.7.0 to £17.5.0. There was reference to the performance by Wilmotts Combination Company of the celebrated drama "Queen's Evidence". The firm of Loveday and Heyhoe were advertising, not money to lend, but apparel from their drapery store.

It was, however, a quiet day in the town. The previous day the Editor of the *Colonist* had fulminated against the reprehensible happenings in the Coroner's Court where Cr Harley had sat not only as juror but as foreman of the jury when someone had been killed in an unfenced ditch on a city street. "Judge and Judged" was the *Colonist's* cry.

There was no similar event to press itself on the memory on Wednesday, 12 August 1885 and the inaugural meeting of the Society did not merit a mention in the pages of the dailies. On that day 12 August 1885 the following minutes were made on the books of the Society:

Nelson 12th August 1885

A meeting of Solicitors, residing & practising in such part of the Nelson Judicial District of the Supreme Court of New Zealand as is comprised within the Provincial District of Nelson, was held at the office of Messrs Fell & Atkinson at 3 p.m.

Present: Messrs Pitt, A. S. Atkinson, Kingdon, Haseldean by his proxy A. S. Atkinson, Moynihan by his proxy, F. H. Cooke, E. Moore, Cooke and T. Atkinson.

Mr Pitt was voted to the chair.

Mr Atkinson (A. S.) moved & Mr Kingdon seconded that the solicitors residing & Practising in such part of the Nelson Judicial District of the Supreme Court of New Zealand as is comprised within the Provincial District of Nelson shall be associated as a Society by the name of "The Law Society of the District of Nelson". Carried.

Mr A.S. Atkinson moved and Mr Kingdon seconded that Mr Cooke act as Secretary pro tem and that he telegraph other Law Societies for copy of their rules. Carried

Mr Moore moved and Mr T. Atkinson seconded that the resolution forming the Society be gazetted by the Secretary and that the meeting be adjourned till Thursday the 27th inst. same place & time.

Carried.

Adoption of rules

Speed was not an essential ingredient for progress in those days and the reasons for Nelson being known as "Sleepy Hollow" are perhaps exemplified by subsequent events.

The meeting of 27 August was adjourned until 3 September and that to 10 September and that to 17 September. On 17 September 1885 the minutes read:

Nelson 17th September 1885.

Adjourned meeting held this day at Messrs Fell & Atkinson's office.

Present: Messrs Pitt (chair) Kingdon, Moynihan, (proxy Cooke), Haseldean (proxy A. S. Atkinson), Harley, A. S. Atkinson, Cooke, E. T. Atkinson.

Rules: Mr Harley proposed & Mr Kingdon seconded that the rules hereunto annexed (as altered in red) be passed & adopted as the rules of this Society.

Members: The following new members were elected:

Lowther Broad, John Meeson, proposed by F. H. Cooke, seconded by R. W. W. Kingdon; Andrew Turnbull, Harry Vincent Gully, proposed by A. S. Atkinson, seconded by R. W. W. Kingdon

The meeting was then adjourned till 1st October next at 7.30 o'clock at Library Provincial Buildings.

The rules thus adopted were in general the Auckland rules, but with a power to amend the rules, the Auckland rules being set in stone with no power to amend. The objects of the Society were:

To preserve and maintain the integrity of the Profession; to suppress illegal and dishonourable practices; to afford means of reference for the amicable settlement of professional difficulties; to watch proposed changes in the law, and to aid such as may appear likely to be beneficial; to consider all matters affecting the duties interests and prosperity of the Profession; and to represent generally its views and wishes.

The word "duties" showed the stronger moral calibre of the South. It had not been in the Auckland rules.

On 6 October 1885 the minutes read:

Nelson 6th October 1885.

Adjourned meeting held this day at 3.30 p.m. at Messrs Fell & Atkinson's office.

Present: Messrs Pitt (chair), Broad, Fell, Atkinson, Turnbull, Gully, Kingdon, Meeson, Haseldean proxy Atkinson.

Mr District Judge Broad & Mr Turnbull were elected President & Vice-president respectively of the Society.

Council: Messrs Pitt, Fell, Harley, & Cooke were elected.

Meeting adjourned for a fortnight: Council to consider the situation in the meantime.

It could be said that the Council has been considering the situation ever since. □

Nelson reminiscences

By W J Glasgow, a senior practitioner of Nelson

After Mr J A Doogue as President of the Nelson District Law Society had spoken at the centenary celebrations about the beginnings of the Society in Nelson 100 years ago, he was followed by Mr W J Glasgow. In introducing Mr Glasgow to the audience, Mr Doogue said he was asking him to speak about his recollections of the last 50 years and more of law in Nelson. Mr Doogue also pointed out that the Society's minutes recorded that Mr Glasgow was present at the 1935 Annual General Meeting of the Nelson District Law Society.

I find myself in a very alarming situation. I am always alarmed by a platform. I am still more alarmed by sitting beside Her Majesty's Chief Justice and finally I am alarmed because I have been here before. Sixty eight or 69 years ago under almost identical circumstances, that is to say I was dragooned into it, I came onto this platform with my little brother and played a piano duet. Well, we got through it without breaking down, but having done that we advanced according to instructions to the very edge of the platform, hand in hand, and bowed. My brother forgot to bow. He was frozen even more stiff than I was. So I poked him in the stomach – like that. I understand that was the hit of the evening.

Dealing with judges

To revert to my other cause of alarm. I have always been alarmed by the Judges of the Court, even though I lived in a covey of them in Wellington when I was a Judge's Associate. At that stage I found myself able to deal with them quite normally even with Sir Michael Myers. Once I left the Judge's Associate job the alarm returned and it is only gradually fading. I have this comfort for the younger barristers among you that when the Judges gradually cease to be the age of your father or your grandfather and become the age of your elder children they aren't quite as bad as they were.

As for the Attorney-General, who hasn't arrived yet, well, in 1924 at College House in Christchurch I have a vivid recollection of one Leonard Russell Palmer who became editor of the *Mail* here. He was spending about half of his valuable time in the pursuit of the lady who subsequently became the Attorney-General's mother. So he really doesn't frighten me very much either.

The Slump

There have been very great changes over the 50 years and I have been thinking about them for the last several weeks. What we did in 1932 is just not recognisable today. When I arrived back in Nelson in 1932 the slump was in full force. We were not exactly overworked, because there was nothing much happening, and when it did happen you didn't get paid for it.

However, one of the highlights of 1932 was the National Expenditure Adjustment Act. The National Expenditure Adjustment Act cut salaries by 10%. More to the point for us it directed the reduction of all interest rates by 20%. There was a terrible fuss about that. The words sanctity of contract was bandied about for months. I have often thought that if Mr Lange and Mr Douglas get upset by what is said about National Superannuation they should look at what was said about that National Expenditure Act in 1932. They would find themselves in very good company, if they thought Coates and Forbes good company.

Statute law

One of the main things which has happened I think is the enormous increase in statute law. My recollection of the thirties is if a problem arose you went and got Salmond or the appropriate textbook and a volume or two of Laws of England. You retired into a corner and you found out what you were going to say. Now you have to go and look at some Act and endeavour, possibly unsuccessfully,

to interpret it. I think I preferred it before. In my view I think that is going to increase. I think that if the Attorney-General remains where he is for another year or two the ancient and sacred principle of caveat emptor is going to suffer even more than it has in the past few years. You are going to hear about something called product liability in the States.

There were of course some of these new Acts which were welcomed. I well remember the original Law Reform Act of 1936 which everybody got very excited about and were very pleased with. I don't remember when it happened, but whoever relieved us from the necessity of negativing the law in *Howe v Dartmouthand* who was it? Allhusen and Whittell. Whoever did that relieved the drafters of wills an enormous amount of trouble.

Law clerk

Well, I started as a law clerk in 1928 in Christchurch and that again, I think, was very different from what it is today. None of the bosses turned up until 9.30 — I don't know that we did either as a matter of fact. They used to have a week off in August for Cup Week. We used to have a week off in November for Show Week. My recollection now is that all hands and the cook who were going to the Land Transfer Office or the Court, or what have you, always had morning tea on the way. There was a little shop next to the Bank of New Zealand and it cost fourpence.

Actually, the best times in Christchurch were before that. Some of you will remember the late Dennis Glover's book. He says that before the days of telephones, those happy days, everybody took his file under his arm and went to the long bar in Warners at 11 am. There the business of the day was done in the best possible circumstances. Then you went back to your office and nobody rang you up.

Well, I was a Judge's Associate in 1930 and 1931. That of course was a marvellous job, one learned a tremendous amount. Also one was extraordinarily, for those days, well paid. We made about £500 a year in that job then and we were the richest men in Wellington, richest young men in Wellington. It was a magnificent affair.

In 1932 I came back to the office here and back to 15 bob a week. As I said the slump was in full force. I of course was the very junior in the office. I had the dirty work. The dirty work in 1932 was the farmers, because until 1932 no farmer paid income tax. He wasn't liable unless his unimproved valuation was over £15,000. In those days over £15,000 was an enormous property. There were not many of them in Nelson.

Gordon Coates produced his unemployment tax. It was fourpence in the pound. To compute it you had to make a tax return. I had these farmers in by the hundred, it seemed, but there was 50 or 60 of them I suppose. They had to make the first tax return they had ever made in their lives. None of them had any records. At least half a dozen of them could neither read nor write. You can imagine that kept one pretty busy. No doubt we charged a guinea but we never got paid because nobody had any money then.

And then of course the Mortgagors Relief Acts started. They were absolutely draconic. In the end about 1937 or 38 I got put on one of the Commissions, or Committees. There were two of them in Nelson. What you had to do was to go and look at the farm and the man who had applied for relief against his mortgagee. You put a value on the farm. You then dealt with all his debts — his first mortgage, his second mortgage, his third mortgage, and his unsecured debts. Say the value of the farm was £5,000 a pretty good one if it was mark you in those days. If the first mortgage was £4,000 it was sustained, if the second mortgage was £2,000 you wrote off half of it and the other half was sustained. All the rest of his debts were written off.

It is difficult to conceive now how anybody put up with that. It did have the great merit that the farmers were left on their farms. I don't think the unsecured creditors who got their debts written off minded very much, because they knew dashed well that they weren't going to be paid anyway. Well, the years went by and I finally ceased to be the junior in the office.

Senior partner

About 35 years later I became the senior in the office, except for my father who had by then more or less retired. I must say it was a great relief to have somebody to fob off the dirty jobs on to instead of having to do them all yourself.

Another very striking thing was the smallness of our whole legal world in Nelson then and I believe there are now something over 70 members of the Society. In 1935, or around about there, I don't believe there were 70 people employed in the law all told — including the office girls. In fact I am sure there weren't, so naturally one knew everyone else a great deal better than one is able to today.

Incidentally, there was another splendid habit in those days, which has unfortunately fallen into disuse. Whenever you settled a matter with a farmer, he took you by the arm, took you down to the pub and he bought you a drink. That was invariable and it was splendid. It doesn't happen now.

I remember we had an accountant who had been trained in London. He was one of those chaps who put three fingers on the cash book. He went down at that speed. He wrote down the answer and it was always right. He had never heard of calculators then or adding machines. If he had had one he wouldn't have used it. He came to us — this is a very interesting little bit. He was employed by Cock & Co which was then a large mercantile firm. It had a wholesale licence. They had just had a terrific upset because poor old J H Cock had found that everybody in the place was into the cellar. When Alnut came for a job my father wrote to him and asked for a character. I think it was a damn good character. He said "Mr Alnut is the only man in my employ who could have stolen from me and didn't".

Faithful clients

Another thing you know, clients were much more faithful then. Once they came to you they stayed with you for ever. They hardly ever left. I don't know why. I think possibly its got a lot to do with the land agents. Of course it cut both ways. You had your pet troublemakers. They stayed too. But, of course, there again you know the old saw about the doctors. The doctors bury their mistakes but we have to put up

with them – I am beginning to bury them too.

We acquired one client under the most mysterious circumstances. He was a chap of considerable wealth and he marched into the office one day and instructed us to go across to the other man and pick up all his deeds and would we please act for him thereafter. And we did for years and years. We never found out why.

Then he died and his widow blew the gaff. This chap had an interest in the East. One day his mail boat had stopped for the night in Yokohama. He had gone ashore and had breakfast in the pub in the morning. What did he see on the other side of the dining room but his solicitor from Nelson having breakfast with a lady to whom he was not married. It was too much for him.

My father was a great friend of the original Harley. There are four generations of them now. They used to have all kinds of friendly legal arguments. On one occasion they were endeavouring to settle an argument about a will, drawn up by somebody else who shall be nameless. They couldn't come to an agreement at all. They agreed that there were three possible interpretations. My father wanted one, Harley wanted two. They agreed that number three had no merits whatsoever. There wasn't much money in the estate. They wanted to save the costs of litigation if they could. So they agreed to take leading counsel's opinion in Wellington and to abide by the result. So they wrote to Wellington.

Time went by. Time did go by in those days and nothing was done in a hurry. Finally one morning there was a commotion in the outer office and in came Charlie Harley, spitting with rage, with an opinion in one hand and the bill in the other. He marched into father's room and he said "Look at this Glasgow – just look at this". So father sees the opinion and reads it and he discovered that the learned counsel in Wellington had decided on interpretation C, which neither of them believed in. "I'll tell you what it is Glasgow. These damn people in Wellington don't know any more than we do. They only charge more."

Father had a partner who was a good Irish bulldog named Hayes. Then we had another Irishman named Stephen Moynihan. Stephen was a Court man. He wasn't the best conveyancer in the world. He wasn't even the best conveyancer in Nelson as a matter of fact. Somehow he got landed shortly after he came to us with new articles on completing the new Articles of Association of S Kirkpatrick & Co Limited. He got them finished and he had them printed. Then my father came back from – I don't know whether he had been sailing or whether he was ill – anyhow he came back – and he picked it up and he said "Good God Stephen there is a limited off the end of the name" – it was just S Kirkpatrick & Co. "Oh", said Stephen "No, the printer didn't do that. I did. The company shares are all fully paid now so it doesn't have to be limited any more."

Action for slander

Then Stephen had a slander action, a lot of fun. You know, or some of you know, that there used to be a railway here. It left Nelson and went to Glenhope and then stopped. In other words it didn't go anywhere. It was proposed to extend it to Murchison and eventually to Westport, thereby coupling up with the railway from Christchurch through to the West Coast. Public work camps were set up all along the road from Glenhope to the Gowan.

As you can imagine there were some fairly tough characters among them. On one St Patrick's Day they took a holiday. They had a party, variously described as a sports day and a picnic and a hooley. Anyhow they had the party. There were races. There were axeman's competitions. There were lolly scrambles for the children and so on and so forth. There was also a large tent for the gentleman in charge who should have been licensed to sell fermented or spirituous liquors. He wasn't.

Latish on in the day a young man emerged from this tent. He saw a young woman of his acquaintance. He saw with his other eye a little whare in the corner of the field. He made an improper proposal to her. She turned him down, flat.

He was very annoyed and also very surprised. He said "Oh Mary what is the matter with you?" I bowdlerise a little here. He said "You have been out with me before – you have been out with all nations over the last six months." She was quite unmoved. So he went back to the gentleman who was unlicensed to sell fermented liquors.

But the young lady went to town next day. She consulted a young man about taking action. Now, this of course was long before there was a popular indoor sport to issue writs for libel for a quarter of a million, of dollars or such like. This young man had probably not thought of libel or slander since he passed his exam three or four years before. What's more he didn't much like the look of his client. However, he remembered the little bit in the good book that says in the case of imputation of unchastity in a female – you don't have to prove special damage. So he issued a writ. It duly got served.

The young man came to see Stephen. Stephen didn't care for his client much either. But he was an Irishman. He was always good for a fight. So he said "alright leave it with me and I will see what I can do". Well, time went by and the next sitting was approaching. Somebody suddenly said to Stephen at morning tea one day "How's your slander getting on?" "Oh" he said, "I can prove a Frenchman, two Irishmen, and a Scotsman and an Englishman and a Greek and a Chinese and two New Zealanders. Will that do for all nations do you think?"

Work, fun and money

Well, when I was very young I was going into the Navy. Nothing else would do. I was absolutely determined. But my eyes went bad on me before I was of the age to join. The age was then 12 and half I think. So that was off – I was sorry about that for a long time. But I am not sorry now. I have enjoyed my life as a very ordinary country solicitor. I have had a lot of fun – I have had a lot of hard work too. From the time to time considerable satisfaction.

I haven't made any money but that dosen't seem to matter very much. In fact, I think that it is wrong to go into this profession or any other profession with the idea of making money. What you go into it for is to make enough to live on. I am very grateful to my brother and sister solicitors for putting up with me for so long and I am grateful to you for putting up with me tonight. □

Brain death and dissolution of marriage

By Professor P R H Webb LLM of the Faculty of Law, University of Auckland

This article deals with a most difficult and unusual set of circumstances caused to some extent by the advances of modern medical science and current nursing methods. The case that came before the Court related to a wife who was in a coma since 1981 when she suffered a severe stroke. Her condition was considered to be irreversible. She was not on a respirator as her breathing and heart functions were working normally. The issue before the Court was whether she could be deemed to be dead; and the husband therefore entitled to remarry. The Judge in the Family Court, Judge B D Inglis QC considered this issue at considerable length in relation to ss 32 to 36 of the Family Proceedings Act 1980, and reviewed American, Canadian and Australian opinions on the medical definition of death.

An unsusal case of dissolution of marriage was *Joe v Joe* (1985) 3 NZFLR 675. This tragic case was one *primae impressionis*. The applicant husband was a successful business man dedicated to his family. Each Sunday he drove from Wellington to visit his wife in hospital. They had been married for nearly 27 years, and had a son aged 13. The applicant had visited his wife for four years and had given her all the support and comfort he could. His wife did not know he was there having been in a coma since suffering from a severe stroke in November 1981. She had no perception or consciousness of anything. She could not move. She could not do anything for herself. Her heart beat, and she breathed – that was all. That degree of function was maintained by artificial feeding. She was protected from infection by hospital care. Her condition was beyond remedy and irreversible. His Honour said:

> Her body is there, but it is like an empty house. Nobody is at home.

The question before the learned Judge was: Could the Court declare that the respondent wife might be presumed to be dead and dissolve the marriage – pursuant to s 32 of the Family Proceedings Act 1980 – or, alternatively, could the marriage be dissolved – pursuant to s 39 of that Act?

The Court was satisfied, on the evidence, that the applications were made in good faith. The husband was a realist and knew that the most the hospital could do was to keep his wife breathing and her heart beating. Nothing could restore her brain, which was to all intents and purposes dead. The husband was concerned about their son, for whom he wanted to provide a proper home. The husband wanted to remarry, but, holding, as he did, to traditional values, he would not take another woman into his house until his marrige had been dissolved in law and he was free to marry.

A protection order had been made under the Aged and Infirm Persons Protection Act 1912 and two managers had been appointed to administer the wife's estate. They did not desire, in their capacity as such, to take any part in the present proceedings (see s 156(1) of the 1980 Act), though one of them, a solicitor, gave formal evidence and was present throughout the hearing. At a pre-trail conference, the Court appointed a Wellington barrister as counsel to assist the Court since the case, on both issues, appeared to be one of first impression. The issues of law and fact were fully argued before the Court.

The medical evidence

There was no dispute about the wife's medical condition. Her stroke had affected the brain stem. Since then, she had been unconscious and immobile. She would never regain consciousness and would continue to require continuous nursing care and attention. Her condition had not altered for the better since the stroke, and was irreversible. In terms of s 164 of the 1980 Act, the Court admitted in evidence, without objection, a certificate from the neurologist who had initially been in charge of the wife and the affidavit which the doctor presently in charge of her had sworn for the purposes of the 1912 Act.

Counsel for the husband had offered to call as a witness a leading New Zealand neurologist, but it was accepted that his evidence would add nothing to what was already known about the wife's condition. Counsel for the husband also drew attention to the evidence the same neurologist had given in the case of *R v Godinet* (1978, unreported, High Court, Wellington T60/78). The transcript of the neurologist's testimony was formally produced. It dealt generally and in detail with the issues of "brain death" with

which the present case was concerned and was of general assistance.

His Honour said:

> On the evidence it can hardly be doubted that Mrs Joe has neither sapient nor sentient brain function. She can do nothing at all for herself. If it were not for the hospital treatment which keeps her body nourished and free from infection her bodily functions would quite clearly have ceased long before now. I have no difficulty in finding as a fact that if she can properly be regarded as alive, her remaining functions are limited to heartbeat and breathing and that those functions are sustained only by artificial feeding and protection from infection.

His Honour went on to say:

> On these facts the question on the first issue in this case is whether Mrs Joe can be presumed by the Court to be dead. On the second issue it is beyond doubt that she has since November 1981 been completely incapable of forming any intention in regard to the marriage: she has been aware of nothing. . . . These issues take us into largely uncharted territory. There is no statutory definition of death in New Zealand, nor is there any known precedent in any common law country. As [counsel appointed to assist the Court] pointed out in his submissions, it is only relatively recently that it has become possible for this kind of problem to arise. That is because without modern technology Mrs Joe's exact condition could not have been identified, nor could her present very limited functioning have been sustained. It is clear on any view of the modern literature that modern technology has entirely overtaken the traditional view that death occurs at the point when the heart stops beating and the lungs stop breathing, the obvious outward signs of death.

The Court expressed its indebtedness to counsel for their references. It also derived assistance from an unpublished research paper prepared by Mr S K Chew in the Law Faculty of Victoria University of Wellington, *The Definition of Death* (1984).

Presumption of death

His Honour stated that it was important to emphasise that the inquiry was limited to Mrs Joe's state of being for the purposes of ss 32-35 of the 1980 Act. Proceedings under those provisions were:

> fundamentally different from proceedings under ss 37-39 for dissolution of a marriage. Proceedings under ss 32-35 are primarily concerned with whether or not it can be determined, in relation to a marriage, that the respondent is dead on the balance of probabilities: see s 167 as to the standard of proof. Provision of the additional declaration that the marriage is dissolved was no doubt intended as a safeguard in case it later turned out that the respondent was still alive: cp *Wall v Wall* [1949] 2 All ER 927. And it is to be noted that ss 32 and 34 are expressed in terms of enabling the Court to "presume" the respondent to be dead. That way of putting it is apt in a situation where no direct evidence of death is available and where it is reasonable to infer from the circumstances that it is more likely than not that the respondent has died: cp *Parkinson v Parkinson* [1939] p 346; *Thompson v Thompson* [1956] p 414; *Harris v Harris* [1970] NZLR 804. The way in which ss 32 and 24 are phrased is also apt in a situation where the respondent has not disappeared apparently without trace, but where there is uncertainty for different reasons whether the respondent is or is not dead. That is the present situation. Sections 32-35 were clearly enough modelled on s 19 of the Matrimonial Proceedings Act 1963 and it might be unsafe to infer that Parliament, when it enacted the 1980 Act, contemplated that technological advances in medicine might make ss 32 and 34 relevant in an inquiry into the state of being of a comatose person. But on the other hand Parliament can hardly have been unaware, in 1980, of the notorious case of *In the Matter of Karen Quinlan*, 70 NJ 10 355 A 2d 647 (1976), decided only four years earlier. And ss 32-35 must be given ". . . such fair, large and liberal interpretation as will best ensure the attainment of the object of the Act . . . according to its true intent, meaning and spirit": Acts Interpretation Act 1924, s 5(j). In my opinion nothing is to be found in the intent, meaning, or spirit of the Family Proceedings Act contrary to an interpretation of ss 32-35 which would bring the present inquiry within their provisions. I therefore hold that the Family Court has jurisdiction under ss 32-35 to determine whether in the present circumstances and on the balance of probabilities Mrs Joe is presumed to be dead.

His Honour further stated that it did not follow from a finding in terms of s 34 that the respondent is presumed to be dead, or its converse, that she could necessarily be regarded as dead or alive for other purposes such as, for instance, the vesting of jointly owned property: see *Lichtwark v Lichtwark* (1977) 3 NZ Recent Law (NS) 10, or in terms of the Human Tissue Act 1964.

Death

As already observed, there was no statutory definition of death in New Zealand. Nor had research revealed any common law authority of direct assistance or guidance in determining whether Mrs Joe was dead or could be presumed to be so. None of the doctors who had attended Mrs Joe had been prepared, as his Honour pointed out, to certify death or to contemplate doing so. That was understandable in the present state of the law on the point. However, the absence of a clinical decision of this kind could not properly be regarded as relieving the Court of its duty to determine whether, on the undisputed evidence of Mrs Joe's condition, the legal criteria of death

or presumed death were met.

The question was: What were those legal critera? His Honour referred to a recent article by Russell Gordon Smith, *Refining the Definition of Death for Australian Legislation* (1983) 14 Melb Univ Law Rev 199, and to the *Quinlan* case. In that case, Karen Quinlan was struck in 1975 by an illness of unknown origin which left her in an irreversible "chronic and persistent vegetative state". By any accepted criteria she was not dead. The issue debated was whether she might be removed from the respirator which was believed to be keeping her alive.

His Honour said:

> It should be mentioned at this point, that the *Quinlan* case differs from the present one in two important respects. In the first place no direct question arises in the present case of depriving Mrs Joe of any so-called life-support mechanisms or care because the question is whether she has already ceased to be alive. It is therefore unnecessary for me to consider the substantial volume of material on the *Quinlan* issue, helpfully summarised in an anonymous note, *Proxy Decisionmaking for the Terminally Ill,* 70 Virginia Law Rev 1269 (1984). The second difference between the *Quinlan* case and the present case is that Mrs Joe's condition is clearly very much more limited than was that of Karen Quinlan as described in 355 A 2d 647, 655:
>
> > Although she does have some brain stem function (ineffective for respiration) and has other reactions one normally associates with being alive, such as moving, reacting to light, sound and noxious stimuli, blinking her eyes, and the like, the quality of her feeling impulses is unknown. She grimaces, makes stereotyped cries and sounds and has chewing motions. . . . The question is whether this is a difference only of degree, or whether it marks a difference between life and death.

Judge Inglis, QC, went on to say that the Supreme Court of New Jersey, in developing common law criteria which might assist them, relied heavily on a report prepared in 1968 by an ad hoc committee of the Harvard Medical School. For himself, sitting as a New Zealand Judge at first instance, His Honour considered it safer to rely on those criteria than on the statutory criteria developed in Australia, and described in Russell Gordon Smith's paper.

The Judge said:

> There is no way of knowing, how the New Zealand Parliament might react to a similar problem. The Harvard Medical School ad hoc committee's report was published under the title *A Definition of Irreversible Coma,* 205 Journal of the American Medical Association 337 (1968), and the Supreme Court of New Jersey approached it in the following way (355 A 2d 647, 656):
>
> > The determination of the fact and time of death in past years of medical science was keyed to the action of the heart and blood circulation, in turn dependent upon pulmonary activity, and hence cessation of these functions spelled out the reality of death.
> >
> > Developments in medical technology have obfuscated the use of the traditional definition of death. Efforts have been made to define irreversible coma as a new criterion for death, such as by the 1968 report of the Ad Hoc Committee of the Harvard Medical School (the Committee comprising ten physicians, an historian, a lawyer and a theologian), which asserted that: "From ancient times down to the recent past it was clear that, when the respiration and heart stopped, the brain would die in a few minutes; so the obvious criterion of no heart beat as synonymous with death was scientifically accurate. In those times the heart was considered to be the central organ of the body; it is not surprising that its failure marked the onset of death. This is no longer valid when modern resuscitative and supportive measures are used. These improved activities can now restore "life" as judged by the ancient standards of persistent respiration and continuing heart beat. This can be the case even where there is not the remotest possibility of an individual recovering consciousness following massive brain damage.

His Honour then enumerated the specific criteria suggested by the Committee, as summarised by Facer, *Do we need a Legal Definition of Death?* [1975] NZLJ 171:

(1) Unreceptivity and unresponsivity (that is no response even to painful stimuli).
(2) No muscular movement and no spontaneous breathing for at least one hour or for three minutes if a mechanical respirator is turned off.
(3) No elicitable reflexes, ocular movements, or blinking, and the presence of fixed dilated pupils.
(4) A flat isoelectric electro-encephalogram (EEG).
(5) No change when all of these tests are repeated at least 24 hours later.
(6) These criteria to be exclusive of two conditions: hypothermia (body temperature below 90 °F), or central nervous system depression due to drugs such as barbiturates.

Spontaneous breathing

It was to be noted, His Honour observed, that, included in these criteria, was the absence of spontaneous breathing. The respiratory system was a brain stem function. Because she retained her spontaneous respiratory function, Mrs Joe's condition therefore did not come within that particular criterion of the Harvard Committtee's definition of death. That particular aspect of the Committee's criteria had not been universally followed for all purposes, although a similar set of criteria had become accepted in the United Kingdom: see *Diagnosis of Death,* Br Med Jnl, 1976; ii 1187 and 1979; i 3320.

In Canada (Law Reform Commission of Canada, Report 15, 1981), Australia (Law Reform Commission of Australia, Report 7, 1977) and the United States (President's Commission for the

Study of Ethical Problems in Medicine and Biomedical and Behavioural Research, 1981) the suggested uniform test had been formulated more narrowly as an irreversible cessation of all functions of the brain; that was expressed as an alternative to the test of irreversible cessation of circulatory and respiratory functions (in Australia, circulatory functions only). The reason for the availability of both tests was that irreversible cessation of the circulatory (and respiratory) functions leads inevitably to irreversible cessation of all functions of the brain, while irreversible cessation of all functions of the brain ("brain death") did not necessarily inevitably lead to failure of the circulatory and pulmonary functions.

The Australian commentator to whose paper His Honour had referred, after an exhaustive examination of the topic, concluded that:

> Conceptually, death should be defined as occurring when the individual attains a state of permanent and irreversible unconsciousness. . . . The physiological standard by which permanent and irreversible loss of consciousness should be determined, is the irreversible cessation of brain stem function of the individual, without reference to the traditional standards of respiration and blood circulation: 14 *Melb Univ Law Rev* at 236.

Judge Inglis, QC said:

> There are, clearly strong arguments to support that view. I would follow the Supreme Court of New Jersey in the *Quinlan* case in its view that advances in medical science and technology have taken us beyond the position where it is appropriate to think of death solely in terms of an irreversible cessation of respiration or circulation. But I find myself unable to accept that the Family Court, unaided by any statutory guidance, should go as far as declaring the common law in terms of the learned commentator's conclusion as stated above.

In the first place, His Honour doubted whether it could be said that it was generally accepted that an individual crossed over the threshold from life into death simply by attaining a state of permanent and irreversible unconsciousness. From the sources discussed by the commentator, it appeared that there might well be general acceptance in the medical profession that the threshold was crossed when there was an irreversible cessation of brain stem function so that the individual's respiration and circulation could be maintained only by artificial means: see at 208.

As could be seen from the undisputed facts of the present case, an individual could be in a state of permanent and irreversible unconsciousness while still retaining sufficient brain stem function to allow spontaneous breathing and circulation. While it was possible to argue on philosophical, psychological and sociological grounds that an individual's lapse into permanent and irreversible unconsciousness marked the point at which that individual ceased to be a person (these points were discussed by the commentator at 209-211) there was no indication in any of the material considered by the Court that such an argument would attract general agreement and acceptances.

Secondly, it could not be right, in His Honour's view, for the common law to develop in such a way that the threshold of death could be fixed at different points depending on the individual circumstances. Some might find it unobjectionable to regard a state of permanent and irreversible unconsciousness, on its own, as a sufficient indication of death for the purposes of remarriage or for a grant of probate or administration. But it could be expected that there would be general difficulty in accepting the same criterion for the purpose of tissue or organ transplants, or for burial or cremation.

Differing thresholds

It could be argued that any apparent problem in setting differing thresholds for death was resolved by common sense: burial, cremation, or the use of vital organs for transplanting required a far greater measure of certainty about the patient's condition. Acceptance of a state of irreversible unconsciousness as death for the purposes of remarriage or administering an estate could not harm the comatose patient. It seemed to His Honour, however, that these were issues on which people's values might be expected to differ quite widely and that, if a threshold for death was to be fixed for any purpose below a level which attracted general acceptance in situations where there must be a high degree of certainty that death has occurred, that was the function of Parliament and not of the Courts.

His Honour said he might well have been prepared to hold, as a matter of law, that a person would be dead when there was an irreversible cessation of brain stem function so that the person was in a state of permanent and irreversible unconsciousness *and* when that person's respiration and circulation could be sustained only by artifical cardio-respiratory processes. But, in the circumstances of the present case, he was not required — nor was it desirable — to express any concluded view on the point. It was enough to say, on the undisputed facts and findings of fact mentioned earlier, that it could not be certain, according to criteria which could be held acceptable at common law, that Mrs Joe had died.

However, in this part of the case, the inquiry was not into whether it was certain that Mrs Joe had died, but into whether she could be presumed to be dead for the purposes of s 34 of the 1980 Act. That was a different issue: the resolution of a doubt for a particular purpose. There was no need to "presume" what was known with certainty.

Could the respondent be "presumed" to be dead?

Proceedings under ss 32-35 of the 1980 Act were, repeated His Honour, concerned with whether, in relation to the continuation of a marriage, the respondent could be presumed to be dead, the presumption being on the balance of probabilities. He had already suggested, he continued, that those

provisions were not necessarily to be regarded as limited to the classic situation of the vanishing explorer or the mountaineer last seen vanishing over a cliff whose body is never found. He thought it was open also to an applicant to rely on those provisions for the resolution of medical doubt whether the respondent was or was not dead. If it could be proved positively on the evidence that the respondent was indeed dead, then there was, of course, no need to rely on the sections. They could, however, be resorted to where the evidence pointed in both directions and where it was necessary to decide the issue on the balance of probabilities.

Obviously a finding in favour of an applicant in terms of ss 32-34 that the respondent was presumed to be dead and that their marriage was dissolved could not amount to a positive finding for other purposes that the respondent was not alive. In essence, what counsel for the applicant was here inviting the Court to decide was that it should resolve in favour of the applicant the doubt that obviously existed whether Mrs Joe had crossed the threshold from life to death. That was solely for the purpose of defining the applicant's marital status.

The statutory context defined the very limited purpose of the inquiry. That being so, it was tempting to take the view, His Honour said, that while it was not possible, for the reasons already given, to hold positively that Mrs Joe was dead, it was open, for the present limited purpose, to presume her to be dead. When the matter was looked at in that light, it was clear from the material already referred to that there were strong arguments to support the view that her state of irreversible coma had deprived her of the quality of being and that her present very limited functioning was of no significance. But, as already stated by His Honour, that view was not generally accepted.

Nonetheless, at this stage of the reasoning, the issue of expediency needed to be added to the equation. What interest, inquired His Honour, did society have in holding the applicant to a marriage with the respondent when she had irrevocably lost all sense of awareness and when she was in a state where it could be judged uncertain whether she was alive or dead? It could hardly be asserted in any realistic sense that the respondent had any interest in whether the marriage continued. It could not do her any harm to presume her to be dead for the limited purpose of dissolving the marriage.

His Honour nevertheless thought that, if he were to follow that line of reasoning, it would be a matter of a hard case making bad law. The Courts were not entitled, in his view, to go beyond the intentions of Parliament as expressed in the statute. In order to grant Mr Joe relief under ss 32-34, the Court was required to be satisfied on the evidence that it was more likely than not that Mrs Joe was dead.

This was not a case where she had physically disappeared in circumstances which would give rise to a permissible inference that it was more likely than not that she had died. She was there, in her hospital bed, breathing, and her heart was beating. There might be some room for dispute whether her irreversible condition of unconsciousness might justify the supposition that she was dead. But, in the present state of the law, applying the criteria already discussed, the Court did not consider that she could properly be regarded as dead.

On that footing, the balance of probabilities could lead to only one conclusion. The most that could be said was that, in Mrs Joe's known condition, there was room for argument that she might be dead. That could not "bring the scales even into equipoise". His Honour did not consider that the real sympathy that one must have for Mr Joe, or the social interest in putting an end to a marriage that could now be only one in name, were factors which could be placed in the scales at all.

In the circumstances he felt it unnecessary to consider what might have been the position had Mrs Joe's continued respiratory and cardiac functions depended entirely on artificial and mechanical support. That was an entirely different situation and it would be inappropriate to express any view upon it. His Honour added that he was not prepared to find that the feeding, guarding against infection, and other services provided for Mrs Joe by the hospital amounted to the kind of "forced sustaining . . . of an irreversibly doomed patient" discussed by the Supreme Court of New Jersey in the *Quinlan* case: see 355 A 2d at 667-668.

It had not been necessary, continued the learned Judge, to consider issues of public policy regarding the sanctity of human life. He referred to *McKay v Essex Health Authority* [1982] 2 WLR 890, 902, per Stephenson LJ. Public policy in this respect emphasised the need for caution in a case such as the present lest the concept of the sanctity of life be eroded.

For the foregoing reasons His Honour felt obliged to hold that there were no grounds on which Mrs Joe might be presumed to be dead in terms of s 34 of the 1980 Act. The application for relief on that ground was accordingly dismissed — it is submitted absolutely correctly.

"Living apart"

The alternative application was for dissolution of the marriage simpliciter. His Honour observed that the expression "living apart" had been considered in a number of cases and that any residual difficulty arose not so much from the meaning to be given to the expression but to its application in particular circumstances. He noted *Sullivan v Sullivan* [1958] NZLR 912 (CA) where it was held that the state of living apart was constituted not only by physical separation but also by "a mental attitude averse to cohabitation": see per Turner J, at 922. His Honour observed that, in *Edwards v Edwards* 2 MPC 50, Davison CJ had adopted the same test. In *Dorf v Dorf* (1982) 1 NZFLR 331 (CA), it was accepted that the "mental attitude averse to cohabitation" needed to be demonstrated on the part of one only of the spouses—thus affirming the view to the same effect by the same Court in the *Sullivan* case.

Counsel for Mr Joe had candidly acknowledged that these authorities created some difficulties in the circumstances of the present case. His Honour reiterated that it was clear on the evidence that the spouses' physical separation had been forced on them by the illness of the wife; that the wife had, for the last four years, been completely incapable of forming any attitude

at all in regard to their marriage and that, far from abandoning her, Mr Joe had acted exactly as one would expect a loyal and devoted husband to act in the circumstances.

His Honour then considered the *Dorf* case at some length. After 48 years of marriage, Mrs Dorf had suffered a serious cerebral occlusion which led to her permanent confinement in hospital. She was mentally incapable of forming any attitude in regard to the marriage. The husband instituted matrimonial property proceedings. As a jurisdictional requirement, he had to prove that he and his wife had been "living apart". There was no material distinction between the concept of "living apart" for the purposes of the Matrimonial Property Act 1976 and that of "living apart" for the purposes of s 39 of the Family Proceedings Act 1980. There was little direct evidence in the *Dorf* case as to the husband's attitude towards the marriage.

Having considered what had been said in that case by Woodhouse P (at 333) and by Ongley J (at 336), Judge Inglis, QC, observed that it was clear from a careful reading of their language that there were features in the *Dorf* case that were not present in the instant case. In the present case, there was no direct evidence that at any particular point of time up to two years before he filed his present application Mr Joe had taken any step which indicated in a positive way that he regarded the marriage as at an end. But what the evidence did show was that it was known from a very early stage after the onset of Mrs Joe's illness that she would never again regain consciousness. It was accordingly not difficult to infer from Mr Joe's evidence that he knew quite well that he was going to have to rearrange his own life and that of their son on the basis that Mrs Joe's effective role as a wife and mother had absolutely ceased.

A further difference between the present case and the *Dorf* case was that there did not seem to have been any possible room for suggestion in the latter case that Mrs Dorf's condition was such that she could arguably be regarded as having suffered "brain death". From the facts as they appeared in the judgments in the Court of Appeal, a visitor to her hospital bedside would certainly have seen an indisputably alive person, even though very ill and not mentally competent. On the undisputed facts in the present case, it appeared that Mr Joe's visits to the hospital, from the time four years ago when Mrs Joe had suffered her stroke, could not:

> realistically be seen as visits to a wife: they have been more like visits to her grave or to a shrine to her memory.

His Honour stated that it was tempting to regard the facts, in the context of "living apart", as very special and unusual, but he thought it would be "over-confident to say that they are":

> It seemed to him quite likely that modern and future medical technology would produce not dissimilar situations so that he must bear in mind that he was not necessarily considering a unique set of facts. He must, he said, also bear in mind that, since this was an undefended application for dissolution of marriage, there could be no appeal if the application were granted: see s 174(3) of the 1980 Act. He went on to say that: The rule that "living apart" involves not only physical separation but also a mental attitude by at least one of the parties averse to continued cohabitation or consortium — a positive repudiation of the marriage is another way of expressing the mental element — must of course be accepted as the ordinary test. The judgment of Turner J in *Sullivan v Sullivan* (supra) illustrates clearly the practical and policy considerations which make the rule necessary. But the present case is one to which those practical considerations have no realistic application. Where, as in this case, one of the partners in the marriage has for the past four years been irreversibly deprived of all sentient or sapient function we have a situation which on any view of the matter is the antithesis of "living together": any hope of continued cohabitation or consortium in even the most platonic sense entirely disappeared with the onset of Mrs Joe's illness. In these circumstances I do not see how it could be possible to infer that Mr Joe could have had any realistic hope or expectation that the marriage could survive as a marriage in any sense, once the truth of Mrs Joe's condition became known. There is no reason why Mr Joe might have been expected, in the intervening period, to make it known that he regarded the marriage as at an end: to anyone who knew the facts it must have been self-evident that it was. If it is indeed necessary, on the facts of this case, to identify a mental element averse to cohabitation, the nature of the circumstances forces one to the inference that Mr Joe has for the past four years tacitly accepted that the marriage has ended. If I were free to do so I would conclude that in a situation of this kind any "mental element" is irrelevant: that the state of "living apart" is self-evident from the circumstances; and I would have distinguished the authorities mentioned earlier on the basis that in this particular state of facts the rule as to the "mental attitude" in living apart cannot realistically be applied.

His Honour stressed that it was the complete absence of sentient and sapient function in Mrs Joe's condition that led him to such a conclusion. He certainly was not saying that the mere fact of permanent hospitalisation or the permanant loss of mental capacity could justify the assumption that the other marriage partner must tacitly have accepted that the marriage had ended. What he would say was that, in a case of clearly established "brain death", as here, the state of living apart began once the fact of "brain death" was known.

However, His Honour concluded, this part of the case could be disposed of consistently with the authorities by his finding that Mr Joe must obviously have accepted, once his wife's condition was made known, that the marriage was inevitably over. His Honour believed it was properly open to him to hold that the parties had been "living apart" for the requisite period. He would, therefore, make an order dissolving the marriage. □

Controlling crime by computer in the United States

By Dr Margaret C McLaren, Senior Lecturer in Management Studies, University of Waikato

Computers and crime was an issue noted in articles published at [1983] NZLJ 270 and 273. This article describes the use that is being made of computer technology by law enforcement agencies. The author recently spent some months at San Diego State University where she was teaching technical writing to police detectives.

When the national central computer was installed at Wanganui, groups such as the Council for Civil Liberties were disturbed that personal information might become accessible to those who had no right to it. The recent Official Information Act again has made all sorts of people concerned about keeping records which might become available for those it was never intended to reach. And for different reasons, Stephen Bell in a recent issue of *National Business Review* has suggested that the new government computer services (GCS) could face a spate of criticism.[1]

What we hear much less about – strangely, since it is in the interests of the great law-abiding majority of New Zealanders – is that crime detection and control are now helped considerably by communication systems, systems which can work much faster by means of computer.

We all know that vehicle licence numbers are stored on computer, and that cars that appear to have been stolen can be quickly traced by the Ministry of Transport. But in the United States computers have become a much more sophisticated tool in crime detection. Several interlinked systems exist. Four specially valuable systems, NCIC, REJIS, NSAF and ARJIS, are discussed in this article.

Information Centre

The National Crime Information Centre makes it possible for police checking minor offences to uncover far more serious crimes. NCIC contains six categories of information: stolen property, wanted persons, missing persons, recent and significant crimes, what is called the "criminilistics laboratory" which can determine the possible make and model of a firearm from a fired bullet or cartridge case and, since 1980, a selective Canadian warrant file.

Part of the information NCIC has stored is kept off-line on magnetic tape. Sometimes this information is highly sensitive but most of it is dated, and simply kept as a backup like the underground stacks of a large library. Certainly both on and off-line searches can help police solve crimes anywhere in the United States. No wonder police refer to it as the "silent partner".

Regional information

One system which draws on local, state and federal information about crimes is called REJIS (Regional Justice Information Service). It serves five centres, including St Louis, in Missouri and Illinois. Eighty-four agencies, such as police and sheriff departments, probation and patrol offices, Courts and correctional institutions have access to online information and data processing through REJIS. It is linked with other computers such as the FBI National Crime Information Centre and the Missouri Uniform Law Enforcement System. Records of parole violation, serious traffic offences, or patterns of strange quirks associated with a series of crimes can be checked rapidly, as can types of penalties imposed for particular crimes. Standard documents such as summonses or jury notices can be printed automatically.

A business file enables the police to check names and addresses of owners and managers of business and public buildings, as well as information on the location of entrances and exits of fire or burglar alarms and so on.

Police are less likely to act on out-of-date information about stolen property or missing persons, since they can quickly check on the computer.[2]

Records contain information about all prisoners, including medical and family information, previous offences and so on.

Stolen Art

In 1983 the estimated value of art thefts in the United States was over $50 million! Four years before the FBI had set up NSAF, a National Stolen Art File, to keep details of all stolen and recovered paintings, prints and sculpture valued at over $2,000. The file consists of a computer interfaced with a computer-driven microfiche viewer which hold both details and photographs of items. The system not only helps the police trace stolen items but it also helps them return objects that have been found in a raid, or even abandoned.[3]

As yet other valuable articles such as antiques, coins and stamps are not included in the file but in time they may well be.

Automated regional scan

The systems in use – and there are many others besides REJIS, NCIC and NSAF – are improving all the time. One system, ARJIS (Automated Regional Justice Information Scan) can take on incomplete vehicle licence numbers. Other information (say, make, colour, model of a car) is fed in and the computer lists all vehicles with those characteristics and the incomplete numbers. Similarly it can take details of the appearance of a suspect, link them with reported sightings of that person and test the match.

Microcomputers

Useful as the information retrieval capability of main frame computers is, law enforcement officers have, since 1980, used a microcomputer

network as well. The FBI Law Enforcement Bulletin gives an example of a detective working on a burglary where a certain silver pattern was stolen, who could ask his micro-computer about any local cases involving the same pattern.[3] Similarly, a patrol officer could use the crime analysis reports for planning where he should be seen if further crimes are to be prevented.

Pawn shop records are checked for stolen property. Even fingerprints lifted from crime scenes are stored and checked, not manually as happened until 1983 but automatically against all held fingerprints.

Security

The danger that private information could become public is kept in sight, with full-time staff constantly auditing security of records and users.

Besides the human controls on such equipment, two computerised devices keep the system secure. One is a fingermatrix machine. When a user tries to log on to a terminal which uses this system a display panel on an attached fingermatrix asks him or her to enter an identification number and place a finger on the scanner of the device. A laser scanner "reads" the fingerprint. If it matches one stored in the system the user can get access to the system.[4]

The Palm-guard 2000 is another device which uses a physical characteristic to allow access. This time a pattern of a 2" x 2" area of a user's palm is compared with a palm print stored in memory. The process takes about three seconds. According to Tom Catlo, the inventor of the system, the Palm-Guard 2000 is very accurate. Fewer than 1% of users are asked to repeat the process before being admitted. The error rate for admitting access to an unauthorised user is .00025%

Both the fingermatrix and the Palm-Guard 2000 are sold commercially, as well as being used by government agencies, and serve as a valuable back up to cryptic coding, double password systems and so on.

Computers may have brought in their wake computer bank fraud and international thefts of money but they can, and already do speed up and facilitate the solving of a whole range of crimes. Computers have made crime detection in the United States easier and faster than it would otherwise be. A typical check on a low-demand day can be answered within eight seconds.

The computer simulation of the bringing down of the Egyptian plane carrying the four Syrian hijackers is a spectacular illustration of the way computers, more quickly but no less efficiently than before, are helping to control crime in the eighties. □

1 Stephen Bell "Computing service may draw critics to old problems", *National Business Review*, Oct 7, 1985, p 30.
2 Federal Bureau of Investigation "The Role of the Computer in Law Enforcement", special issue of the FBI Law Enforcement Bulletin, March 1983, p 25. Much of the other information in this article also comes from this issue.
3 Timothy Macgillivray, "The Function of Computers in Law Enforcement", unpublished report submitted in partial fulfilment for the Technical Writing degree programme, San Diego State University, November 1984, p 11.
4 Pamela Jensen, Steve Lagotta, Claire Lee, Alex San Miguel, "How Safe is Safe", unpublished report submitted in partial fulfilment for the Technical Writing degree programme, San Diego State University, November 1984, pp 6-7.

F E Revisited

The review by John Gibson of the new biography of F E Smith the *First Earl of Birkenhead* by John Campbell, has resulted in Mr K W Walton of Timaru drawing attention to a page from an earlier biography by F E Smith's son and first published in 1933.

Mr Walton remarks that there is a foreword to the book by Winston Churchill. He has suggested that readers would find an interesting follow-up in a couple of paragraphs from the earlier biography, which are reproduced herewith. Although the earlier book is now out of print it would be available from libraries and, of course, the new biography covers these sorts of matters also.

> F E Smith came into collision with the Bench on many occasions, both in High Court and County Court. Once he was opening a case before Mr Justice Ridley. When Smith rose to address the jury, the judge most unjudicially observed: "Well, Mr Smith, I have read the pleadings, and I do not think much of your case." Smith replied quickly: "Indeed, I'm sorry to hear that, m'Lud, but your lordship will find that the more you hear of it the more it will grow on you!"
>
> He appeared before Judge Willis, a worthy, sanctimonious and garrulous county court judge, full of kindness expressed in a highly patronising manner. F E Smith had been briefed for a tramway company which had been sued for damages for injuries to a boy who had been run over. The plaintiff's case was that blindness had set in as a result of the accident. The judge was deeply moved. "Poor boy, poor boy," he repeated, "blind. Put him on a chair so that the jury can see him." These remarks from the Bench were highly prejudicial to Smith's case, and he said coldly: "Perhaps your honour would like to have the boy passed round the jury box." "That is a most improper remark," said Judge Willis angrily. "It was provoked", said Smith, "by a most improper suggestion." A pause; then the judge said: "Mr Smith, have you ever heard of a saying by Bacon – the great Bacon – that youth and discretion are ill-wedded companions?" "Yes," came the reply, "I have. And have you ever heard of a saying of Bacon – the great Bacon – that a much talking judge is like an ill-tuned cymbal?" This retort had long lain pigeon-holed in his mind, but he had never anticipated such a heaven-sent opening. The Judge replied furiously, "You are extremely offensive, young man," to which Smith replied with a shrug and a sneer: "As a matter of fact, we both are, and the only difference between us is that I am trying to be, and you can't help it. I have been listened to with respect by the highest tribunal in the land, and I have not come down here to be browbeaten."
>
> The same judge, after a long squabble with F E Smith upon a point of procedure, asked, "What do you suppose I am on the Bench for, Mr Smith?" "It is not for me", answered Smith, suavely "to attempt to fathom the inscrutable workings of Providence." □

BOOKS

Australian Civil Procedure. 2 ed, 1985. By Bernard C Cairns. Published by The Law Book Co Ltd NSW.

Rules of Court. By Enid Campbell. Published by The Law Book Co Ltd NSW 1985.

Reviewed by Gordon Cain, Barrister, Editor of Sim & Cain.

Australian Civil Procedure deals with and compares the rules of the Federal Court and those of each Australian State and discusses their differences. It is also a comprehensive survey of Australian law on the progressive steps in litigation, and viewed from this latter aspect it contains much material of a very practical nature, and therefore of significant value in the day to day work of the court practitioner.

Although the only New Zealand decision apparently referred to (p 69) is one in respect of a libel published in an Australian newspaper, nevertheless the book could be of no little interest to the New Zealand court man for two reasons: firstly much of the general comment on the litigation process is equally applicable in this country (and in particular, the chapters on Pleading are much to be commended); and secondly, our High Court Rules adopt as new rules, with only minor modification quite a few of the New South Wales rules eg in the areas of particulars as to condition of mind; interrogatories and discovery, admission of documents, payment into Court (in part); evidence by deposition, perpetuating testimony and discovery in aid of execution. Thus the text on such topics relating to the NSW rules and Australian decisions thereon have relevance for us.

There is a contribution to the whimsical mishap department; in a discussion of the plea of confession and avoidance (ie the defendant admits the allegations in the claim but their effect is avoided by the assertion of additional facts) the plea is referred to, at one place on p 170 as a plea of "confusion and avoidance". To the casual reader this type of "Yes but no" plea may indeed be confusing.

But trivia aside, the book is certain to be of value and of particular interest, to the common law side of any New Zealand practice.

Rules of Court, is not concerned with civil procedure as such, but with the sources and location of authority to make rules of court; with the ambit of delegated powers to make such rules; their manner of exercise, control and enforcement. The work is a study in comparative law on these topics in the jurisdictions of England, the United States of America and Australia.

New Zealand is unhappily not included; there is no spill-over from CER. But many topics interesting to a New Zealand practitioner are discussed and have relevance to our local scene eg to what extent does statutory power in those jurisdictions to make rules supersede the inherent powers of the Court to regulate procedure in areas outside the rules.

The identity of the statutory delegates is considered; in most jurisdictions Judges alone, or with other lawyers are given the power to make rules of court. Does this give a sufficiently board base? One objection put forward is that it is the Judges themselves who are to pronounce upon the validity and interpretation of the rules they have made; some impairment of customary independence may be suspected; nor is the draftsman of a document the best judge of its correct interpretation.

The status of the Practice Note or Direction, a feature of each of the jurisdictions (including our own) is discussed in a manner useful to one who may wish to question its validity. The problem of classifying a particular rule as directory or mandatory, and the consequences of that are considered; also the distinction between irregularities and nullities and between substance and procedure. This last point may well arise in New Zealand in respect of s 51C of the Judicature Act 1908 conferring power to make rules in respect of practice and procedure. This does not extend to the making of substantive law yet it is often possible to discern a substantive content in a rule directed at procedure only.

This reviewer is certainly not free from typographical mishaps but an amusing one at p 43 of this work may be mentioned; it is said of a case that the defendant "rushed" to sign a Certificate of Readiness for hearing. "Rushed" seems an odd word in the circumstances; yes, gentle reader, it should be "refused" to sign it.

The book would be an interesting addition to the library of the serious common law practitioner and of the student of the manner of exercise of statutorily delegated power. □

Withdrawal from ANZUS

By Grant Hewison BA LLB of Hamilton

An appraisal of the ANZUS Treaty by Campbell McLachlan was published at [1985] NZLJ at 271. There he dealt with the politics and legal context in which ANZUS was created, how it has evolved and how it is now considered. The Treaty itself, Mr McLachlan explained, placed two major obligations on the parties, being mutual aid and mutual defence. While the Treaty at present appears to be in a state of partial suspension, a threat of termination remains. This article considers the legal position regarding the United States threats to terminate the ANZUS Treaty with respect to New Zealand.

Since the introduction of the New Zealand Government's anti-nuclear legislation banning visits by nuclear armed or powered warships concern has arisen over threats that the United States will withdraw from Anzus should the Bill became law. Charles Redman, a State Department spokesman has said;

> The probable result of (a review of Anzus following the New Zealand legislation) would be the termination of our alliance relationship with New Zealand because the absence of normal port access would make it impossible for the United States to carry out its defence commitment to New Zealand.[1]

In response David Lange has said that the United States would be acting unconstitutionally if it declared the Anzus Treaty null and void:

> In the United States, as in New Zealand, you cannot by executive action go completely against what is a legal obligation.

A pre-emptive veto, says Lange, would be inconsistent with the terms of the treaty which has a 12-month notification withdrawal period and since there was no power within the Anzus Treaty one or two partners could not expel a third.[2]

Although both parties argue that it is their point of view which is to be preferred, the fundamental issues remain unconsidered. Would the United States be acting unconstitutionally if it declared, by executive action that Anzus was null and void? Would a pre-emptive veto (abrogation or withdrawal) be inconsistent with the terms of the Anzus Treaty? Does New Zealand's legislation breach a term of the Anzus Treaty which could allow the United States to withdraw; and finally, is there power within Anzus for one or two parties to expel a third?

US Constitution

The first issue requires an examination of the United States Constitution concerning Treaty-making and withdrawal.

Article II, section 2 of the Constitution of the United States declares that:

> the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate present concur.

Unfortunately the Constitution does not provide details on the power of withdrawal from treaties. However, in a recent United States Supreme Court decision involving a suit between Senator, at the time, Barry Goldwater and President Carter over the termination of the Taiwan Defence Treaty, the Court declared that no constitutional provision explicitly conferred upon the President the power to terminate treaties. Taking account of this and Article VI of the Constitution, which provides that treaties shall be a part of the supreme law of the land, the view which prevails is that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.[3] Unlike the Supreme Court, the lower Court of Appeals decided conclusively that

> the constitutional initiative in the treaty making field lies with the President, not the Congress. It would take an unprecedented feat of judicial construction to read

into the Constitution a requirement that Congress approve all treaty terminations.

But the Appeals Court qualified its decision by saying that it was acting only on the Taiwan Treaty and was not ruling on the general issue of Congress' role in ending treaties.

In the end the Supreme Court decided that the issue was of a political nature and consequently the legal question on the power of termination was left in doubt. The unconfirmed view of American constitutional writers, however, is that treaties of the United States may be terminated by the President alone, or by the President and the Senate. As "law of the land" they may be repealed by act of Congress, or they may be terminated in accordance with their own provisions or by agreement. But, as Edward S Corwin points out:

> any one-sided procedure still leaves open the question of the outstanding legal obligation.[4]

International obligations

It seems then that the United States, or the President would not be "unconstitutionally" if Anzus was declared null and void. This is of course subject to a future decision of the Supreme Court outlining which procedure for terminating treaties is constitutional. But this leaves open the issue of whether such a pre-emptive veto or withdrawal would be inconsistent with the terms of the Anzus Treaty and the international obligations thereunder.

Article X of the Anzus Treaty deals with withdrawal. It states:

> This Treaty shall remain in force indefinitely. Any Party may cease to be a member of the Council established by Article VII one year after notice has been given to the Government of Australia, which will inform the Governments of the other Parties of the deposit of such notice.

Herein lies one of the provisions of the Anzus Treaty which seems to have been misinterpreted. The Anzus Treaty states that it remains in force indefinitely. Article 56 of the Vienna Convention on the Law of Treaties, which deals only with provisions in treaties and not with international law in general, provides that:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
> 2. A party shall not give less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

The Anzus Treaty is resolute with regard to termination or denunciation. Article X states categorically that the treaty shall "remain in force indefinitely". Taking into account Article X and the Treaty as a whole, no right of denunciation or withdrawal can be implied by the nature of the Treaty nor the intentions of the parties. Consequently, although a party may cease to be a member of the Anzus Council in accordance with the provisions of the Treaty regarding 12 months notice, a party cannot unilaterally terminate, denounce or withdraw from Anzus.

Seato precedent

A similar situation existed with the South-East Asian Treaty Organisation, Seato. Seato was based quite closely on Anzus and Article X of that Treaty also provides for withdrawal:

> The treaty shall remain in force indefinitely, but any party may cease to be a party one year after notice of denunciation has been given to the Phillipines Government, which shall inform the Governments of the other Parties of each notice of denunciation.

By decision of the Seato Council the Organisation ceased to exist as of June 30th 1977. The Organisation dissolved due to Pakistan's decision to cease to be a member, France's decision to withdraw its financial contribution and the fact that the main aim of the Treaty, to deter Communist aggression, had been alleviated by improved relations with China. Now, although the Organisation ceased to exist, the Seato Treaty remains in force. Consequently the legal obligations undertaken by the parties in Seato continue to exist, but the political will to uphold these obligations has effectively been withdrawn.

Anzus could go a similar way. But other issues remain to be considered.

Defence commitments

The United States argues that the absence of normal port access makes it impossible for them to carry out their defence commitment to New Zealand. The probable result of a review of Anzus following the New Zealand legislation would be the termination of the Anzus alliance relationship with New Zealand. Their argument seems to suggest that the New Zealand legislation is legally inconsistent with the terms of Anzus. The argument rests on the obligations contained within Articles II, III and IV of the Anzus Treaty:

> Article II
> In order more effectively to achieve the objective of this Treaty the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.
>
> Article III
> The Parties will consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific.
>
> Article IV
> Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

The Americans seem to be arguing that legislation banning the access of a large part of the United States Navy and Airforce from New Zealand's ports and land territory would be inconsistent with the obligations to separately and jointly by means of continuous and effective self-help and mutual aid maintain and develop individual and collective capacity to resist armed attack. In the unlikely event that New Zealand should be attacked, the Americans argue, a nuclear ban would thwart their

obligation under Anzus to act to meet the common danger. Consequently, the New Zealand legislation is in breach of the Anzus Treaty "contract". The Vienna Convention on the Law of Treaties provides, in Article 60,[5] that:

> 2. A material breach of a multilateral treaty by one of the parties entitles:
>
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
> (i) in the relations between themselves and the defaulting State or
> (ii) as between all parties;
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
>
> 3. A material breach of a treaty, for the purposes of this article, consist in:
>
> (a) a repudiation of the treaty not sanctioned by the present Convention; or
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Material breach, for the purposes of Anzus, would consist of a violation of a provision essential to the accomplishment of the object or purpose of the treaty. This would lead to Australia and/or the United States either suspending the treaty or terminating it with respect to all parties or just New Zealand. The provisions of Article 60 are also an exception to Article 56 which states that a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal. But the conditions by which material breach would occur must be of a serious nature.[6]

Breach of a treaty

Unfortunately State practice does not give great assistance in determining the true extent of a material breach or the proper conditions for the exercise of its sanctions. A breach of a treaty may be direct or indirect. A State may take certain action or be responsible for certain inaction, which, though not in the form of a direct breach of a treaty, is such that its effect will be equivalent to a breach of treaty.[7] In such cases a tribunal will demand a requirement of "good faith" in the performance of the treaty and will go "beneath the surface" of the actual text of the treaty to establish the reality of the breach rather than its mere appearance. In the case of a treaty being breached by the introduction of regulations, a tribunal would require evidence that the making of the regulations substantially destroyed or frustrated the rights of the other party. Generally:

> it would be necessary to establish such serious conditions ... as would operate to frustrate the purpose of the agreement.[8]

The question whether New Zealand's anti-nuclear legislation materially breaches the Anzus Treaty is not one I would readily pronounce judgment on. Although a right exists in international law for a wronged party to resort to an arbitral tribunal or the International Court of Justice for a declaration that a treaty has been breached, this is subject to the necessary consent to be bound by the Courts jurisdiction.

> In many cases the denouncing State decides for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into serious discussion of the legal principles involved.[9]

Conclusion

In conclusion then, the Anzus Treaty is under threat. The introduction of New Zealand's anti-nuclear legislation has seen us one step closer to the possibility of the United States realising that threat. It seems that the President would not be acting unconstitutionally, at least in terms of the Constitution of the United States, if he declared Anzus null and void. But this would leave open the question of outstanding treaty obligations. Anzus only provides for withdrawal from its Council. The Treaty itself remains in force indefinitely and with it the legal obligation to meet an armed attack in the Pacific Area. Should the Americans simply decide to "leave" Anzus that would leave the Treaty in a state of limbo similiar to that now held by Seato. Although the legal obligation would remain, the political will to uphold it would not.

But a legal argument does exist by which the Treaty obligations could be declared void. If the New Zealand legislation banning United States defence forces from our shores and harbours materially breaches the terms of Anzus (for instance, New Zealand must jointly by means of continuous mutual aid maintain and develop individual and collective capacity to resist armed attack) then the United States could terminate or suspend the operation of Anzus with respect to New Zealand.

It is doubtful that the United States would terminate Anzus even if the legal option is available. The difficulty of getting two-thirds of the Senate to approve a similiar defence relationship means the United States is more likely to simply "leave" Anzus in its present state of "non-operable" suspended limbo and await a change in perspective to occur in New Zealand's foreign relations to resume nuclear ship visits. □

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1 The *New Zealand Herald*, 12 December, 1985, p 22.
2 The *New Zealand Herald*, 10 December 1985, p 6.
3 *Goldwater v Carter* (The Taiwan Treaty Termination Case) 62 L Ed 2d US Supreme Court Reports p 428, at 429.
4 E S Corwin, *The Constitution and what it means today*, 1978, Princeton University Press, p 172.
5 Article 60 provides a codification of international law whereby material breach of a treaty entitles the innocent State party to withdraw irrespective of the provision in Article 56.
6 D J Harris, *Cases and Materials on International Law*, 3 ed 1983, Sweet & Maxwell, p 620.
7 Mc Nair, *The Law of Treaties*, 1961, Oxford University Press, p 540.
8 Tacna-Arica Arbitration in Harris, see note 6, p 621.
9 International Law Commission commentary, in Harris, see note 6, p 620.

Parents and Children

Mrs Gillick in the House of Lords

By W R Atkin, Senior Lecturer in Law, Victoria University of Wellington

This article takes a favourable view of the majority decision of the House of Lords in the case of a doctor providing contraceptives to children despite or without the knowledge of the parents. As the article makes clear New Zealand statute law is different to that in England and the issue is therefore unlikely to arise here in Court proceedings in the same way. A critical view of the decision as a matter of legal principle involving the relationship of civil and criminal law is published below from the Solicitors' Journal *of 8 November 1985. This article by W R Atkin originally appeared in the* Family Law Bulletin *for December 1985.*

The relationship between parents, children and the state is a delicate one. Some people argue for greater state intervention in the way that children are brought up, more especially when there are hints of child abuse and deprivation. Others argue that the rights of the child should be spelt out in law and enacted in a kind of Bill of Rights for Children. Others yet again believe strongly in parental autonomy – parents should have the right to determine how their children are to be brought up and these rights should prevail over all others.

Mrs Gillick falls within this last category. She objected to a Department of Health and Social Security guidance which purported to allow area health authorities in England to give contraceptive advice and treatment to girls under 16 without first obtaining parental consent. Mrs Gillick is the mother of girls who might under the guidance have received contraceptive advice without her knowledge. As a staunch Roman Catholic, she rejects artificial contraception. As a strong, and no doubt loving, mother, she wants to bring up her daughters her way, without interference by the state and the medical profession. Having won with a unanimous decision in the Court of Appeal, Mrs Gillick has now lost by a three to two majority in the House of Lords. (See *Gillick v West Norfolk and Wisbech Area Health Authority, The Times,* October 18, 1985.) If the circumstances were right, the Gillick girls might legally be supplied with contraception without their mother knowing anything at all about it.

The *Gillick* decision is important at several different levels. First, it obviously deals with the law in England on contraceptive advice to minors. There are several subsidiary questions here. What are the civil law rules on the giving of contraceptive assistance? Do parents have overriding rights to veto that assistance? Must doctors consult parents or will the consent of the child be enough for advice and treatment to proceed? What is the standing of the giving of such assistance to minors under the criminal law?

The second level in the decision is the extent of parental authority in relation to all medical procedures, not just contraception. In the absence of an emergency, special statutory provision or judicial order under the High Court's wardship powers (in New Zealand under s 9 of the Guardianship Act 1968), must parental consent be first obtained?

The final level of significance in the decision is that of parental rights generally in relation to their children. How far does the law allow parental autonomy to extend and when, if at all, may a child act independently? The minority in the House of Lords based their judgments mainly on factors arising at the first level. The majority Judges however looked to broad principles about parental rights, and having established what these might be, they deduced consistent rules for handling the particular problem of contraception.

The *Gillick* case has been a much

publicised saga in England. It has had political, social, medical and religious overtones. What is its relevance to New Zealand, so far removed from the specific controversy that has surrounded the case? It is the writer's view that all three levels of the case apply in New Zealand law. It represents a statement of the common law rights and responsibilities of parents and, given the New Zealand terminology in the Guardianship Act 1968, of guardianship as well. Except where there are special statutory provisions, it will govern the medical treatment of minors. And more narrowly and perhaps more controversially it sets out the civil law conditions for the giving of contraceptive advice and treatment. The legal profession in New Zealand must take account of *Gillick*. But even more, will the medical profession have to do so.

Parental Rights

In the Court of Appeal, it had been held that parental authority was always paramount, save in emergencies, where there was specific statutory exception or where the Court invoked its wardship powers over the child *(Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 2 WLR 413; [1985] 1 All ER 533). This neat but uncompromising statement of parental rights was rejected by the majority in the House of Lords. In so doing, Ttheir Lordships achieved a greater balance between the interests of parents, children and the state.

According to Lord Scarman, the common law, while accepting that parental rights do not wholly disappear until the child reaches the age of majority, has never treated those rights as "sovereign or beyond review and control". His Lordship developed this point in an important way by saying that "[p]arental rights were derived from parental duty and existed only so long as they were needed for the protection of the person and property of the child".

In an equally important dictum, Lord Fraser said: "Parental rights to control the child existed not for the benefit of the parent but for the child". His Lordship agreed with Lord Denning in *Hewer v Bryant* [1970] 1 QB 357, 369 that parents had "a dwindling right which the Courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with the right of control and ends with little more than advice". So, concludes Lord Fraser at this point in his judgment, reference to rigid parental rights at any particular age will not provide a solution to the problem of the relationship between parents and children. The solution "depended upon a judgment of what was best for the welfare of the particular child".

In his reasoning, Lord Fraser appealed to the ordinary experience of mankind in Western Europe this century. Likewise, Lord Scarman noted modern developments which the law ignored at its peril – the growth of family planning techniques and services, the increasing independence of young people and the changed status of women. We might add to this list, the greater involvement of the wider community in the upbringing of children, exemplified by the rise of public education and new insights into child abuse and neglect. The emphasis in these majority judgments on actual practice is an absorbing illustration of judicial realism.

How do these general statements about parental authority apply in New Zealand? Ironically the argument for their application is not as easy to make as it is with respect to the more specific levels of the case.

In New Zealand parental rights are normally identified with rights of guardians. This is because parents will normally be guardians under s 6 of the Guardianship Act 1968 and guardians have the principal responsibility for the upbringing of children. Under s 3 guardianship is defined as, among other things, "the right of control over the upbringing of a child". "Upbringing" is defined to include education and religion and "child" is a person under the age of 20.

At first glance, the definition of guardianship favours the view that parents have a veto over all decisions affecting their children, except as otherwise provided by statute. (For example, s 25A provides that a girl may obtain an abortion without parental or guardian's consent.) The view is reinforced by s 14 which sets up a procedure whereby children of or over 16 may dispute a parent's decision or refusal of consent by taking the matter to a Family Court Judge. The possible implication of this procedure is that children, even in their late teens, have no independent decision making over their lives and are subject to dominant parental power. A further twist in the statutory picture comes in s 33. "Except as otherwise expressly provided in this Act", the Guardianship Act is to be a code, replacing the rules of common law and equity. In the light of this, how can a decision of the House of Lords, no matter how momentous, be relevant in New Zealand?

The first point to note is that while the Act is said to be a code it does not provide for every eventuality. Thus in the area of custody, there is ample scope for the Courts to interpret the Act and develop the law. The well known injunction that the welfare of the child is to be paramount (s 23) is a classic example of the elasticity of the Act and the need for judicial creativity. Likewise the definition of "guardianship" does not purport to cover every circumstance. On a question such as the naming of a child, the Courts, in the absence of express guidance in the Act, have had to develop their own jurisprudence (cf *H v J* [1978] 2 NZLR 623; *S v C* (1981) 1 NZFLR 13).

With respect to s 14, we should note that nowhere in that section is it laid down when a parent or guardian's consent is in law essential. The section merely establishes machinery for reviewing parental actions, after those actions have in fact taken place. The importation of the rules from *Gillick* is in no way inconsistent with that machinery.

Then we come to the definition of "guardianship". That definition refers to a "right of control over the upbringing of a child", not to a right of exclusive or complete control. It is not a licence for unreasonable discipline, or for keeping a child out of the education system, or for starvation diets, if one happens to believe in these things as part of bringing up children. Further, the definition does not address the relationship between the child and the parent. More specifically, it does not rule out the possibility that as a matter of law the child may have

independent decision-making powers depending upon its age and maturity. It makes more sense to see the definition dealing with other situations. So, a person who is not a guardian of a child will not have rights over the upbringing of the child (absent express statutory exceptions). Again, where there are two guardians — which will normally be the case in a two parent family — both have a part to play in the life of the child and one cannot be unilaterally excluded from that role by the other.

The view that the definition of guardianship does not exclude the application of *Gillick* receives support from the latter part of the definition, viz that guardianship "includes all rights, powers and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child". In other words, the common law is saved by an express provision of the kind envisaged by s 33. It is true that because of the word "includes" guardians may have more rights, powers and responsibilities than were available at common law. But where the common law has clearly limited those rights, then that limitation prima facie should continue to exist. *Gillick* represents judicial law-making and is a response to social and technological change. But in strict theory, Judges in formulating the common law are saying in clear words what was thitherto left unsaid. Thus it is submitted that *Gillick* articulates aspects of the rights, duties and responsibilities of guardians (and parents) as they were "at the commencement of this Act".

The conclusion therefore is that the general level statements in *Gillick* apply in New Zealand. They are consistent with the statutory scheme in the Guardianship Act 1968. If the particular child is mature enough, important decisions such as whether to go to university or what religion to belong to may be made by the child independently. Where parents make decisions for the child, those decisions must be for the benefit of the child, not for the benefit of the parent. Surely, aside from the technical analysis of the New Zealand law, these conclusions are eminently reasonable.

Medical Intervention

The majority of the House of Lords made several statements which apply broadly to medical treatment of minors. Lord Fraser admitted that "[i]n the overwhelming majority of cases the best judges of a child's welfare were the parents. There was no doubt that any important medical treatment of a child under 16 would normally be carried out only with the parents' approval". His Lordship's discussion proceeded to the more specific issue of contraception, but his comments clearly relate to other medical actions as well. Thus, circumstances can arise whereby the doctor is the better judge of what is conducive to a child's welfare than the parents. His Lordship entrusts a discretion to the doctor to act in the best interests of the child patient. Lord Scarman says in this context:

> If the law should impose upon the process of growing up fixed limits where nature knew only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.

So, as with parental authority generally, medical intervention may take place with the sole consent of the child, if the particular child is mature enough to consent and reference to the parents is considered inappropriate. Even Lord Templeman, one of the minority Judges, agreed that parental consent was not always necessary. His Lordship said:

> A doctor might lawfully carry out some forms of treatment with the consent of the infant patient and against the opposition of a parent based on religious or any other grounds, depending on the nature of the treatment and the age and understanding of the infant.

In New Zealand, there are some specific statutory provisions empowering doctors to act without parental approval. Section 25A of the Guardianship Act 1968, permitting abortions to take place without reference to the girl's parents, has already been mentioned. Under s 125 of the Health Act 1956, official medical officers are entitled to enter public schools, private schools if the private school's controlling body has so requested, and child care centres, and they may examine children at the school or centre. Prior parental notification is not provided for in the Act but parents may be notified subsequently of any condition or disease which the child is discovered to be suffering from. Regulation 7(5) of the Veneral Diseases Regulations 1982 (SR 1982/215) provides another interesting example. If a doctor sees a child under 16 who is suffering from veneral disease the doctor must inform the parents, guardian or person acting in loco parentis "unless in his opinion it would be undesirable to do so in the interest of the health or wellbeing of the child or in the wider interests of public health".

The most important provision on medical intervention is s 25 of the Guardianship Act 1968. Persons aged over 15 or married may give valid consent to medical procedures (including blood donation, blood transfusions, surgery and dentistry) as if they were adults. Where otherwise consent is necessary or sufficient for treatment of a child, the consent may be given by a guardian (usually, of course, a parent), by a person acting in loco parentis if there is no available guardian, or by a District Court Judge or the Director-General of Social Welfare if there is no one else available (s 25(3)).

The question which now arises is whether the existence of s 25 affects the application of *Gillick*. Subsection 5 expressly saves any common law rules whereby (a) no consent or no express consent is necessary; (b) the consent of the child in addition to any other person is necessary; and (c) the consent of any other person instead of the consent of the child is sufficient. This subsection does not expressly refer to any rule whereby the consent of the child alone will be sufficient, but arguably a rule about the non-necessity of parental consent could fall within exception (a). Subsection 5(a) is silent on whose consent need not be obtained. It is possible to argue that in the context of a section which deals primarily with proxy consent, subs 5(a) embraces, inter alia, the *Gillick* kind of situation. In terms

of subs 5(a), no consent from the parents is necessary because the child can give sufficient consent.

There is a further argument however to justify the co-existence of *Gillick* with s 25. Section 25(3), which sets out the authority for proxy consent, commences with the words "where the consent of any other person . . . is necessary or sufficient". It will be noticed that the subsection does not spell out the circumstances in which another person's consent is indeed necessary or sufficient. This is a matter left to the Courts and the determination of the House of Lords can be seen as filling the vacuum which has long existed on this question.

Contraception

The specific facts of the appeal before the House of Lords related to the departmental guidance on contraception. The validity of this guidance was upheld by the majority and in so doing, a number of conditions were laid down on doctors exercising their clinical judgment to act without parental approval. The guidance itself was narrow in its terms. It envisaged that a doctor or counsellor would act on their own only in "exceptional cases". In a similar vein, Lord Fraser emphasised that the Court's decision "was not to be regarded as a licence for doctors to disregard the wishes of parents whenever they found it convenient to do so". According to His Lordship a doctor who ignored the wishes of parents without justification should be subject to professional discipline.

Lord Fraser laid down five conditions which would justify a doctor's acting without the parents' consent or knowledge. It will be seen that these conditions are fairly strict. The doctor must be satisfied that:

(1) the girl would although under 16 years understand his advice;
(2) he could not persuade her to inform her parents or to allow him to inform the parents that she was seeking contraceptive advice;
(3) she was very likely to have sexual intercourse with or without contraceptive treatment;
(4) unless she received contraceptive advice or treatment her physical or mental health or both were likely to suffer; and
(5) her best interests required him to give her contraceptive advice, treatment or both without parental consent.

Law in New Zealand relating to contraceptives and children is covered by s 3 of the 1977 Act. This legislation was passed in response to the Report of the Royal Commission of Enquiry on *Contraception, Sterilisation and Abortion in New Zealand* (March 1977). Broadly speaking, parents, guardians, doctors and family planning clinics and like agencies (approved by the Minister of Justice) may sell or give contraceptives to children under 16 or give such children direction or persuasion on the use of contraceptives without criminal penalty. Pharmacists may sell contraceptives on prescription or on the written authority of parents, guardians or family planning personnel. In addition to the persons just mentioned, contraceptive instruction may be given by social workers, pastoral workers, and child counsellors, and if permission is given by the school principal after agreement with the School Committee or Board of Governors, instruction of school pupils may take place. Offences are created for contraceptive sale, advice and instruction unless in accordance with s 3.

At first glance, s 3 appears to give the medical profession and others all the authority they need to offer contraceptive assistance to minors. There would thus be no way a person like Mrs Gillick could challenge the action.

This interpretation does not however follow from the words and scheme of s 3. The section sets out the criminal law rules on contraception but does not explicitly override any common law or other statutory rules about the role of parents. The civil law on contraception is in fact left untouched and must surely be determined by reference to other sources. The scheme of s 3 is to establish that offences are created when specified things are done, unless the actions fall within the listed exceptions. All seven subsections are directed to the criminal law position. It is submitted therefore that s 3 does not prevent parents from obtaining a declaration or injunctive relief to prevent their child from receiving contraceptive advice and treatment. The test for determining whether such contraceptive advice or treatment may be given without parental approval is, it is submitted, the one which has now been laid down by the House of Lords.

Lord Fraser's list of five conditions leaves open the possibility of parental challenge. Doctors and counsellors will have to take time and care in ensuring that each individual child is capable of giving proper consent and that the conditions are definitely satisfied. This flexible and subjective assessment may well turn out to be quite a burden. Writing recently in *The Times* (October 21 1985, p 12), Simon Lee of King's College, London, said:

> As for Mrs Gillick's future, she will surely help ensure that doctors *do* follow the guidelines. If 100 15-year-old girls present themselves to a clinic and all 100 are given contraceptive treatment without parental consent, suspicions must be aroused as to the efficiency of the testing for capacity to consent. Doctors will have to make time to do this properly, and Mrs Gillick will doubtless be pressing for effective monitoring and sanctions by the DHSS and the General Medical Council.

Conclusion

The view expressed in this article is that the House of Lords decision in *Gillick* applies under New Zealand law. It relates widely to medical procedures for children, not just to contraceptive advice and treatment. It governs the relationship generally between parents and children.

The House of Lords has rejected the very high view of parental rights which prevailed in the Court of Appeal. In setting out an alternative model for the parent/child relationship, it could not be said to have taken an extreme position. In fact, as discussed above, the criteria for contraceptive advice and treatment are quite stringent. Nevertheless, *Gillick* is of profound legal and medical significance. It is an historic blow for the supporters of children's rights. □

Children and the Law Lords

By "Richard Roe"

The "Personal Angle" column of the pseudonymous "Richard Roe" in the Solicitors' Journal *has a deservedly high reputation for its often critical comments on issues concerning the relationship of the law to matters of social policy. In this article republished with permission from the* Solicitors' Journal *of 8 November 1985 being (1985) 129 SJ 773, Richard Roe takes a strongly critical view of the decision of the majority of the Law Lords in the* Gillick *case which was decided 3 to 2 in allowing an appeal from a unanimous decision of the Court of Appeal. As is clear from the preceding article by W R Atkin the New Zealand law differs from that in England. In New Zealand there is a statutory defence available to doctors and others to what would otherwise make them parties to a criminal offence. Indeed the act is still a criminal offence on the part of any male who has sexual intercourse with a child even if she has been provided with contraceptives by a doctor or other specified official person in order to facilitate her taking part in the criminal activity. This can be done presumably without the knowledge of the girl's parents or despite their objection. It has been well said that the life of the law (certainly as provided by our legislators, and now as interpreted by 3 Law Lords) is not logic. Richard Roe implies that in this particular case it does not show much that could be described as experience of the realities of life and the normative value of the law either.*

Too Close Run

On the face of it the decision in the *Gillick* case [1985] 3 WLR 830 (HL), a close run thing if ever there was one, is a lot less than satisfactory. Mrs Victoria Gillick, having convinced five sages of the law out of nine, has nevertheless lost the battle, nor is it obvious that if the divided heads were weighed, instead of counted, the balance would not still be in her favour. But the decision of the majority in the ultimate tribunal suffers from a far more fundamental defect than that. It has opened a yawning gap between the criminal law and the civil law.

By the Sexual Offences Act 1956, Parliament, bringing up to date the Criminal Law Amendment Act 1883, enacted it to be a criminal offence to have intercourse with a girl under the age of 16. The relevant age had been raised to 16 for the express purpose of extending to older girls the protection previously afforded only to the very young. To promote or encourage the commission of such an act is also declared to be a criminal offence. (The protected girl is not herself made liable to criminal sanctions.)

Admittedly social habits change, but the thrust of a statute less than 30 years old can scarcely be ignored as antediluvian. If Parliament changes its mind in such a case it is for Parliament, and no one else, to say so. Yet in this state of the law, the effect of the decision in *Gillick's* case is that a doctor who provides contraceptive devices for an under age girl need fear no criminal sanctions, though if that is not encouraging a breach of the statute by diminishing the inhibitions of the girl and the man or men with whom she proposes to copulate, the English language is robbed of all precision. The doctor's conduct is unequivocally and necessarily linked with the commission of an illegal act. At this crisis in a young girl's life the signposts of the civil and the criminal law are now pointing in diametrically opposite directions. As a lucid leading article in the *Daily Telegraph* points out, the Government is now put in the painful dilemma of either lowering the age of protection or expressly enacting the illegality of the guidelines of the Department of Health, the subject matter of the decision.

The decision of the majority to ignore the statute seems to be largely based on a despairingly pragmatist conclusion that the sexual revolution is irresistible and irreversible and that accordingly public policy requires society to save under age girls from its natural and probable consequences. Doubtless this argument springs from compassionate concern for disorientated and unprotected children deprived of a normally wise, affectionate and supportive family background. But it is just as true now as it ever was that "hard cases make bad law" and that in legislating for the abnormal it is oppressive to cast the net so wide as to entangle the normal.

The law would inspire little confidence if it enabled any doctor, however trendy, cranky or pill crazed, to have a go at ignoring and overruling any parent, however wise and affectionate. It would inspire even less confidence if, on a challenge, the jurisdiction to determine whether he had properly or honestly dealt with the factual and moral issues involved in his action were entrusted, not to the courts, but to his own professional

organisation composed of men at least in some degree sympathetic to him.

Strange Assumptions

Another assumption on which the decision of the majority in the House of Lords rested is that a substantial number of under age girls may be so poised, sensible, balanced and reasonable as to be able to form coherent judgment on the question whether or not they should seek contraceptive devices so as to form an assured infertile liaison with a man who will ipso facto be breaking the law in linking himself with them. Certainly such precocious paragons may exist. But the law must take it stand on the normal, not the exceptional, and such prodigies cannot be the norm in the case of girls below the age which Parliament has fixed as the upper limit of protection by the criminal law. The recently published life of Nancy Mitford vividly illustrates the sheer naive silliness into which a highly intelligent and sophisticated woman may fall when gripped by strong sexual attraction. How much the more an inexperienced girl hit for the first time by the strongest and most overpowering of the human passions, for which men, as well as women, have through the centuries ruined their lives.

As a judge of her situation no doctor, with perhaps hundreds of patients to attend to, is in a position to form as clear a picture of a child's past and present character, temperament, circumstances, strengths and weaknesses as the parents who are still under a legal obligation to feed, clothe, shelter, educate and care for her. A doctor cannot be said to pass a "clinical judgment", or any real judgment at all, until he has heard both sides of the story, the parents' as well as the child's. A young girl in love cannot be relied on by the doctor not to tell him lies to gain her ends. Subtly worse than lies, she will probably tell half truths.

Limits of Tolerance

If the medical profession chooses to claim the sacrosanctity of "confidentiality" of a young girl's communications to her doctor, it is not obvious that the law must follow suit and treat her as a separate entity from the parents who are still held responsible for providing her with all the essentials of life and on whom she remains dependent. In another context it has been convincingly suggested that a doctor whose patient is suffering from AIDS would not be debarred by confidentiality from telling his wife.

Lord Fraser was at pains to emphasise that the doctors were not being given an absolute authorisation to provide contraceptives at their unchecked discretion, and he laid down five conditions which they must satisfy before they could do so in defiance or in ignorance of the parent's view. The last condition which he listed was that the girl's "best interests" required the provision. It would be stretching "best interests" to breaking point to say that they involved forming a carefree relationship with a man embarking on a course of deliberately breaking the law and so liable to a gaol sentence. There is also the other little matter of sowing dissention between parents and daughter by conniving at her deception of them.

Any lingering doubts as to the potential silliness of under age girls and their incapacity to understand a doctor's or anyone else's advice can be instantly resolved by reading the letters they write to those "agony aunties" in the newspapers, jubilant now at having recovered a captive clientele.

There is no easy way out of the moral morass in which pornography and permissiveness have ensnared the young, but an additional defeatist dose of permissiveness atrophying a sense of the natural and probable consequences of their actions is not promising an escape route. As Lord Templeman, in his robust dissenting opinion, said: "There are many things which a girl under 16 needs to practice, but sex is not one of them". Perhaps if a doctor, buttressing her strength and not pandering to her weakness, told her that, she would believe him.□

1985 Butterworths Travel Award

One of the recipients of the 1985 Butterworths Travel Award was Suzanne M Janissen. Miss Janissen is a graduate of Otago University having graduated both in Arts and Law. She had also studied at Auckland University. She was admitted to the New Zealand Bar in December 1984.

Miss Janissen is at present doing her post-graduate studies at Berkeley University in California.

She reports that she has already completed one semester. The main areas of study which she is concentrating upon revolve around advocacy, evidence and general litigation. She has found the classes during the first semester to have been extremely interesting, and considers they will prove valuable for future practice in New Zealand.

As part of her course in the next semester she will be working in a large San Francisco law firm. This is a programme which involves being with that firm for one and a half days a week.

In her course of study at an American law school she finds it a fascinating experience to be working with other graduate students who come from over 20 countries around the world with extremely varied backgrounds. She says she is also finding that California is a wonderful place to live in.

Illegal Opinions

In re Noah's Ark, Limited.

This opinion by an anonymous contributor first appeared in (1934) 10 NZLJ 322 and is reprinted more particularly for the edification of younger members of the profession who in this irreligious age might not have heard, during the course of their secular education, of the adventures of Noah and his Ark, and much less have given careful consideration to its profound legal implications.

Noah's Ark, Limited, was the first known limited company. Its promoters had as their object the avoidance of liquidation, the reverse of the object of most modern companies.

Was Noah's Ark, Limited, a legally constituted company, and, if not, what are the consequences?

From the manner in which these questions are stated, any of the competent examinees who are the main product of our University system, will know that the answer to the first question must be in the negative. And they will be right.

The facts of the case were these: Mr Noah had received certain advice as to coming events which were to lead to the death by drowning of all mankind, and he took steps to avoid that consequence for himself. This he did by floating a limited company, the shareholders in which were all members of the family: they were Mr Noah and his wife, and their sons, Messrs Shem Noah, Ham Noah, and Japhet Noah, and the Mesdames S, H, and J Noah. It was a holding company; the capital of the company was to be invested in a wooden ark designed to hold a quantity of assorted livestock. The stock was not to be watered although, paradoxically enough, the whole of the capital assets were to be floated on water. The ark was to be constructed of gopher, and its dimensions were such that it would be about one-tenth of the size necessary to hold all the animals taken into it; this would probably annoy the elephants, and sardines have never recovered from the habits then acquired.

The only human beings entitled to enter the ark were the members of the Noah family, and to their knowledge, all other human beings were to be drowned, whilst Noah's Ark, Limited, was successfully floated. Was this an illegal association?

The Companies Act of the day (3 Adam & Eve, c 13) enacted one principle still followed in some circles, namely, the rule that two's a quorum and three's a divorce action. Noah's Ark, Limited, was an association constituted in breach of this rule and to that extent illegal. But there was a more serious illegality; no company formed for other than a legal purpose is a lawful association; Noah's Ark, Limited, was formed with the express object of killing by drowning everybody but the Noah family, and wholesale murder is illegal unless, which was not the case here, it is called war. Consequently Noah's Ark, Limited, was an illegal association and its every act was tainted with illegality; in fact it could not legally act at all.

What is the result of this on the modern world?

It is to be remembered that the whole of the human race of today is descended from the Noah family, and the Noahs were only kept alive by an illegal act — in other words they were legally drowned and we are illegally alive. This means that every human being and every human institution and invention are legally non-existent. Men are illegal, women are illegal, politicians, luncheons, clubs saxophones, publicans, educationalists, and the Ten Commandments are all illegal: in fact in the eyes of the law none of them exist — for most practical purposes the Ten Commandments don't.

But the consequences are possibly not as serious as they seem. On the contrary, legally non-existent Parliaments can enact nought but legally ineffective laws which legally non-existent judges cannot legally enforce, so that we may continue to park our cars anywhere and to buy beer after hours — and in fact to do what we like as we always have done. If then we are put in goal, we have the satisfaction of knowing that, legally, such institutions cannot exist. It was upon these logical and illegal opinions that Lord Verulam (formerly Sir Francis Bacon) who, besides being Lord Chancellor, was the author of all Elizabethan poetry and drama, based his famous dictum reported by Lovelace, that stone walls do not a prison make. But that was before he spent two days in the Tower of London.

In brief, Noah, the first known Company promoter, was the promoter of nought but illegality; the most famous company promoters of modernity have followed closely in his footsteps. □

Correspondence

Dear Sir

As an editor with a professional interest in national disasters and the reactions to them, I was interested to read the article by D J Round in the December issue of the *Law Journal* in which he pointed out that it is usually illegal to "rescue" endangered people against their will.

Whether it is wise to remind the more obstinate ones in society of that is probably a moot point.

One of the things the article did was remind me of the old gentleman who refused to be evacuated when Mount Saint Helen was threatening to blow her top in the United States. When he told the nation's ever-eager television cameras that no Government was going to shift him out of anywhere for his own safety, he became, overnight, a national hero. When Mount Saint Helen blew, he became a dead hero.

Allan R Kirk