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Certainty and stare decisis

Some practitioners, like the redoubtable Mr Dugdale and other opponents of a Bill of Rights place a very high value on the principle of certainty in the law. This is generally regarded as the basis for the doctrine of *stare decisis*, that a Court is bound by its own previous decisions.

Not of course that the common law always required this. In 1840, in the case of *Birtwhistle v Vardill* 7 Cl & F 895 at 922, the Lord Chancellor, Lord Brougham, said that the Judges

> in deciding important questions, should adopt the course, when they have gone wrong, of at once, in an open and manly way, retracing their steps, rather than persist in their error.

In due time however this view was itself considered to be in error. Lord Campbell in *Bright v Hutton* (1852) 3 HL C 341 at 389 said:

> this House cannot decide something as law today and decide differently the same thing as law tomorrow; because that would leave the inferior tribunals and the rights of the Queen's subjects in a state of uncertainty.

It was this argument of uncertainty that finally led to the standard expression by Lord Halsbury of the overriding importance of certainty in the law, in the leading case of *London Tramways Co v London City Council* [1898] AC 375. And this remained the law until 1966. On 26 July that year the then Lord Chancellor, Lord Gardiner, issued the following statement:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.

The concluding reference to "elsewhere than in this House" was of course significant for the Court of Appeal and the relevance of *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 (affirmed [1946] AC 163; [1946] 1 All ER 98 (HL)) when it was laid down that the Court of Appeal was bound by its own previous decisions subject to certain exceptions. This is still the position in England, (see Halsbury, 4 ed, vol 26, para 578) despite the efforts of Denning MR to effect a change, as in the case of *Davis v Johnson* [1979] AC 264 (HL and CA). When that case went to the House of Lords, Lord Diplock in his usual forthright manner stated at p 328:

> In my opinion, this House should take this occasion to reaffirm expressly, unequivocally and unanimously that the rule in the *Bristol Aeroplane* case as to *stare decisis* is still binding on the Court of Appeal.

The binding force of the *Bristol Aeroplane* decision has been the subject of much debate. A general survey of the arguments will be found in the article by Peter Aldridge in (1984) 47 *Modern Law Review* 187. In particular he considers and criticises an earlier article by Rickett in (1980) 43 *Modern Law Review* 136. According to Rickett there are four arguments in favour of the *Bristol Aeroplane* decision:

(i) It is more than a mere rule of practice;
(ii) The certainty argument;
(iii) The floodgates argument;

(iv) The House of Lords is different as the Court of last resort.

Rickett then sets out five arguments against regarding *Young v Bristol Aeroplane Co Ltd* as being final and binding on subsequent members of the Court of Appeal. The five arguments he puts forward are:

(i) Being only a self-imposed limitation it can be abolished;
(ii) The purity of justice argument;
(iii) The dishonesty in distinguishing or explaining argument;
(iv) The argument that it will be rarely used;
(v) The Court of Appeal as the final Court for most litigants argument.

Neither of these sets of arguments seems conclusive to Peter Aldridge. The conclusion he seems to come to is that the principle should not be retained, simply because he can see no convincing argument in its favour. He sets out his view as follows:

> It seems, therefore, that if it can be demonstrated that in spite of the possible introduction of confusion into the law from distinguishing, strict adherence to *stare decisis* conduces to greater certainty in the law, the rule in *Young* should still only be retained if that certainty is valued more highly than "justice" in individual cases. Whilst there is no evidence that *stare decisis* gives rise to certainty, it is clear that there are cases where adherence to precedent gives rise to what Judges at least regard as unjust solutions in individual cases. It is submitted that the avoidance of such tangible wrongs ought to be preferred to the dubious argument from certainty.

What then of the New Zealand Court of Appeal? It has apparently never formally adopted the principle of the *Bristol Aeroplane* case. Although most practitioners would probably have taken it for granted, the Court of Appeal has been careful in such cases as *R v Rayner* [1948] NZLR 455 and *Preston v Preston* [1955] NZLR 1251 to avoid making a definitive ruling on the issue.

But in a very recent decision *Howley v Lawrence Publishing Co Ltd* (unreported, 1 May 1986, CA 77/84) the issue was raised; and by a majority of 3 to 2 the Court stated that it was not bound by its own previous decisions. This was the view of Woodhouse P, Richardson and McMullin JJ whereas Cooke and Somers JJ each felt that the question needed more careful analysis than it had received in argument, and that this was not an appropriate case in which to deal with such a fundamental issue.

The case originally came on before a Court of three but was specifically adjourned so that it could be considered by a Court of five in case "it should become necessary to review the earlier *News Media* case", per Woodhouse P at p 13 of the written judgment. The question seems, surprisingly, not to have been argued as counsel for the Collector of Customs accepted that the Court of Appeal is not bound by its previous decisions. It was presumably this failure to present argument on the point to the Court that disturbed Cooke and Somers JJ, although both indicated a willingness to consider a wider departure from *stare decisis*, than the very restrictive exceptions allowed for in *Young v Bristol Aeroplane Co Ltd*.

The judgment of Richardson J is devoted almost entirely to the question of *stare decisis*. There are a number of interesting points that arise from a reading of this judgment. First there is the emphasis that the judgment places on the reconstitution of the Court of Appeal in 1957 with permanent appellate Judges. Richardson J states that the Court of Appeal before 1957, like the reconstituted Court of Appeal since, has been careful not to make a specific decision that it was bound by the principle in *Young*. He then cites a number of Australian decisions in which the High Court of Australia had consistently asserted its power to overrule its previous decisions.

In words that echo the thought of Lord Brougham in 1840 Richardson J quotes from the judgment of Isaccs J in *Australian Agricultural Co v Federated Engine Drivers and Firemen Association of Australia* (1913) 17 CLR 261 to the effect that in his opinion it was not better that a Court "should be persistently wrong than that it should be persistently right."

Richardson J was careful to say that he did not consider it necessary to reach any final view on the *stare decisis* issue. He agreed with the reasons given by the President for allowing the appeal. McMullin J said expressly that although no argument had been addressed to the Court by either counsel as to whether or in what circumstances the Court should review and reverse one of its earlier decisions he thought it "should be free to do so in this case, *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 notwithstanding". The irony of the decision of McMullin J who dealt at length with the issue in the case, the meaning of indecency, was the emphasis he finally placed on the principle of certainty. At p 12 of the typescript of his judgment he said:

> It is desirable that in an area which touches upon matters of public interest so much as this subject, there should be as much certainty as possible in the legal test to be formulated. Those concerned with the administration of the [Indecent Publications] Act and those whose activities may be caught by it are entitled to a clear interpretation of the law.

None of the judgments indicated any expectation of there being reversals of previous decisions to any large extent. In that they were probably reflecting the practice of the High Court of Australia and that of the House of Lords subsequent to the statement made by Lord Gardiner in 1966. An analysis of the practice of the House of Lords a few years later in 1972, was made by J F Burrows at [1973] NZLJ 85. In that article it is pointed out that there were four cases in 1972 when the House of Lords was invited to refuse to follow its own decision. In three cases it declined to do so, but in *British Railways Board v Herrington* [1972] 1 All ER 749 the House departed from its earlier decision in *Addie v Dumbreck* [1929] AC 358 on the ground, as Lord Pearson expressed it, that the *Addie* decision had been rendered obsolete by changes in physical and social conditions so that it had become an anomaly. In refusing to make changes in the other cases the principle of certainty had weighed with the Lords of Appeal.

In Halsbury, 4 ed, vol 26, para 577, note 3 there are set out examples of the developing practice in the House of Lords in this area. For instance a previous decision should not be departed from *merely* because the House

considers it was wrongly decided, or that it was illogical or generally where questions of construction are involved. A previous decision may, however, be departed from where it is shown to be unduly restrictive of legal development, or where it causes uncertainty or inconvenience in practice, or where fresh considerations of real substance are to be found.

The extent of the confusion in this area of *stare decisis* is to be found in respect of the Divisional Court in the apparently conflicting judgments in *R v Greater Manchester Coroner, ex parte Tal* [1984] 3 All ER 240 and the subsequent decision in *Rogers v Essex County Council* [1985] 2 All ER 39. These cases and the issue of precedent are discussed in (1985) 101 LQR 157 and (1985) 101 LQR 484 respectively.

The situation in New Zealand following the *Howley v Lawrence Publishing Co Ltd* case is somewhat unsatisfactory. The issue was not argued and the judgments while expressing views on *stare decisis* did so without them being necessary to determine the issue. It is also of interest to note that the three Judges most clearly of the view that *Young v Bristol Aeroplane Co Ltd* did not apply to the New Zealand Court of Appeal had been the three Judges who sat on the recent case of *L D Nathan v Tradespan and Hotel Association of NZ* [1986] BCL 90 in which both Woodhouse P and McMullin J referred to the question of a previous decision possibly being overruled and said that if it were to be done it should normally be only by a Court of five McMullin J said that in the *Nathan v Tradespan and Hotel Association* case one division of the Court of Appeal was asked to review and overrule the decision of another division in an earlier case but declined to do so. He then went on, at p 5 of the typescript of his judgment to say:

> But it is implicit in my own judgment in that case that the Court may not have felt so inhibited had a full Court of five Judges been sitting.
>
> While, therefore, this Court, after proper argument, may decide to lay down the bounds of its capacity to review an earlier decision, in practice the Court has been reviewing earlier decisions on a case to case basis.

The clearest statement of the present position arising out of *Howley v Lawrence Publishing Co Ltd* is probably the following extract from pp 4 and 5 of the typescript of the judgment of Richardson J:

> Clearly the Court would and should adopt a cautious approach to the review of earlier decisions. Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded. However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case. This Court has the final responsibility within New Zealand for the administration of the laws of New Zealand and while its decisions are subject to review by the Privy Council few litigants, less than one percent of those unsuccessful in this Court, feel able to follow that path. It is I think unwise to try to formulate any absolute rule. I tend to the view that we should go no further than to indicate that this Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied it should do so, but without attempting to categorise in advance the classes of cases in which it will intervene. In the end and after weighing the considerations favouring and negating review in the particular case, the members of the Court must make their own value judgments as to whether it is appropriate in the interests of justice to review and perhaps overrule an earlier decision. However, for reasons particular to this case and to which I shall come shortly I do not consider it necessary to reach any final view as to *stare decisis* today.

P J Downey

Recent Admissions

Barristers and Solicitors

Alexander, C I	Auckland	19 December 1985	Carrad, H M	Christchurch	17 December 1985
Anderson, K M	Auckland	19 December 1985	Carter, J P	Auckland	19 December 1985
Arthur, B H	Christchurch	17 December 1985	Carter, R A	Auckland	19 December 1985
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Burney, G R	Christchurch	17 December 1985	Davis, C C	Auckland	19 December 1985
Burton, M A	Christchurch	18 December 1985	Day, J S	Auckland	19 December 1985
Calder, A C	Auckland	19 December 1985	Dollimore, W N	Christchurch	18 December 1985

Correspondence

Dear Sir,

re: Law Society and Bill of Rights

I wish to comment on two aspects of the material relating to the Bill of Rights published in the April issue of the *New Zealand Law Journal.*

1 In your editorial you are critical of the submissions made by the New Zealand Law Society to the Parliamentary Select Committee hearing submissions on the draft Bill contained in the White Paper. Similar criticisms have been made by others, as is their right.

I write, not to defend the submission, but to correct misapprehensions as to the Society's intentions.

(a) The introduction of the White Paper by the Minister of Justice says that the publication of the draft Bill of Rights is the first step in what is seen as a process which cannot be hurried. The Minister states that "the Government has no particular commitment to any particular provision in this Bill of Rights. The purpose of the draft Bill is to engender debate and provide a focus for the issues."

The Society's submission set out to do just that. It drew attention to some fundamental matters in a straightforward way. It was not, nor was it intended to be, a learned exposition of the philosophical issues. However, it did have attached to it as appendices three papers prepared by members of the Otago, Canterbury and Wellington District Law Societies which deal with the question in considerably more detail.

(b) When it made its submission the Society knew that at least two district law societies were lodging submissions. The Society was also aware that if the Bill of Rights proceeds it will have an opportunity to make further submissions at a later stage. It noted the Minister's comment that the publication of the draft Bill contained in the White Paper was only the first step.

(c) Your editorial suggests, at the foot of the first column on p 97, that "the Law Society accepts the case against the Bill of Rights and urges its rejection". With respect this is not what the submission says. In para 1.1 of the submission it is stated that "The Society has formed the clear view that the proposals *in the White Paper* should not proceed". Arguments for and against the Bill as set out in the White Paper are put. Because the members of the Society have differing views on the question, arguments against the proposal are stated as those not of the Society but of "opponents of the Bill". The conclusion in para 7.1 urges the rejection of "the Bill of Rights *proposed in the White Paper*". The possibility of support for a Bill drafted in more specific terms is expressly stated.

(d) In the final paragraph of your editorial you state that the New Zealand Law Society has an obligation to explain defend and uphold "the independence and integrity of the Judges". The Society has never hesitated in its discharge of this obligation. In the process of advancing some of the arguments against the Bill of Rights the submission suggests that opponents of the Bill might consider that the background of Judges is not the ideal qualification for the determination of political and social issues. Whether or not this argument is accepted there is no justification for suggesting as you do that by implication it amounts to an attack on the independence and integrity of the Judges. However, to put the matter beyond any possible doubt I state categorically that nothing in the Society's submission was intended to reflect in any way on the independence or integrity of the Judiciary.

2 An article on the Bill of Rights by D F Dugdale appears in the same issue of the *Journal.* As you point out in your editorial, Donald Dugdale presented the New Zealand Law Society's submission to the Select Committee. He was the convener of the representative committee of ten from throughout the country which prepared the submission. He was also a Vice-President of the Society.

Some of the points made in the Society's submission are repeated in Mr Dugdale's article. As a result of its publication at this particular time the possibility is created that he may be thought to have been representing the Society on this occasion also. This was not the case and of course there is no such suggestion in the article.

Mr Dugdale says that one of his reasons for writing the article is to facilitate the subjection of his arguments to the critical scrutiny of his professional peers. I make no comment on the validity of his arguments. However, I consider that on this occasion Mr Dugdale's verbal facility, pungent wit and pointed comment (to use the expressions from your editorial) indeed have caused him to overstep the mark. His ad hominem references, particularly those relating to the President of the Court of Appeal, are deplorable, unnecessary and unworthy. Mr Dugdale's comments relating to the Judges generally go further than is necessary to make his point and are well beyond those contained in the Society's written submission. They will have caused offence and I record a strong objection to them.

Peter F Clapshaw
President
New Zealand Law Society

Case and Comment

Remoteness of damage in trespass

The facts of *Mayfair Ltd v Pears,* [1986] BCL 110 raise a most interesting and rather unusual question of law, namely, what is the test for remoteness of damage which ought to be applied in cases of trespass to land? The defendant had driven his car into the centre of Wellington and without any authority had left it in the plaintiffs' private car parking building while he went to a tavern. On his return he discovered that his car had caught fire in an unexplained fashion and that the fire had damaged the building in which the car was parked. The plaintiffs sued the defendant for the cost of making good the damage, basing their claim variously on negligence and res ipsa loquitur, the rule in *Rylands v Fletcher*, common law liability for the escape of fire and trespass to land. In the District Court his Honour Judge Barber rejected the claim and the plaintiffs thereupon appealed to the High Court, the case coming before Casey J for determination.

His Honour agreed with the Judge below (i) that the principle of *Rylands v Fletcher* did not apply, there having been no escape of fire from land or premises occupied by the defendant, and (ii) that this was not a case of res ipsa loquitur, for the occurence of an unexplained fire in a locked car, shown to have been well maintained and in good running order, did not constitute evidence of negligence. As for the plaintiffs' contention that there was an absolute liability at common law for the escape of fire from chattel, his Honour was of the view that the early cases cited by counsel for the plaintiffs all concerned dangerous machines in which the fire had actually been lit by the defendant or at least was under his control. His Honour said that he was not aware of any authority suggesting that the owner of a chattel not dangerous in itself is liable in the absence of fault for the spread of a spontaneous fire from that chattel to the premises in which it stands. In the absence of negligence the plaintiff could rely only on the defendant's intentional trespass on his land.

The vital question thus was whether the defendant should be responsible for the fire damage which was caused by his continuing trespass in leaving the car in the building and yet which could not have been reasonably foreseen by him. Casey J cited a number of cases concerning trespassing animals as throwing some light on this matter. The general rule was laid down in *Ellis v Loftus Iron Co* (1874) LR 10 CP 10, where Lord Coleridge in the Court of Common Pleas held that the test for remoteness as regards damage caused by a trespassing horse was whether the damage was a "natural and direct consequence of the trespass". This case was applied in *Wormald v Cole* [1954] 1 QB 614 where the plaintiff occupier recovered damages on being injured by a trespassing heifer which knocked her down and trampled her when blundering about in the dark. Similarly, in *Turner v Thorne* (1959) 21 DLR (2d) 29 a carrier was held liable for injuries suffered by an occupier who tripped and fell over a package which the former had wrongly delivered, thereby being guilty of a continuing trespass to the premises.

Casey J took the view that the cattle trespass cases did not impose a strict liability for all damage done by the animal but rather there was in them a recurring theme exonerating a defendant in respect of injuries due to conduct outside what could normally be expected from the animal in the circumstances. This was clearly explained in *Theyer v Purnell* [1918] 2 KB 333, a case where trespassing sheep developed scab and infected the plaintiff's stock. Lawrence J thought that it was quite within the ordinary course of nature that an animal might develop disease and considered that anything which followed as a natural consequence *and might reasonably be foreseen as a possible consequence* was recoverable in damages. Avory J asked whether the damage complained of was a natural and reasonable result of the defendant's act. He thought it would assume this character if it could be shown to be such a consequence as would in the ordinary course flow from a trespass. Casey J took these comments to suggest that the reference by Lord Coleridge in *Ellis'* case to the "natural" consequence of the trespass to have a more restricted meaning than the consequences occurring in the ordinary course of nature; the word "direct" would be an adequate description for that. Again, in *Wormald's* case, Singleton LJ referred to recovery for "the reasonable and natural consequences" of the trespass, while Lord Goddard left open the question whether damage resulting from a vicious attack, outside the natural propensity of a domestic animal, would be too remote. His Honour thus found in these cases a consistent suggestion, if not a firm view, that damage would be too remote if it was not a reasonable or foreseeable consequence.

Casey J observed that the Court of Appeal in *Re Polemis and Furness, Withy & Co* [1921] 3 KB 560 had imposed liability in negligence as regards the direct consequences of a wrongful act but that the Privy Council in *The Wagon Mound (No 1)* [1961] AC 388 had restored the test of foreseeability. He also referred to Glanville Williams' thesis ("The Risk Principle" (1961) 77 LQR 179) arguing for the application of

Wagon Mound principles to all torts based on fault and seeing trespass as within this category. His Honour identified a "steady erosion" of the early concept of strict liability for trespass, as exemplified in the area of personal injury and highway accidents, where the cause of action must now lie in negligence with damages limited by the foreseeability principle. He thought the argument for recognising this limitation in trespass to land as well was persuasive, especially in the light of the support he saw for it in the cases cited. *The Wagon Mound* reflected a well-established view, consistent with current ideas of justice, which should now apply generally to all cases of liability based on fault.

The defendant thus was liable only for those unintended consequences of a foreseeable kind arising from his leaving the car on the plaintiffs' premises. Damage to the building by fire was clearly not a kind of injury that could be foreseen in those circumstances and it was certainly not within the defendant's expectation or intention. The plaintiff was entitled only to nominal damages for the trespass, which the Judge fixed at the sum of $10.

It can be seen that the difference between the *Polemis* and the *Wagon Mound (No 1)* tests for remoteness of damage was here raised in quite stark fashion, the policies underlying each coming into sharp conflict. On the one hand the plaintiffs suffered substantial damage in fact caused as a direct result of the defendant's unlawful conduct. There was no doubt that he intended to commit a trespass on the plaintiffs' land and it can certainly be argued that in these circumstances the plaintiffs should not have to pay for the consequences of the defendant's conduct. Suppose, moreover, that the defendant had parked there preparatory to committing some *criminal* activity, such as burglary of the building. Fleming (The Law of Torts, 6 ed at p 37) suggests that the prevalent view is in favour of an intentional trespasser being held strictly liable for all damage caused by his presence and comments that this "stringent deterrent" reveals the importance traditionally attached to protection of the land-holder against intrusion. In addition it has been held in Canada that a defendant's liability for a trespass to the person extends to all consequences flowing therefrom, foreseeable and unforeseeable: see *Allan v New Mount Sinai Hospital* (1980) 109 DLR (3d) 634. The policy reasons favouring the setting of limits to the extent of liability for negligent conduct have been regarded as inapplicable in the case of deliberate conduct, for the Courts have always protected the inviolability of the person. Thus if more serious harm comes about than was intended or foreseen, it has been seen as fair that the defendant and not the innocent plaintiff should bear the cost: *Bettel v Yim* (1979) 88 DLR (3d) 543.

On the other hand, it is argued by Glanville Williams in the article cited earlier that where a defendant sets out to commit one harm and unintentionally commits another, the question should be whether he was at fault *in the particular respect.* If he was not, he should not be liable unless, perhaps, the tort is one of strict liability. The contrary view he sees as based merely on sympathy for the plaintiff and a strong emotional reaction against an intentional wrongdoer. He regards revival of the *Polemis* doctrine in trespass cases as out of place at the present day. Certainly, if a defendant is to be held liable for all the direct consequences of his trespass, he might have to shoulder a very extensive burden stemming from a wrongdoing which is trivial in nature and essentially incidental to the damage. His innocence as regards the risk which eventuated suggests that there is no compelling reason for shifting the loss; and the plaintiff is in a much better position to insure against it.

Not to be left out of the equation is the desirability of achieving legal symmetry or, to put it another way, of avoiding anomalous differences in the test for remoteness of damage according to the particular cause of action which is asserted. A negligent defendant is a "wrongdoer" yet an innocent plaintiff cannot for this reason recover damages for all the harm in fact caused by the negligence. In drawing a distinction between foreseeable and unforeseeable damage the Privy Council in the *Wagon Mound (No 1)* sought to achieve a reasonable balance between the interests of the warring parties. In the *Wagon Mound (No 2)* [1967] 1 AC 617 the same policy was held to apply in determining the amount of recoverable damages in nuisance. The tort of nuisance usually is committed intentionally, in the sense that the defendant intends to carry out the activity even though he may not intend, and may do his best not, to cause a nuisance. He is liable if he unreasonably interferes with another's use or enjoyment of land, thereby being at fault in that respect, but only for consequences that he can reasonably foresee. Trespass is similarly based on fault, for the defendant must intend to enter upon the land. It is not a tort of strict liability for he is not liable for an involuntary entry, there being no act on his part. If entry is unintentional, it seems that the plaintiff must prove negligence, the trespass to the person cases being quite clear on this; see *Fowler v Lanning* [1959] 1 QB 426; *Beals v Hayward* [1960] NZLR 131. Viewed in this light it does not seem desirable that there should be a different test for remoteness in negligence and nuisance on the one hand and trespass on the other.

What authorities there are, in particular the cattle trespass cases, on balance tend to favour foreseeability. To the extent that some early trespass cases might suggest a wider ambit of liability, they can be explained as applying a general rule of remoteness in tort at the time they were decided, before the *Wagon Mound (No 1)*. There is also post-*Wagon Mound* authority in Australia in favour of this view. In *Svingos v Deacon Avenue Cartage and Storage Pty Ltd* (1971) 2 SASR 126 (FC) it was expressly held that an intentional trespasser is liable only for foreseeable damage resulting from the trespasser. Some support was found in *Hogan v A G Wright Pty Ltd* [1963] Tas SR 44 (SC) although in that case the question ultimately was left open.

While policy arguments against the foreseeability principle may appear to assume greater weight where a defendant has been guilty of intentional wrongdoing, nonetheless it is respectfully submitted that Casey J was right in deciding that the logic of the *Wagon Mound (No 1)* should still apply.

Stephen Todd
University of Canterbury

Affirmation of contract and the Contractual Remedies Act 1979

Section 7(5) of the Contractual Remedies Act 1979 provides that a party is not entitled to cancel a contract if, with full knowledge of a repudiation, misrepresentation or breach, he has affirmed the contract. While this does very little more than reproduce in statutory form the common law doctrine of election, it does so in apparently stark and unqualified terms. This might be thought to raise difficulties for the innocent party whose first impulse after a serious breach is to try to salvage the contract by persuading the other party to perform, but who then finally decides that it is pointless to proceed; or for the party who for a time tries to keep all his options open, for example the vendor who after a repudiation by the purchaser issues proceedings for specific performance and concurrently relists the property for sale. If such conduct can be regarded at any point as "affirming" the contract, later attempts to cancel will be ineffective. This could sometimes lead to a result so impractical, and even unfair, that there has been an understandable reluctance by the Courts to find that conduct amounts to an affirmation unless it is totally clear and unequivocal: unless, in other words, it demonstrates a deliberate decision by the innocent party not to cancel.

Two recent decisions illustrate this point in different ways. In *Oldham Cullens & Co v Burbery Finance Ltd* [1985] BCL, 1861, the plaintiffs, a firm of solicitors, had contracted with the defendant to provide a computer service for them so that they could computerise their trust account. Certain difficulties arose, and meetings were held between the parties. The defendant alleged that at one of these meetings the plaintiffs repudiated the contract. As a consequence, the defendant switched off the computer, and the plaintiffs were without the service for some days. They brought proceedings against the defendant for an interim injunction, and an ex parte order was made directing the defendant to turn the computer back on. Twelve days after this order was complied with the contract was cancelled by the plaintiffs.

Heron J held that although the plaintiffs' conduct at the meeting came close to a repudiation, it did not go quite that far. The defendant was therefore not justified in switching off the computer; that in the circumstances amounted to a material breach by it which in turn justified cancellation by the plaintiffs. (The case is an excellent illustration of how a purported cancellation by one party can itself turn out to be a breach justifying cancellation by the other.) One of the points discussed by Heron J was whether the plaintiffs could, before their purported cancellation, be said to have affirmed the contract by their conduct in seeking the injunction: if so, the cancellation would be ineffective under s 7(5). His Honour held that in the circumstances the plaintiffs had not affirmed, and were thus not debarred from later cancelling. He thought that the taking of urgent interlocutory proceedings to force continuance of the defendants' contractual obligations was analogous to taking proceedings for specific performance or damages in the alternative, a course of action which does not amount to final affirmation. The Judge was attracted by the view of Dawson and McLauchlan in their book *The Contractual Remedies Act 1979* that in such a case a doctrine of "conditional election to affirm" may apply.

It would seem that the present case is not quite on all fours with the specific performance example; in that example the party claiming specific performance is doing so in the hope that the other party will eventually perform, whereas in the *Oldham Cullens* case the injunction was claimed out of virtual necessity to avert chaos while the plaintiffs decided what to do. However in neither case, for slightly different reasons, could it be said that the party was opting for "eternal and unconditional affirmation", to use the words of Lord Wilberforce in *Johnson v Agnew* ([1979] AC 367 at 398). In other words, to constitute affirmation there must have been a *final* decision to keep the contract on foot despite the breach. If affirmation requires such a strong demonstration of intent, s 7(5) is not going to pose as great a problem as it may appear on a first reading.

The second case was decided in the Court of Appeal. It is *NZ Tenancy Bonds Ltd v Mooney* [1985] BCL, 1202. By a contract for the sale and purchase of land entered into on 13 December 1984, the deposit of $3,000 was to be paid "immediately on acceptance of this offer". In fact the deposit was not paid until 4 February, 53 days after it had become payable. It was then paid to the vendor's real estate agent. On 15 February the solicitors for the vendor gave notice cancelling the contract. On 27 February the solicitors received the amount of the deposit less commission from the agent, and issued a trust account receipt for it.

It was held by Roper J at first instance – and this holding was not challenged on appeal – that failure to pay the deposit immediately was a fundamental breach which entitled the vendor to cancel. The question was whether the cancellation, late as it was, was valid. The Court of Appeal held as follows:

> 1 The authority of an agent to receive a deposit is limited by the provisions of the contract. Here the real estate agent had no authority to receive the deposit so late. The vendor had done nothing to ratify that unauthorised receipt.
> 2 While delay in electing to cancel might in some circumstances be evidence supporting an affirmation, there was nothing in the vendor's conduct here to warrant that inference.
> 3 There having been no affirmation, the contract was validly cancelled by the vendor on 15 February. When on 27 February the vendor's solicitors received the cheque for the balance of the deposit "the contract was already at an end. There was nothing left to affirm under s 7(5)."

For the purposes of the present note the second of these holdings is the important one: even lengthy delay need not be evidence of affirmation. In the circumstances of this case, it would have been difficult so to construe it: the vendor had made numerous enquiries of the land agent about the deposit; in the absence of payment he took steps in January to refinance through a further mortgage on the basis that he did not wish to proceed with the sale; and the purchaser, who, it later turned out, was an undisclosed agent for an undisclosed principal, could not be traced for some time. But there might well be other

circumstances where non-activity in the face of a breach, particularly such a breach as late payment of a deposit, would be treated as an affirmation, or at least as a waiver of the essentiality of time. (Although these two concepts, and that of estoppel, often become entangled, there may be a difference between them in cases like the present.)

The two cases discussed in this note thus make it clear that on a serious breach of contract the innocent party has effectively three choices: to cancel the contract, to affirm it, or to steer a middle course and keep his options open. The lesson of the two cases is that where it is sensible to hold that a party retains the right to cancel, the Court may well tend to the third of these choices and be most reluctant to find that the party's previous conduct is sufficiently unequivocal to amount to affirmation.

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Contracts — election

Section 7(5) of the Contractual Remedies Act 1979 may not be as clear as it first appears and in this regard, a recent English case may be of assistance in interpreting the section. The case is *Peyman v Lanjani* [1985] 2 WLR 154.

Section 7(5) of the Contractual Remedies Act 1979 states that:

> A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

Dawson and McLauchlan consider that the requirements of s 7(5) are uncertain — The Contractual Remedies Act 1979, pp 121-122. The learned authors refer to the conflict of authority that exists in defining the criteria that is relevant to determining when a contracting party will be deemed to have made a binding election between terminating and affirming a contract. One line of authority asserts that if one contracting party acts unequivocably (so as to lead the other contracting party to believe that the contract has been affirmed) with knowledge of the facts which give rise to a right of election, the contract may be deemed to have been in fact affirmed. The other line of authority asserts that the contracting party must have not only knowledge of the facts which give rise to a right of election but also that he has a right of election.

The learned authors show a preference for a distinction made in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 between termination (discharge for breach) pursuant to a contractual right and termination pursuant to a common law right. Where a party is alleged to have affirmed a contract instead of having exercised a *contractual* right to terminate it, *Sargent's* case suggests that he should be held to have elected to affirm the contract if he had knowledge of the facts which gave rise to the right of election irrespective of whether he knew that he had a right of election. However, where a party is alleged to have affirmed a contract instead of having exercised a *common law* right to terminate it, *Sargent's* case suggests that knowledge of the right to terminate must also exist in order for there to have been a binding election. The basis of the distinction is apparently that in the former case, (termination pursuant to a *contractual* right), contracting parties must be deemed to have knowledge of the rights conferred by their contracts.

Dawson and McLauchlan state that it is difficult to predict with any degree of confidence what approach the New Zealand Courts will take to s 7(5) in view of the conflict of authority on the point. However, having expressed an opinion that the distinction suggested in *Sargent's* case might be useful in interpreting s 7(5), the learned authors suggest that the New Zealand Courts might *generally* require that a contracting party has knowledge not only of the facts giving rise to the right to make an election but also of the right to make an election itself before he will be deemed to have (unintentionally) affirmed a contract. (The learned authors emphasise that even if no binding election has been made, the doctrine of estoppel may prevent a party from denying that he has affirmed the contract.)

In the writer's respectful opinion s 7(5) should be interpreted literally so as to require only knowledge of the facts giving rise to a right of election for one party to be deemed to have elected to affirm a contract. Had s 7(5) been designed to require not only "full knowledge of the repudiation misrepresentation or breach" but also full knowledge of the right to make an election, the subsection could easily have been so worded. Perhaps by requiring only knowledge of the repudiation misrepresentation or breach (if this is in fact the only criterion), it was intended to avoid having to consider the two sides of the coin of affirmation ie election and estoppel. In other words, if with full knowledge of the repudiation misrepresentation or breach a contracting party has acted (unequivocably) in such a way as to have *apparently* affirmed the contract, he will generally be deemed to have in fact affirmed the contract for the purposes of s 7(5). This would be irrespective of whether he had knowledge of the right to make an election and irrespective of whether the other party had acted to his detriment in reliance on the apparent affirmation.

The main purpose of this note is to bring to the attention of practitioners a recent English case which will have some bearing on the interpretation of s 7(5) of the Contractual Remedies Act 1979 if *Dawson and McLauchlan* are correct in their view that the section is not as clear as one might think. In *Peyman v Lanjani* [1985] 2 WLR 154, the Court of Appeal referred to the conflict of authority and decided that a contracting party will not be deemed to have made a binding election to affirm a contract unless he has had knowledge of both of the facts which give rise to the right of election and of the right of election itself. (The Court recognised, as *Dawson and McLauchlan* point out, that even though a party might not be deemed to have made a binding election, the doctrine of estoppel might operate to prevent a party from denying that he has affirmed a contract.)

The facts of *Peyman* were somewhat complicated and will therefore be recited as simply as possible for the purposes of this note. The plaintiff wished to take an assignment of the first defendant's lease of restaurant premises. An Agreement for Sale and Purchase of the restaurant business was prepared and was made conditional upon the landlord consenting to the assignment. For various reasons, the first defendant's title was defective at the time that the plaintiff entered

into possession of the premises. The plaintiff learned of the defect in title and sought to terminate the contract.

The question was whether the taking of possession by the plaintiff amounted to an affirmation of the contract. While the Judge at first instance considered that the plaintiff had affirmed the contract, the Court of Appeal considered that he had not affirmed the contract because he was unaware of the defect of title when he took possession. Further, the plaintiff was not estopped from denying that he had affirmed the contract because the first defendant had not acted to his detriment in reliance on any representation that the plaintiff may have made.

While *Sargent's* case (for example) was not apparently cited to the Court of Appeal a number of cases cited to the Court of Appeal are not referred to by *Dawson and McLauchlan*. However, to the extent that s 7(5) may require interpretation, *Peyman* will of course be relevant and support *Dawson and McLauchlan's* general comment that the New Zealand Courts may require that a contracting party have knowledge not only of the facts which give rise to a right of election but also that he has a right of election before he will be deemed to have affirmed a contract.

Addendum

In *Jolly v Palmer* [1985] 1 NZLR 568, Hardie Boys J had to consider s 7(5). In that case, a real estate agent misrepresented the government valuation to the purchasers. The purchasers did not discover this until after the contract had been entered into. However, with full knowledge of the misrepresentation, they then made application for mortgage finance and it was only when their application was declined that they purported to cancel the contract. In essence, two points arose for consideration. One was whether the misrepresentation was of such a nature as to enable the purchasers to cancel the contract. The other point was whether, if the purchasers had that right, they had nevertheless affirmed the contract.

Hardie Boys J considered that the misrepresentation was not of such a nature as would have entitled the purchasers to cancel the contract. Even if the purchasers had been entitled to cancel the contract, the learned Judge considered that they had acted in such a way as to have affirmed the contract. Consequently, the purchasers repudiated the contract when they purported to cancel it at a later stage. (The case demonstrates, in this respect, that despite legislative changes to contract law, the statutes are not necessarily any easier to apply than the pre-existing common law.)

Unfortunately, there is no express statement of principle as to what knowledge the purchasers had to have in order to have made a binding election to affirm the contract. The point may not have been in issue. For that reason, and because Hardie Boys J considered that the misrepresentation did not give rise to a right to cancel the contract, the Judge may not have directed his mind to this point. In those circumstances, it would probably be unwise to suggest that any conclusions one way or the other can be implied from the decision.

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Natural justice and the contract of employment

The relationship between natural justice and the contract of employment has recently been considered in *Goulden v Marlborough Harbour Board* [1986] BCL 125. Until recently, the rapid extension in application of the principles of natural justice seemed to have left the common law contract of employment in the conceptual backwater which it had occupied since the nineteenth century. The inroads into managerial prerogative made by state servants in such cases as *Poananga v State Services Commission* (unreported, Court of Appeal, 19 December 1985, CA 112/84) were not reflected in the private sector: here, Lord Reid's view in *Ridge v Baldwin* [1964] AC 40, that "in a pure case of master and servant" procedural fairness was irrelevant to the question of wrongful dismissal (at 65) remained unchallenged. *Goulden's* case was the second of two decisions delivered by the Court of Appeal in 1985 which suggest that this traditional view is now on the wane in New Zealand, whilst leaving unclear the precise scope of the application of natural justice to the contract of employment. In each case the unanimous judgment of the Court was delivered by Cooke J.

The first decision was *Auckland etc Shop Employees etc IUW v Woolworths (New Zealand) Limited* [1985] BCL 533. In this case, which came to the Court as a case stated by the Arbitration Court, the basic issue was whether a worker had been constructively dismissed. The worker concerned had been held for some time by the employer following an alleged till discrepancy, partly searched and comprehensively interrogated by a security supervisor. Finally, in what the Arbitration Court accepted was "some desperation", she resigned and paid the disputed amount ($6.50) to the shop manager whilst protesting her innocence. Dishonesty on her part was never established. The Arbitration Court held by a majority that she had not been constructively dismissed: that once the employer was justified in setting up an inquiry into such events the decision to resign, whilst made under stress, did not amount to a constructive dismissal. A unanimous Court of Appeal held that the categories of constructive dismissal included cases where a breach of duty by the employer leads a worker to resign. Citing the English case *Woods v W M Car Services Limited* [1981] ICR 666, [1982] ICR 693, the Court held that:

> It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity. . . . No formulation of duties in general terms can relieve a tribunal from assessing the overall seriousness of the particular conduct about which a complaint is made. And the seriousness of any breach of an employer's duties will often be important in deciding whether a resignation was in substance a dismissal. . . . What can be said without doubt is that there must

> at least be an implied term or a duty binding an employer, if conducting an inquiry into possible dishonesty by an employee, to carry out the inquiry in a fair and reasonable manner. We so hold. It may be seen as part of a wider duty as already discussed, *or as an application of natural justice to contemporary industrial relations, or perhaps most naturally as combining both ideas.* (Emphasis added)

Somewhat surprisingly, the Court of Appeal declined to state a final opinion on the general question since it did not have "the benefit of the Arbitration Court's view on how best to define an implied term so as to serve the needs of industrial relations in New Zealand". The Court's previously expressed reluctance to interfere with matters of technical interpretation under industrial relations legislation is understandable, given the preponderance of specialist tribunals in this area. Nevertheless, with respect, it seems strange to find the Court of Appeal leaving the definition of an implied term in contract to the Arbitration Court. When the case under consideration was referred back to the Arbitration Court, the Arbitration Court upheld its earlier decision without detailed reference to the common law principles although it did hold that no breach of duty had caused the resignation (*Auckland etc Shop Employees etc IUW v Woolworths (New Zealand) Limited*, unreported, Arbitration Court, 11 November 1985, AC 140/85, DR 281/83). Consequently, the precise scope of what Lord Denning MR referred to as the employer's duty to be "good and considerate" (the *Woods* case at 689) must now await another test case. If judicial reference to natural justice in industrial relations had gone no further than the *Shop Employees* case, it might have been considered peculiar to its context: a statutory scheme for "unjustifiable dismissal" into which the Court of Appeal had already imported a requirement of procedural fairness (*Auckland City Council v Hennessey* [1982] ACJ 699). In the context of the common law contract of employment it might then have been argued that the legislation governing dismissal in New Zealand is less wide-ranging than corresponding legislation in the United Kingdom, being confined to workers covered by an award as opposed to all private sector employees, thus leaving less room for implication of new terms through "changed social conditions" than the English cases display. However, the Court of Appeal returned to the point later in 1985, in the second case under consideration in this note.

In *Marlborough Harbour Board v Goulden* [1986] BCL 125 the respondent's employment as the appellant Harbour Board's general manager had been terminated by the Board. When the appellant had applied for a judicial review of the decision to dismiss him, Sir Ronald Davison CJ set aside that decision, holding that the Board had not acted fairly nor in accordance with the principles of natural justice in carrying out the dismissal. In particular the learned Chief Justice held that, at a hearing preceding the decision to dismiss, there was a real likelihood of bias on the part of the majority of Board members, that the Board chairman had acted as both prosecutor and Judge, and that other procedural irregularities had disadvantaged the applicant in preparing his case. Davison CJ further held that, in reconsidering the dismissal:

> The Board must adopt procedures that are fair to the applicant so as to give him reasonable opportunity to answer allegations made against him. The Board members should approach the inquiry with open minds, not closed, and be prepared to consider fairly any evidence and explanations given by the applicant.

The thrust of the Harbour Board's case on appeal was that bias, or its likelihood, and procedural unfairness were irrelevant to the lawfulness of its decision: here the Board relied on the principle that no authority given a function for the public good may, by contract or otherwise, lawfully fetter its future performance of that function in a manner incompatible with its objects. The Court of Appeal gave this argument short shrift, holding that the principle cannot legitimately be used to exclude the duties of natural justice or fairness that would otherwise fall on the authority. Noting the statutory context provided by the Local Authorities (Employment Protection) Act 1963, under which the appellant's contract of employment was drawn up, and the Harbours Act 1950, which conferred power on the Board to dismiss, the Court held that:

> Where the statute contains some protection for the employee . . . it is relatively easy to imply the general obligation of fairness so far as the field is not covered by a detailed statutory code. . . . In the instant case Davison CJ . . . thought that the very fact that Mr Goulden held the office of general manager and that the office was one of public employment or service gave him the right to have the principles of natural justice observed in the event of his contemplated dismissal. We agree: this should be the prima facie rule and there is nothing to displace it here.

The Court of Appeal also upheld Davison CJ's finding that the statutory right of appeal conferred on Harbour Board officers was a clear indication that the appellant could not be dismissed without reasonable cause and that, in determining whether or not to dismiss him, the Board was required to observe the principles of natural justice: "If there are complaints against him he is entitled . . . to a fair opportunity for correcting or contradicting any relevant statement prejudicial to his view".

Thus far the decision may seem unremarkable, given the trend in natural justice cases over recent years. The facts place the case quite comfortably in the category of "public employment", a category which is well-established if difficult to define: under the principles set out in *Ridge v Baldwin* such cases provide an exception to the general rule that procedural fairness is not relevant to the issue of wrongful dismissal. However, in a wide-ranging obiter statement, the Court of Appeal went further, suggesting that in the light of modern authorities:

> . . . we think that the position

> has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty.

Noting its own decision in the *Shop Employees* case, importing a duty to carry out inquiries preceding dismissals or resignations in a "fair and reasonable manner", the Court observed that:

> Perhaps a similar implication might quite readily be found in private contracts of employment not subject to the 1973 Act. Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in a contract of service.

These observations must now cast considerable doubt on what had been thought to be clearly established principles: amongst these principles are the absence of any duty at common law (i) to warn an employee before dismissing her or him (*Chell v Hall and Boardman* (1896) 12 TLR 408), (ii) to give an employee reasons for dismissal (*Ridgway v Hungerford Market Company* (1835) 3 A & E 171), and (iii) to provide an employee with a hearing before dismissal (*Vasudevan Pillai v City Council of Singapore* [1968] AC 40). When combined with the comments of the Court concerning the relevance of the appeal provisions, the obiter statements may have an interesting impact on employees who have never enjoyed award coverage or whose salary eventually comes to exceed that specified by the salary bar in the appropriate award. That bar, which ran at an average level of $15,000 before the last wage round, excludes a significant number of middle-management employees from the protection against arbitrary dismissal enjoyed by those covered by awards. Nevertheless the limited nature of common law remedies, illustrated recently in *Vivian v Coca-Cola Export Corporation* [1984] 2 NZLR 289, must still have a dampening effect upon any more clearly defined right to natural justice which might eventually emerge. Such a right is likely to be of little benefit to the worker whose contract of employment contemplates termination on one week's notice.

In summary, at a time when the Government is considering the wisdom of universal protection from unfair dismissal for employees in the green paper *Industrial Relations: A Framework for Review*, it seems that the Court of Appeal has provided a tentative lead of its own. Employers in the private sector will be well advised to keep abreast of current developments in a field which has seen few such developments since the late nineteenth century.

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Wrongful dismissal and the duty of care

In *Gee v Timaru Milling Company* (unreported, High Court, Auckland, 4 February 1986, A387/85) Barker J was confronted with a well-tried issue and a novel question. The well-tried issue was whether a right to damages exists for injury to feelings caused by a wrongful dismissal. The novel question was whether an employer who terminates his or her employee's employment owes a duty of care in so doing to that employee's spouse. The facts were simple:

> The first plaintiff, Mr Gee, was employed in Auckland. He was approached by the defendant company to see whether he would work for the company in Timaru. Following a written offer of employment with the defendant, Mr Gee and his wife (the second plaintiff) discussed certain difficulties with the defendant. These included leaving their respective employments in Auckland, selling their home and relocating themselves and their family in Timaru. Eventually Mr Gee accepted the offer. He and his wife gave up their jobs in Auckland, sold their home and re-arranged schooling for their children. Shortly before he was due to start work for the defendant, Mr Gee received a letter advising him that his services were no longer required, attaching a cheque for one month's salary and car expenses less tax.

Mr Gee's principal cause of action was based on breach of contract. The case came before Barker J in the form of an application to strike out an alternative cause of action claiming, on behalf of both plaintiffs, damages for a variety of matters such as loss of career advantage, time, trouble and inconvenience, loss of job satisfaction and costs incurred in seeking alternative employment and in bank overdraft charges. On behalf of each plaintiff it was alleged that there had been a breach of duty of care owed to them by the employer. The defendant alleged that, in each case, this alternative cause of action could not be allowed to proceed.

Barker J accepted the defendant's submission in respect of Mr Gee, applying *Vivian v Coca-Cola Export Corporation* [1984] 2 NZLR 289. In that case Prichard J had applied the well-known case *Addis v Gramophone Co Ltd* [1909] AC 488, holding that damges for wrongful dismissal could not include compensation for injured feelings or for other loss sustained by the plaintiff because the way in which the dismissal had been effected might disadvantage the plaintiff in obtaining fresh employment: further, that there was no concurrent liability in tort and contract in cases of alleged wrongful dismissal. Despite well-reasoned academic attempts to confine what is widely — though perhaps mistakenly — felt to be the ratio of the *Addis* case in this respect (see Freedland, *The Contract of Employment*, OUP 1976, p 248) and a number of Canadian authorities to the contrary (thoroughly reviewed in the *Vivian* case), it now seems tolerably clear that the problem posed by *Addis* in the employment field can be resolved only by legislation. Indeed Barker J, reiterating his own comments eight years earlier in *Bertram v Bechtel Pacific Corporation Ltd* (unreported, High Court, Whangarei, 3 August 1978, A6/78) suggested that the law applicable to middle managers had "lagged behind" that applicable under the Industrial Relation Act 1973 and expressed the hope that reform might be possible.

These are timely comments in view of Question 23 of the Green

Paper *Industrial Relations: A Framework for Review* which asks whether the personal grievance procedure should be available to workers who are not covered by awards and collective agreements. Whilst that procedure had its origins in a desire to minimise industrial conflict, thereby tying the statutory provisions more closely to unionised workers, the same can be said for the statutory claim for "unfair dismissal" in the UK (see Dickens et al, *Dismissed*, Basil Blackwell 1985, p 10): nevertheless, the law on unfair dismissal, by contrast with the New Zealand law on personal grievances, covers almost all private sector employees. Reluctance to extend the scope of the personal grievance provisions might well be thought to be based on availability of resources, since the Arbitration Court and its delegates are already over-stretched. But the Green Paper suggests a more politically pragmatic reason, stating that "consideration of widening the application of this procedure has wide implications for a system where access to dispute resolution procedures is a benefit of union registration" (p 26). The mere suggestion that many thousands of employees in New Zealand should be deprived of adequate remedies for dismissal because restriction of those remedies acts as an incentive for notionally reluctant unions to register under the 1973 Act can only highlight the need for sweeping reform of the present law on dismissal.

Whilst Mr Gee's claim raised yet again a significant problem in employment law, Mrs Gee's claim is perhaps of greater immediate legal interest. Clearly the only viable basis of such a claim must lie in tort, presumably under the principle in *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465. The evidence in the *Gee* case did not disclose whether a relationship of the sort contemplated by the *Hedley Byrne* principle existed. However let us assume that an employer, in the course of a job interview at which a spouse of the potential employee is present, learns of the potential problems which the spouse will face on the offer of employment being accepted, including the disruption which necessarily attends a long-distance removal, reorganising school for the children and giving up his or her own employment. Soon after the offer has been accepted, and the disruption incurred, the employer dismisses the employee, leaving the spouse to cope with yet another move, further reorganisation of the children's schooling and uncertain job prospects. Are there any compelling reasons why the *Hedley Byrne* principle should not apply in these circumstances?

Over recent years the New Zealand Court of Appeal has tended to sidestep the various technical requirements imposed (or superimposed) by *MLC Assurance Co Ltd v Evatt* [1971] AC 793 in favour of a case by case approach, reaffirming that the two broad areas of inquiry are the degree of proximity between the parties and whether there are other considerations tending to negate or restrict a duty of care (*Allied Finance and Investments Ltd v Haddow* [1983] NZLR 22; *Meates v Attorney-General* [1983] NZLR 308). In our hypothetical, the requirement of proximity seems to be satisfied. Indeed, it might well have been satisfied even without the spouse's attendance at the interview since the his or her identity and the nature of the loss which he or she might incur are both foreseeable where the potential employee is married.

In terms of policy factors restricting the duty, the "floodgates" argument might be pleaded: as the defendant in the *Gee* case pointed out, if an employer had to take into account the financial circumstances of an employee's spouse before terminating employment, what is to stop liability extending in respect of all of the employee's dependants? Yet it might be argued in rebuttal that to limit the duty to the employee's dependants will not produce the unlimited class of potential claimants to which the floodgates argument is usually directed, even in the rare event of those dependants possessing a discrete cause of action. Further, whilst this argument was seen by Barker J to pose grave difficulties for Mrs Gee's claim, it might be noted that it has been less readily accepted by the Court of Appeal in recent years (see, for example, the *Allied Finance* case at 35-36 per McMullin J). Undoubtedly some difficulty might attend the calculation of damages: it would be paradoxical if the period in respect of which the spouse is able to claim damages in tort could extend beyond the period of reasonable notice to be provided to the employee under the contract, which will rarely be generous, since presumably both parties to the contract and the spouse concerned will have taken that notice period into account in ordering their affairs. But such difficulties should not operate to limit the duty (*Gartside v Sheffield, Young and Ellis* [1983] NZLR 37).

Depending on the grounds of the claim, problems might also arise in terms of causation. For example, if a claim is made in respect of loss of the spouse's career satisfaction, it will presumably be necessary to show that the termination of the employment as opposed to its acceptance was an effective cause of the loss: if employment prospects in the new locality are generally bleak, this may prove to be difficult. Yet most of the claims in the *Gee* case seemed to turn on the sheer inconvenience and attendant loss arising from what proved to be an unnecessary move of 700 miles.

In summary, the case illustrates yet again the limited remedies available to private sector employees who are outside the scope of the Industrial Relations Act 1973. It is to be hoped that the Government will improve the remedies available to such employees. The attempt to persuade the Courts to widen their perception of available relief under the *Addis* principles, which failed in the instant case as in a number of similar cases, would not have been necessary under a more enlightened legislative framework.

Finally, it is to be hoped that the possibility of a cause of action for spouses in these circumstances will not adversely affect the limited trend towards inviting wives and husbands of potential employees to job interviews. Whilst the motivation behind such interviews is mixed, even superficial recognition that there is a social dimension to employment is long overdue.

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A Standard for Justice

By the Rt Hon Sir Robin Cooke, President of the Court of Appeal

The book A Standard for Justice *by Dr Jerome B Elkind and Mr Antony Shaw was launched at a function held at the Students Union Building, Victoria University of Wellington on 15 April 1986. Sir Robin Cooke was the invited speaker and his remarks are published herewith. In touching briefly on the possible role of the Courts in the event that a Bill of Rights is enacted, Sir Robin Cooke notes that it should be remembered that so many of the freedoms enjoyed by New Zealand citizens have basically been created and evolved by Judges. In commending the new publication as a contribution to the debate about a Bill of Rights, Sir Robin notes that the authors display qualities of imagination and vision, particularly in their advocacy of their own version of an appropriate Bill of Rights for New Zealand.*

This is quite a significant day in the history of a great debate.

A Bill of Rights for New Zealand was first seriously promoted by one of our most outstanding statesmen of the century, the late Mr Ralph Hanan, in the 1960s.

The reception then was at best tepid, on the whole chilly. Leading lawyers of the day, both practising and academic, opposed it – for instance Mr H R C Wild QC, Solicitor-General, later Sir Richard Wild, Chief Justice. He died in 1978 and I cannot claim to be in touch with him, but I strongly suspect that, like so many other opponents of those years, he would by now have changed his mind.

A Bill of Rights is something on which minds tend to change as one adjusts to an idea radical if the sovereignty of Parliament has been taken for granted in one's education. Many lawyers, political scientists and other interested persons have changed their minds in New Zealand over the last decade or so. Among the major contributing factors have been two. First a sense of the fragility of a unicameral Parliament as a safeguard against majority over-dominance. Secondly a sense of New Zealand's isolation and backwardness in constitutional development. Almost every other civilised country, at any rate of the western world, has some guaranteed civil rights. Even the United Kingdom is now affected by the Strasbourg Court.

So it was that the 1985 White Paper represented a much stronger wave of thinking. Part of its purpose was avowedly to stimulate debate. In that it is now succeeding very well. It is true that hardly anyone seems unreservedly in favour. All sorts of groups want all sorts of things added: in the realms of rights to life, to death, to do or not to do all manner of things in between.

To take a few examples. For different reasons the Right Honourable the Minister's Bill is opposed by currently predominating elements in the New Zealand Law Society, by the police, by the strand of liberal opinion represented by the editor of *Capital Letter*. Opposition stems from so many different quarters and invokes so many different reasons that there is one obvious inference. The White Paper must have got the balance about right. A Bill of Rights that favours no one interest group cannot be all bad.

This is not the occasion to canvass the criticisms and, while supporting such a Bill, I disclaim any role of an apostle – partly because a good deal of what it would do should be capable of achievement by the Courts anyway in their function of administering justice. Moreover it is not a role for which a Judge is fit. I would only express some regret at the superficiality of some of the arguments by people who should possibly know better. Thus there is an objection that it might involve Judges in deciding issues that are really important in the community, and even require them to consider matters of concern to politicians. It may be as well to bear in mind that such rights as are already enjoyed by citizens to freedom of person, speech, property, have basically all been created and evolved by Judges, though in some fields codified, refined or augmented by Parliament. Similarly balancing the interests of citizen and State has been an age-old function of the Courts. And today the Privy Council spends considerable time in adjudicating on guaranteed rights issues, without compromising the judicial impartiality or reputation of their Lordships.

The White Paper has provoked, though, criticism at a deeper and more sophisticated level. And one of the best examples of this is *A Standard For Justice, A Critical Commentary on the Proposed Bill of Rights for New Zealand*, by Dr Jerome B Elkind and Mr Antony Shaw. It is a scholarly and comprehensive work, although admirably concise, that I have the pleasure of commending to your attention. It proffers a bigger and better Bill of Rights, supported by detailed and forceful arguments. Of other writing of the authors I once used some such word as romantic, which they did not altogether like. Yet what is a romantic but one who displays imagination and vision? And those qualities are here.

For instance, consider only these extracts from the Preamble to their alternative Bill:

> **Believing** that all persons whatever their race, colour or sex are equal and entitled to pursue personal fulfilment in their own way,
>
> **Considering** that the family is the

natural and fundamental group unit of society and is entitled to protection by society and the State,

Conscious of the beauty of New Zealand and the necessity of preserving and replenishing our environment, . . .

United in our respect and reverence for our Sovereign Queen, Elizabeth II . . .

They strike some resonant chords. As the authors disarmingly say (p 22) about their own drafting, "It is inspirational".

In its detailed provisions their draft diverges from the White Paper draft in many respects, some major; although it casts, in my view, no doubt on the sound conceptions and skilled craftsmanship of the White Paper Bill, which has the advantage of incorporating more from established models. Precedent can be valuable and salutary in this as in other legal fields.

Perhaps the two main differences are that this alternative version incorporates the International Covenant on Civil and Political Rights, an idea that will be of obvious attraction to many, and in the approach to the Treaty of Waitangi. Dr Elkind and Mr Shaw would make the Treaty paramount over all other laws except the Bill of Rights itself, and unchangeable, yet not subject to interpretation or enforcement by the Courts. It may take me some time to adjust to the notion of the Court of Appeal providing advisory opinions for the Waitangi Tribunal, but it is perhaps not inconceivable that one's mind could change on that also.

I warmly congratulate the authors and the Oxford University Press on this timely and responsible venture. Perhaps each of the authors will be prepared to say something about their vision of its seaworthiness before it is finally launched into turbulent waters. □

Books

Australian Bar Review

Edited by J D Heydon.
Published by Butterworths Ltd, Australia

Reviewed by Hon Mr Justice Eichelbaum

The first two numbers of the *Australian Bar Review*, first published in 1985, consist in the main of transcripts of seminar papers delivered by a number of Australian Judges and counsel. The effect is a concentration on subjects of practical interest to litigation lawyers, and indeed the first editorial expresses the view that modern legal periodicals contain less and less material of true practical value. Whether that criticism is valid or not, if the *Australian Bar Review* continues as it has commenced there is no doubt that it will be of interest and value to those practising in the Courts. The papers and articles published in the first two issues deal with the following headings: Deeds – Formalities; Repudiation; Cross-examination on documents; Contractual uncertainty; Exemption clauses; Economic duress; Interpretation of instruments; Suing the Insurer instead of the Insured – some problems; The status of hearsay and other evidence admitted without objection; Independence in the exercise of the Judicial Power. Among the authors are M H McHugh QC, now Mr Justice McHugh of the Court of Appeal of New South Wales; P W Young QC, now Mr Justice Young of the Supreme Court of New South Wales; and well known current silks such as R A Conti and A M Gleeson.

Although for the New Zealand lawyer some of the articles must of course be read subject to statutory differences the bare recital of the subject matter is sufficient to show that the *Review* will be of assistance to practitioners in this country. Regrettably, judging by the contents to date they will not find any immediate reference to New Zealand case law but as access to computerised legal information expands Australian counsel may increasingly discover New Zealand precedents worth citing, as already appears to be the case with their counterparts at the English Bar. Even without New Zealand judgments articles such as those on cross-examination on documents, and the status of evidence strictly inadmissible, would be of considerable value to New Zealand counsel as generally speaking these subjects are not, in the writer's observation, overly well understood.

In addition to the articles already listed the initial numbers contain some material of wider interest to those concerned with the organisation and functioning of the practising profession. In his Foreword to the first number the Chief Justice of Australia, the Rt Hon Sir Harry Gibbs, spoke of the special expertise of the Bar and the traditions made possible only by its separate existence. Sir Harry welcomed the establishment of the *Review* as a means of supporting the continuation of the traditions of the separate Bar. In the next number the President of the Australian Bar Association, emphasising that the time had come for the Australian Bar to formulate its own views and decisions, stated that by medium of the *Review* the Bar would be able to contribute to the more efficient and expeditious despatch of litigation. The theme of the importance of an independent Bar was resumed in an article by the Hon Athol Moffitt QC, until recently President of the New South Wales Court of Appeal.

A disinterested New Zealand observer, used to our more cohesive organisation, can sympathise with the problems arising from a Federal constitution, and the divisiveness which has long plagued Australian law society politics, and may detect the sensitivity of a profession under public scrutiny and attack. But whatever reasons may have combined to lead to the foundation of the *Review* it should be welcomed as a vehicle which is likely to make a practical impact on the standard of advocacy in this country as well as in Australia. □

Sentence discount for plea of guilty

By Don Mathias, Barrister of Auckland

Plea bargaining is understood to be common practice in the United States. It is a practice that raises several problems as well as being on occasion a reasonable course of action depending on what is encompassed by the term. Plea bargaining in the sense of having the charge reduced is one thing; but whether and if so to what degree there should be a reduction in the sentence imposed is another. In this article Don Mathias looks at some of the arguments for and against the practice when looked at realistically from the point of view of the accused, the complainant, the police and the Court itself.

Should an accused person for whom there are no other mitigating factors be able to claim a reduced sentence purely because he pleaded guilty? He demonstrates no remorse or sympathy for his victim. Nevertheless he has saved the Court time and the public expense: is that an occasion for judicial gratitude?

Usually such an accused would disguise his effrontery behind a mask of compassion for the complainant. His plea of guilty in a rape case could be put as a desire to save the complainant from the ordeal of giving evidence, rather than as a simple acknowledgment of the weight of the evidence against him. But the legislature has removed this ruse by s 185C of the Summary Proceedings Act 1957 which makes provision for a complainant's non-attendance at the preliminary hearing of a case alleging sexual violation. So there is less scope for an early plea of guilty to be accepted by the sentencing Court as mitigating by reason of its demonstration of selflessness.

Even the most despicable of accused persons is entitled to an acquittal if the case against him or her at trial is insufficient. Without seeing and testing the complainant at the preliminary hearing of a case of sexual violation, the accused in pleading guilty before trial is accepting the risk that he or she might eventually have been acquitted. The reason for accepting that risk need have nothing to do with contrition, sympathy or rehabilitation; the accused may simply want to get a shorter sentence so as to be able to get out and do it again sooner. At a less extreme level, an accused may be quite unsure of the best thing to do, and may plead guilty merely because of the pressure to do so which results from the offer of a sentencing discount. Although he will be advised by his lawyer that he shouldn't plead guilty unless he really is guilty, there may be a legal gloss to the factual position which merits a trial but which is never tested because of the pressure to plead guilty.

Reduction of sentence purely by reason of a guilty plea thus gives rise to a problem for the accused: is the discount worth the risk that an acquittal would have been secured had the proceedings run their course; and also it raises a matter of public policy: should the accused be rewarded for entering a plea of guilty on purely selfish grounds?

The elements of pressure and the rights of the person charged have been referred to in the context of sentencing discounts for pleas of guilty by Ashworth, *Sentencing and Penal Policy* (1983), p 312:

> The existence of a significant discount for pleading guilty can exert considerable pressure towards a change of plea. Indeed, the purpose of the discount is precisely to act as this kind of inducement. . . . (p 314) To support the discount is therefore to endorse a dilution, for bureaucratic reasons, of rights which the criminal process is supposed to protect — the right to require the prosecution to prove guilt, the right to trial in open Court, and most fundamentally the right not to be subjected to unfair pressure in determining how to plead to the charges.

There are problems in assessing the persuasive value of these assertions because of the absence of quantification. How much pressure to plead guilty actually arises from the offer of a sentencing discount, as opposed to other sources such as awareness of guilt, belief in the likely strength of the evidence, a desire to get it over with, genuine remorse, and other mitigating factors? In other words, is it really likely that an innocent person would plead guilty out of fear of the risk of conviction and out of desire to get a reduced sentence? It is axiomatic that the prosecution be required to prove the guilt of an accused person, and that at the trial there should be a presumption of innocence, but how far back into the pre-trial proceedings should the presumption of innocence operate to protect the accused's rights? What is "unfair pressure" upon a person who has to be decide how to plead?

The purpose of this article is not to answer those questions, but rather to survey the attitudes of Courts in various jurisdictions to pleas of guilty and to highlight areas of controversy and difficulty in a

field which has remained unexplored by New Zealand Courts. The new procedures for cases alleging sexual violation raise an opportunity for Courts here to examine the questions of policy underlying the judicial response to a plea of guilty.

Discounting sentence for a plea of guilty was accepted by the Court of Appeal in England in *De Haan* [1968] 2 QB 108, 111, where the practice was said, rather briefly, to be "clearly in the public interest". The evaluation of the competing merits which must have lain behind this conclusion was unexplained. Elaboration of the public interest factor which favour sentencing discount was given by Cross in *The English Sentencing System,* 2 ed (1975), p 105, where it was acknowledged that these are based on expediency. They are the sparing of the complainant in sex cases, and the smooth working of the judicial system in terms of avoiding the expense and inconvenience of unnecessary trials. That, of course, is to put one side of the argument. Even now it can be said that the English Court of Appeal has not fully analysed the discount principle in any case: Samuels, "Discount for Guilty Plea in Crown Court and Magistrates' Court" (1985) 149 JP 696; *R v Sawyer* [1985] Crim LR 332. A summary of the present English position is contained in the commentary to *R v Williams* [1983] Crim LR 693. Of significance is the observation there that the discount tends to diminish as the evidence points more overwhelmingly to guilt; this highlights by inference the pressure on the person charged where the evidence of guilt is weaker. The authority cited is *Davies* (1980) 2 Cr App R(S) 168. One might wonder, as did Cox J in *Shannon* (infra), why an accused who confessed to the police should be rewarded less after a guilty plea than an accused who had not co-operated with the police.

The smooth working of the judicial system is recongnised in Canada as a reason for discounting for guilty plea. The Alberta Court of Appeal, in *R v Sandercock* (1985) 48 CR (3d) 154, 162, stated:

> Aside from any remorse which the plea shows, an accused should receive substantial recognition for sparing the victim the need to testify or to wait to testify, or for waiving some of his constitutional rights in deference to expeditious justice.

The Court appears to be trading constitutional rights for the right to a sentence discount, on the assumption that they are of equal value.

In the United States of America it is recognised that sentencing concessions are permissible even in the absence of remorse: *North Carolina v Alford*, 400 US 25, 37 (1970), and the Supreme Court has also held plea bargining highly desirable for reasons of speed and efficiency: *Santobello v New York,* 404 US 257, 261 (1971). Judicial attitudes may have been coloured by the overloading and delays which plague the United Stated Courts: see [1981] NZ Recent Law 25, 28.

In Australian jurisdictions the competing values have received some judicial analysis and dissent. In Queensland it seems that a guilty plea does not affect sentence in the absence of remorse: *R v Nancarrow* [1972] QWN 1. A slightly less clear stance appears from the Federal Court's decision in *Schumacher* [1981] 3 A Crim R 441 where it was held that a plea of guilty does not entail or invariably require a reduction of sentence. In Victoria the Full Court of the Supreme Court has considered the matter in *R v Gray* [1977] VR 225, and held that a quilty plea may mitigate sentence even in the absence of genuine remorse because other factors operate in the public interest. Considering that case, the Full Court of the Supreme Court of South Australia, in *R v Shannon* (1979) 21 SASR 442, was divided over the effect of a guilty plea. Cox J was the dissenting Judge. He reasoned (p 457) that:

> . . . the considerations relevant to the question of the proper punishment of an offender do not include matters which have nothing to do with the nature or effect of his offence, or the character or antecedents or disposition of the offender, but relate solely to the machinery by which his offence is tried.

And later, referring to the position of two jointly accused persons, one of whom pleads guilty and the other of whom is found guilty, Cox J said (pp 458-459):

> He will need a very subtle mind, unusually sympathetic to the ways of the law, if he is to understand that he is going to prison for a longer term, not because he pleaded not guilty, but because he failed to plead guilty.

And as to expenditious justice Cox J observed (p 459):

> . . . I would not include among the relevant considerations [to mitigate sentence] the mere fact that the defendant has taken a course that happens to have saved the time of the Court and the prosecutor, and has refrained from unnecessarily burdening the public purse in the form of the legal aid scheme. The proper detachment of the Courts towards such governmental or organisational considerations is better served, in my opinion, by ignoring them altogether.

In earlier decisions the Supreme Court of South Australia had held that only when a plea of guilty demonstrates contrition can it mitigate penalty: *R v Tiddy* [1969] SASR 575, 579; *R v Rowland* [1971] SASR 392, 396. Those decisions involved a total of five different Judges of the Supreme Court; in *Shannon*, which departed from these authorities, the Court sat as a Full Court of five Judges, none of whom had sat in the earlier decisions. The majority of four Judges thus declined to follow the law as it was stated by (including Cox J dissenting) six Judges of the Supreme Court. That there should be such a difference of judicial opinion over the significance of guilty pleas is an indication that there are merits to each side of the argument.

The Chief Justice of South Australia has repeated the views he expressed as a majority Judge in *Shannon* at a conference organised by the Commonwealth Legal Aid Council in Sydney. He gave as the reason for giving sentence discounts for guilty pleas the need to give an incentive for such pleas so as to avoid the cost and time spent on unnecessary trials of accused persons who know they are guilty.

He suggested that there should be a formalised system of discounts of between 25% and 35%, taking the view that greater discounts than these would result in the risk of people with valid defences pleading guilty. The controversial nature of that proposal was noted in the commentary in (1984) 58 ALJ 481.

The majority decision in *Shannon* was that a plea of guilty in the absence of contrition, repentance or remorse may nevertheless entitle the accused to a discount in sentence if the plea is motivated by something which furthers the public interest. Such public interest matters include the desire to save the expense and inconvenience of a trial, or the necessity of witnesses giving evidence.

A similar position pertains in New South Wales, where the Court of Criminal Appeal has held, in *R v Lawrence* (1980) 32 ALR 72, that a plea of guilty not based entirely upon self-interest (as where it shows repentance or that rehabilitation is already under way) can lead to a reduction in sentence. But again, in this respect the decision was a majority one. Moffitt P (dissenting) was of the view that "A less sentence cannot be brought [sic] by a plea of guilty" (p 107), drawing an analogy with the rejection by the Courts of the use of confessions obtained by the promise of lenient treatment. He added that "there can be no bargain in the criminal procedures". That was not to say that contrition and signs of rehabilitation could not be taken into account as separate mitigating factors. The majority on the other hand were able to conclude (p 147): ". . . we do not regard his plea of guilty as being entirely based upon self-interest" even though there was no evidence of contrition.

The self-interest criterion marks a claim by some Courts to be able to identify a half-way house between giving credit for every guilty plea and never giving the plea independent mitigating status. The problem with the half-way house is in identifying when the plea is motivated by self-interest so as not to be mitigatory as opposed to when it is motivated by public-interest so as to mitigate sentence. It must be very difficult to distinguish cases where the accused wants to relieve the complainant of the ordeal of giving evidence from those where he wishes to obtain a sentence discount. Furthermore, there are problems in trying to classify cases by looking at the strength of the evidence; where there has been a boastful confession so that the case is a strong one, a guilty plea is likely to be seen as self-serving, but why should an accused who has confessed (albeit without remorse) be denied sentence discount when one who did not co-operate by confessing would get a discount for pleading guilty to a weaker case by reason of remorse? Both served the public interest by saving the complainant the ordeal of giving evidence and avoiding the time and expense of a trial.

In New Zealand a plea of guilty is a well-established mitigating factor, although in serious drug offences the scope for mitigation is restricted. Recognition of the plea as grounds for a discount began with *R v Taylor* [1968] NZLR 981, 987 in which *De Haan* (supra) is tersely approved and there is no discussion of the merits of refusing to allow a discount. Decisions have established the practice across a spectrum of offences: aggravated robbery: *R v Moananui* [1983] NZLR 537; *R v Morgan* [1985] BCL 28; *R v Maxwell and Hills* [1986] BCL 161; rape: *R v Puru* [1984] 1 NZLR 248; *R v Stanley* CA 202/84, 30 October 1984; incest: *R v K* CA 247/85, 10 December 1985; aggravated assault: *R v Miller* CA 242/81, 3 March 1982; indecent assault: *Fury v Police* [1986] BCL 165; controlled drug offences: *R v Dutch* [1981] 1 NZLR 304; *R v Urlich* [1981] 1 NZLR 310; *R v Parata* [1984] BCL 29; *R v Shewan* [1984] 2 NZLR 362; *R v Reiri* [1986] BCL 166.

These cases do not allude to any reasons why it might be wrong in principle to allow a reduction of sentence for guilty plea. Reasons supporting the discount were stated in *Parata* as follows (Cooke J delivering the judgment of the Court):

> In principle some reduction in sentence may be appropriate for such a plea. It is more likely to be justified when the plea is entered at an early stage. A reduction on that account then reflects two factors for which the defendant can claim some credit, namely contrition and the saving to the State of the time and expense involved in a contested prosecution. In some cases there is also the factor of saving witnesses the ordeal of giving evidence.

So well established is the mitigating effect of a guilty plea that an appellate Court will not accept that the sentencing Judge overlooked it merely because he did not mention it in his remarks on sentence, particularly because he had the information on which the plea was recorded before him: *Stanley*. That case also highlights problems for appellants which arise from the nebulous discretionary areas which merge on appeals: the sentencing Judge's discretion as to how much weight to give the guilty plea, and the appellate Court's discretion in evaluating whether the sentence imposed was manifestly excessive. In *Stanley* the judgment of the Court was delivered by Eichelbaum J who said:

> If allowance is made for a minimum reduction of one year for the plea of guilty (greater credit could have been given, in the circumstances) the sentence becomes equivalent to one of eight years after a defended hearing.

That, it was held, was not manifestly excessive although it was observed that a more lenient view would have been within the Judge's discretion.

It would not be wise to endeavour to state a formula by which an appropriate discount for guilty plea can be calculated, because account must be taken of the circumstances of the particular case as well as the category of crime into which it falls. The practice in England seems to be to allow a discount of somewhere between one-quarter and one-third, but the tendency of the Courts to think in whole numbers, and to deal with prime numbers differently, complicates matters: see the commentary to *Williams* [1983] Crim LR 693.

Given that the effect of a guilty plea may be difficult to isolate and quantify, and that mitigation factors such as remorse and rehabilitation can be expressed independently of the guilty plea, and that there are

different ways of viewing the proper emphasis to be placed on a guilty plea, what should be the effect of such a plea on the sentence for sexual violation? The legislature has given the complainant some respite from the ordeal of giving evidence, so an accused cannot now say that his plea of guilty saved the need for the complainant to give evidence at the preliminary hearing. Here, then, is an opportunity for the Courts to decline to pursue a policy of discounting which could put any pressure upon an accused as far as plea is concerned. In *R v Turner* [1970] 2 QB 321 Lord Parker CJ, giving the judgment of the Court of Appeal, held (at p 326):

> The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.

It was also held that it is wrong for a Judge to allow any suggestion that the penalty will be reduced if the plea is one of guilty. A Judge may indicate the form which a sentence may take but he should not suggest that leniency is conditional upon a plea of guilty.

Clearly the established practice of discounting for guilty plea erodes the freedom of choice which the decision in *Turner* sought to protect. At the time *Turner* was decided it appears that a guilty plea could mitigate if it showed an element of remorse, and His Lordship referred to that as a matter about which counsel would advise the accused. If "complete freedom of choice" about plea would perhaps be an overstatement of the accused's position when given that advice, then with broader scope for mitigation on cost saving grounds the accused's freedom as to plea is even more restricted.

No defence counsel is likely to submit to a Court upon sentence that his client's plea of guilty should be disregarded. The problems raised for the accused by the promise of discount for guilty plea had to be dealt with at an earlier stage in the proceedings. Once the accused has made the decision to plead guilty the way is open for counsel to undertake the relatively secure and pleasant task of asking for the reward.

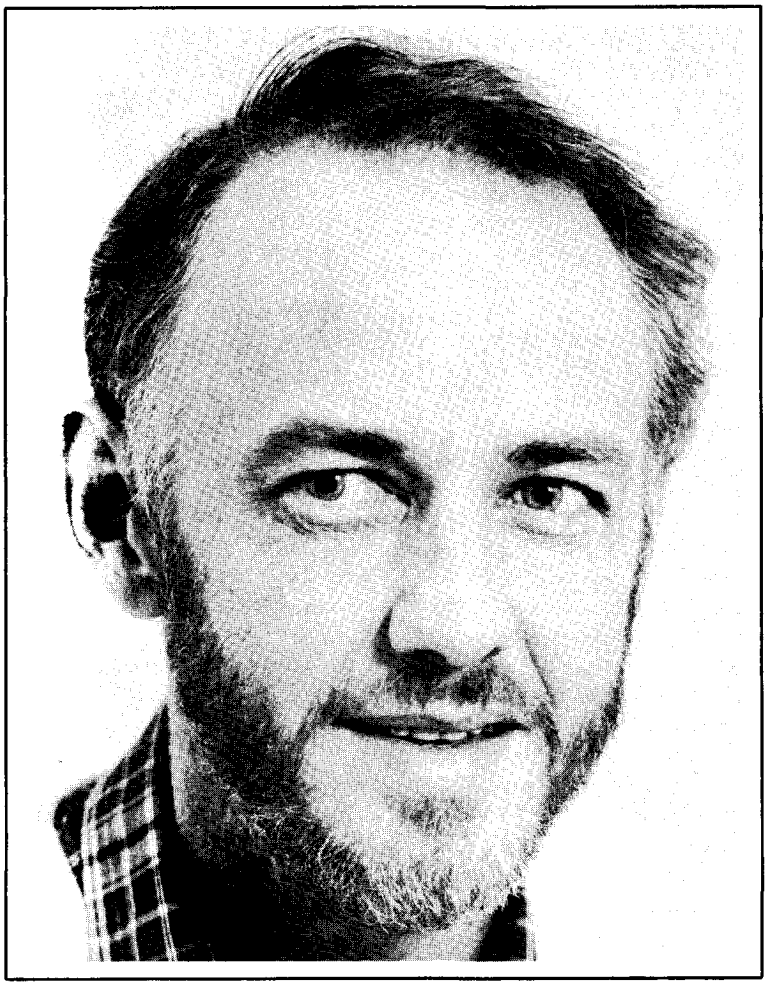
The question of policy for the Courts is whether a sentencing discount should be given for a plea of guilty to an offence of sexual violation where there is no indication of any altruistic motive for that plea. Should the accused be given credit for the public-interest consequences of his plea even though he didn't enter the plea in order to achieve those consequences? Mitigating factors other than plea relate to the circumstances of the offender and his prospects for rehabilitation; the plea is unique in this context in that of itself it says nothing about those matters. Mitigating sentence for guilty plea not only tends to look suspiciously like a compromise deal with a criminal, but it also puts unseemly pressure upon an accused at the stage where the law should protect his freedom of choice. □

Memorial to I D Johnston

Iain Johnston, senior lecturer in law at the University of Canterbury and one of the original team who set up *Butterworths Family Law Service* died in Christchurch in October 1985 at the age of 36.

Iain's contribution to family law in this country both as an academic and in practice was a major one. He was one of the first to study family law in its wider social context and to adopt a multi-disciplinary approach to it. His dedication to his work has led the law faculty at the University of Canterbury to institute a memorial to him which will suitably recognise the loss the profession has sustained by his death. This will take the form of an annual prize in family law and the building up of a specialised collection of materials in the law library at Canterbury.

Those wishing to subscribe to the fund may send contributions to the secretary, Law Faculty, University of Canterbury, Private Bag Christchurch. □



I D Johnston

New Zealand extradition law and procedures and the Courts (II)

By Douglas C Hodgson, Faculty of Law, Victoria University of Wellington

In the first part of this article [1986] NZLJ 119 Mr Hodgson dealt with the respective conditions of extradition and decision-making processes laid down by the Fugitive Offenders Act 1881 (UK) and the Extradition Act 1965 (NZ). In this article, the author discusses the various surrender restrictions (including the important political offence exception), the role of habeas corpus in extradition cases, and the nature and extent of judicial control of the exercise of Executive discretion in this field. Finally, the question whether the continued retention of the dichotomous extradition regime is justified in light of recent developments, is considered.

Restrictions on Surrender and Judicial Control in Extradition

(i) *Fugitive Offenders Act 1881*

Both the 1881 and 1965 Acts contain provisions which are designed to protect the offender's position. By virtue of a 1976 amendment to the 1881 Act, a fugitive offender shall not be returned under that Act from New Zealand to another Commonwealth country if it appears to the District Court at the extradition hearing or to the High Court in habeas corpus proceedings inter alia that the return is sought for the purpose of prosecuting or punishing the offender on account of her or his race, religion, nationality, or political opinions (s 29A(2)). The Courts of the requested State also possess a discretionary power to prevent extradition conferred by s 10 of Part I and s 19 of Part II of the 1881 Act. Section 10 states in part:

> Where it is made to appear to a superior court that, by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to . . . all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive . . such Court may discharge the fugitive. . . .

Section 19 of Part II (relating to "regional" extradition) is couched in almost identical language and would appear to serve the same purpose as s 10 except that s 10 can only be applied by a superior Court (ie, the High Court of New Zealand) whereas s 19 may be applied concurrently by the District Court as well as by a superior Court. It is not proper for a s 10 or s 19 discharge application to be made by way of habeas corpus proceedings: *In re Murray Ross (A Prisoner)* [1921] NZLR 292. The burden would appear to rest upon the prisoner in satisfying the Court as to the existence of the statutory grounds for discharge: *Police v Blundell-Cunningham* (1964) 11 MCD 215, 216; *Police v Gardner* (1970) 13 MCD 64, 67.

A respectable body of jurisprudence has been developed by New Zealand Courts respecting the interpretation of these two discharge provisions and the extent to which humanitarian and compassionate princples underlie them. *In Re Gorman* [1963] NZLR 17 concerned a motion under s 10 of the 1881 Act seeking an order discharging from custody one Gorman who was awaiting return to England on a warrant charging that he had escaped from lawful custody in an English prison. McCarthy J considered the language of s 10 and observed that its literal reading would incline one to the view that the Court has jurisdiction to discharge thereunder only when it is satisfied either that the matter in respect of which the warrant is issued is trivial, or that the application for return is not made in good faith. Since the evidence placed before McCarthy J amounted, in his opinion, to a "strong prima facie case" that Gorman did escape from lawful custody, these two narrow grounds for discharge had not been satisfied. Nevertheless, McCarthy J preferred to follow the English decision of *R v Governor of Brixton Prison, Ex parte Naranjan Singh* [1962] 1 QB 211 which accorded a wider construction to s 10 such that the phrase "or otherwise" enlarged the Court's discretion to discharge so as to include any "other" cases where it is satisfied that the fugitive's return would be unjust, or oppressive, or too severe a punishment. After noting that the s 10 discretion to discharge will only be exercised in exceptional cases, McCarthy J applied this wide construction of s 10 to the case before him.

In dismissing the application, His Honour rejected Gorman's plea of hardship which the latter claimed would fall on himself and his New Zealand wife and child as a result of his return to England. McCarthy J considered it his duty to decide the application "not on grounds of compassion or other emotion, but in accordance with justice and the words of the legislation" (at 19), and that it was not unjust, oppressive or too severe a punishment to require a man to serve the balance of a sentence imposed upon him by a properly constituted Court or to answer a charge of escaping from lawful custody. *Gorman's* case was followed in *Police v Dryden* (1980) 1 DCR 39 which involved an application under Part II of the 1881 Act to return the prisoner to Western Australia to face a charge of escaping from lawful custody. The prisoner concurrently applied for a s 19 discharge submitting that his return would entail such hardship and anxiety for his family as to make it unjust or oppressive to so

order. In dismissing the discharge application, Hall DCJ considered (at 43) that "to yield to submissions based upon compassion for other members of the defendant's family would be to reward the successful prison escaper with the offer of asylum or sanctuary in this country and to threaten the comity and mutual respect for law in Commonwealth countries which is the basis of the Fugitive Offenders Act 1881."

In *Police v Blundell-Cunningham* (1964) 11 MCD 215, the prisoner applied under s 19 of Part II of the 1881 Act for an order of discharge from custody in relation to a Queensland warrant. Jamieson SM followed the *Naranjan Singh* and *Gorman* cases in treating the parallel wording of s 19 as not being confined narrowly to the two grounds of triviality and lack of good faith. Although the learned Magistrate accepted that the discretion to discharge must be carefully and rarely exercised, he nevertheless discharged the prisoner considering the less serious nature of the offence and the fact that restitution had been made to the victim. This wide construction placed upon the discharge provisions continued in the case of *Re H (A Prisoner)* [1971] NZLR 982. The case concerned a s 19 discharge application to the Supreme Court (now the High Court). The Magistrate had ordered the return of the prisoner to Western Australia pursuant to s 14 of the 1881 Act and had rejected the prisoner's s 19 discharge application pursuant to a narrow construction of the s 19 discharge grounds. The prisoner appealed to the Supreme Court under s 19 against the Magistrate's refusal to make a discharge order. In allowing the appeal and discharging the prisoner absolutely, Wilson J regarded the phrase "or otherwise" contained in s 19 as enlarging the grounds upon which the Court can order the discharge of a prisoner. In so doing, His Honour followed the *Naranjan Singh* decision and the reasoning and wide construction adopted by Lord Parker therein. Lord Parker (at 218) had adopted a purposive approach to the construction of the section and considered that to do otherwise and adopt a limited construction, so as to limit the Court's powers and general discretion to do justice in all the circumstances of the case, would be extraordinary. In the instant case, although Wilson J was satisfied that the case was not a trivial one and that the application for the return of the prisoner had indeed been made in good faith, he nevertheless held that it would be "otherwise" unjust or oppressive to return the prisoner to Western Australia on account of his state of health and unfitness to attend Court.

Despite the somewhat limited success enjoyed by prisoners in invoking compassionate grounds upon which to base their discharge applications under ss 10 and 19 of the 1881 Act, the New Zealand judicial system has otherwise remained vigilant in striking a fair balance between the interests in the detention of a fugitive on the one hand and the liberty of the subject on the other. In *The Queen v Howard* (1985) unreported, Court of Appeal, CA257/814, McMullin J noted (at 16) the absence in the 1881 Act of any restriction on the period for which a fugitive may be remanded in custody and approved the practice of New Zealand authorities and Courts of applying New Zealand domestic legislation such as the Summary Proceedings Act 1957 to fugitive offenders to ensure that they do not remain in custody without their custody being closely supervised by New Zealand Courts. In His Honour's view, such a use of domestic legislation in order to bridge the gaps in the 1881 Act's structure and place the fugitive offender on an equal footing with the domestic offender is clearly desirable pending legislative intervention.

(ii) *Extradition Act 1965*

The Extradition Act 1965 also contains important restrictions on surrender. Where the 1965 Act has been extended in its application to any foreign country by Order in Council, the relevant extradition treaty (whether concluded before or after the commencement of the 1965 Act) is to be read subject to various restrictions on surrender contained in s 5 of the Act (s 3(3)). Apart from a prohibition on surrender relating to political offences (which will later be dealt with), s 5 prohibits surrender unless the law of the requesting country or the extradition treaty provides that the offender will not be detained or tried in that country for any offence committed before the surrender other than an extradition offence disclosed by the facts on which the surrender is based. This is the so-called "speciality" rule which has only relatively recently been adopted into Commonwealth practice, as the 1881 Act did not require an assurance that a person extradited will not be tried for any offence other than the one upon which the extradition has been based. The rule was first incorporated into Commonwealth practice by the 1966 London Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth[1] and is primarily intended to protect fugitives from having to face charges after their return of which they have not had notice and as to which no sufficient case of guilt has been established before the Courts of the requested country. Article XIII of the United States-New Zealand Extradition Treaty contains the speciality rule. By contrast, fugitive offenders may be returned to Australia under Part II of the 1881 Act to be prosecuted for any pre-surrender offence.

Section 5(7) provides that in every extradition treaty made between New Zealand and a foreign country "after" the commencement of the 1965 Act, provision shall be made either to the effect that no New Zealand citizen shall be surrendered or to the effect that the Minister of Justice may in her or his discretion refuse to surrender an offender who is a New Zealand citizen. Accordingly, Article V of the United States-New Zealand Extradition Treaty of 1970 states:

> Neither of the Contracting Parties shall be bound to deliver up its own citizens under this Treaty, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

A similar provision appears in a large number of extradition treaties to which Australia is a party (including the 1974 Australia-United States treaty), and an increasing number of Commonwealth countries (with the exception of the United Kingdom) are likewise becoming more protective of their

citizens in this regard. Finally, bearing in mind s 3(4) of the 1965 Act which effectively provides that the Act shall, apart from the s 5 restrictions mentioned, be read subject to the terms of the extradition treaty; it would seem that New Zealand and the foreign country concerned are free to supplement the surrender restrictions that may be contained in their own domestic legislation. For example, Article VI of the United States-New Zealand Extradition Treaty prohibits extradition when inter alia the prosecution has become time-barred or the offender has been tried and discharged or punished either in a third State or in the requested party for the same extradition offence.

The Crimes (Internationally Protected Persons and Hostages) Act 1980 also contains various surrender restrictions in respect of offences therein contained. Notwithstanding the 1881 Act or the 1965 Act, a person whose surrender is sought in respect of the offence of hostage-taking shall not be surrendered if it appears to the Minister of Justice, the District Court, or to the High Court in habeas corpus proceedings that the surrender, although purporting to have been sought in respect of such a crime, was sought for the purpose of prosecuting or punishing the person on account of race, ethnic origin, religion, nationality, or political opinions (s 12(1)). Furthermore, no person shall be surrendered in respect of any crime contained in the 1980 Act if proceedings have been brought in New Zealand against that person concerning such a crime upon which the surrender request is based (s 13(1)). Finally, the 1980 Act contains restrictions on surrender in relation to the liability of the offender to capital punishment on return. Section 12(2) states that the Minister of Justice may decline under s 6 of the 1881 Act (which appears in Part I relating to non-regional extradition) to order the surrender of a person to another Commonwealth country in respect of any crime under the 1980 Act if it appears to the Minister that the person has been or is liable to be sentenced to death for that crime in the requesting country.

Concerning regional extradition under Part II of the 1881 Act, s 12(3) of the 1980 Act provides that notwithstanding s 14 of the 1881 Act, no Judge shall order the surrender under s 14 of a person to another Commonwealth country without the consent of the Minister of Justice where identical circumstances as in s 12(2) exist. Although this particular surrender restriction is not mentioned in the 1965 Act, Article VII of the United States-New Zealand Extradition Treaty nevertheless provides that:

> When the offence for which the extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offence, extradition may be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed. . . .

The 1966 London Scheme allowed Commonwealth Member States a discretion to refuse extradition where the death penalty might be imposed and a 1983 amendment permits extradition to be made conditional upon satisfactory assurances being made by the requesting State that the death penalty will not be carried out. The more recent extradition treaties to which Australia is a party vest a similar discretion in the requested State.

The extent of judicial control over extradition proceedings governed by the 1965 Act may perhaps be illustrated by the relative dearth of cases decided thereunder compared with the case-law that has developed around the discharge provisions contained in ss 10 and 19 of the 1881 Act. There are no similiar provisions to be found in the 1965 Act. A further explanation is touched on by Chilwell J in *Mewes v Attorney-General* [1979] 1 NZLR 648, 654 (SC), in the context of the judicial review of a committal order prior to extradition under the 1965 Act, where His Honour commented that:

> Probably because of a desire on the part of the Courts to see that properly negotiated treaties are observed and to see that other countries availing themselves of extradition legislation receive equal justice along with the alleged offender, the Court has indicated a reluctance to go behind the exercise by the committing Magistrate of his discretion.

The decision of the House of Lords in *Atkinson v United States Government* [1969] 3 All ER 1317, a highly persuasive authority in New Zealand, may further account for the infrequency of judicial intervention in extradition proceedings not governed by the 1881 Act. There the issue arose whether the Magistrate has power to refuse to order committal if it would be contrary to natural justice or otherwise oppressive to surrender the person. The House of Lords held that no such power or discretion existed. Lord Reid, (with whom Lords Guest (at 1334), Upjohn (at 1334-1335) and McDermott (at 1325) concurred on the particular point), took judicial notice of the practice in a few countries of obtaining convictions by improper means and of the necessity in such cases to protect the person although there is sufficient evidence to justify committal. Nevertheless, in his Lordship's view (at 1322-1323), the well settled power of the Courts to expand the procedural protection laid down by statute was negatived here by Parliament having provided a sufficient safeguard in ss 10 and 11 of the Extradition Act 1870 (UK). That provision is similar to s 10(3)(b) of the Extradition Act 1965 (NZ) in requiring the committing Magistrate to send to the Secretary of State a committal certificate and such report on the case as he may think fit which could conceivably include information tending to show that it would be in some way improper for surrender to occur. And, in terms of s 11 of the United Kingdom Act, whose wording is closely followed by s 11 of the New Zealand Act, Lord Reid stated (at 1322-1323):

> The Secretary of State always has power to refuse to surrender a man committed to prison by the Magistrate. It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man.

It is therefore submitted that the same considerations would apply in the New Zealand setting such that the Minister of Justice would have a discretion to decide questions of oppression and denial of natural justice. The Minister would be primarily answerable to Parliament concerning such decisions, and New Zealand Courts would be (and arguably have shown themselves to be) reluctant to interfere.

Political Offences

The final surrender restriction which is common to both the 1881 Act and the 1965 Act is that relating to political offences. Section 29A(1) of the 1881 Act provides that a fugitive shall not be returned under the Act from New Zealand to another Commonwealth country if the offence in respect of which the return is sought is an offence of a political character. Section 29A was added to the 1881 Act by s 7 of the Fugitive Offenders Amendment Act 1976 (NZ) which implements in this respect the London Scheme Relating to the Rendition of Fugitive Offenders. The amendment applies to both non-regional and regional extradition under Parts I and II of the 1881 Act respectively. The task of defining the political offence exception in extradition law has been fraught with problems. In *Schtraks v Government of Israel* [1964] AC 556, the House of Lords wrestled with the meaning of the concept of offence of a political character in terms of the Extradition Act 1870 (UK). Viscount Radcliffe articulated the view (at 591) that the fugitive must be shown to be "at odds with" the requesting government in a political context, and that such government was "after him for reasons other than the enforcement of the criminal law". Lord Reid looked to motives and purposes such that an offence committed from a political motive and for a political purpose was an offence of a political character.

Provision is made under the 1965 Act for the Minister of Justice to refuse to notify a District Court Judge that an extradition request has been made or to order an offender to be released where she or he is already in custody if the Minister is satisfied that the offence to which the extradition request relates is one of a political character (s 6(3)). Judicial as well as Executive control in such a case is also contemplated by s 5(1) which prohibits surrender not only upon the s 6(3) ground but where the offender proves to the satisfaction of the District Court or the Minister of Justice or of the High Court in habeas corpus proceedings that "the request for his surrender has *in fact* been made with a view to try or punish him for an offence of a political character". (Emphasis supplied.) Article VI of the United States-New Zealand Extradition Treaty repeats the wording of s 5(1) but adds that the laws of the requested Party will determine whether a case comes within the scope of Article VI. Finally, s 9(1)(d) of the 1965 Act requires the District Court at the extradition hearing to receive any evidence tendered by the offender to show that the offence is of a political character, while s 9(2) authorises the Court for the purposes of s 9(1)(d) to receive "such evidence as in its opinion may assist it in determining the truth, whether or not such evidence is otherwise legally admissible in a Court of law."

A recent celebrated United States-New Zealand extradition case involved the attempts made by the New Zealand Government to have extradited from the United States one John Kirk, a former New Zealand Member of Parliament, to face various charges under the New Zealand Insolvency Act 1967 (which is one of the enactments listed in Part II of the First Schedule to the 1965 Act). At the extradition hearing in Dallas, Texas, in August 1985, Mr Kirk contended that the extradition request had been politically motivated. Mr Thomas Snow, a United States Justice Department attorney, stated that a decision on whether the extradition request had been politically motivated was properly one for the United States Secretary of State to make and submitted that:[2]

> United States law and jurisprudence showed clearly that political offences are only those that are incidental to severe disturbances such as war, revolution or rebellion. By no stretch of the imagination could these crimes against the bankruptcy laws of New Zealand be considered political offences.

As Article VI of the United States-New Zealand Extradition Treaty requires, the laws of the requested Party will determine such an issue and, in the event, Mr Kirk was eventually extradited to New Zealand.

Finally, s 12(1) of the Crimes (Internationally Protected Persons and Hostages) Act 1980 prohibits the surrender of a person whose surrender is sought in respect of the crime of hostage-taking if it appears to the Minister of Justice, or to the District Court, or or to the High Court in habeas corpus proceedings that the surrender is in fact sought for the purpose of prosecuting or punishing that person on account of her or his political opinions; or, if the person is surrendered, she or he may be prejudiced at trial or punished by reason of the holding of such opinions.

Habeas Corpus

In terms of extradition under the 1881 Act, s 5 of Part I expressly acknowledges the right of the offender to apply to a superior Court for a writ of habeas corpus after the District Court has ordered her or his committal to await extradition. There is no mention of this remedy in the Part II regional extradition scheme but it is still available to review a Part II committal order as part of the inherent jurisdiction of the Courts. Since it has been held to be improper for a s 10 or s 19 discharge application to be made by way of habeas corpus proceedings (*In re Murray Ross (A Prisoner)* [1921] NZLR 292), and in view of the wide grounds for discharge contained in those two sections (as interpreted by the Courts), the incentives to rely on habeas corpus proceedings are fewer. Nevertheless, s 29A of the 1881 Act (which was inserted into the Act by a 1976 amendment) requires the High Court in habeas corpus proceedings under both Parts I and II of the Act to set the applicant at liberty if it appears to the Court that the applicant's return is sought for the purpose of prosecuting or punishing her or him on account of race, religion, nationality or political opinions. To a similar effect is s 5(1)(b) of the 1965 Act whch provides in part that an offender shall not be surrendered if she or he proves to the satisfaction of the High Court on habeas corpus that the surrender request has in fact

been made with a view to try and punish her or him for an offence of a political character. To complete the picture, s 12(1) of the Crimes (Internationally Protected Persons and Hostages) Act 1980 provides that a person whose surrender is sought for the crime of hostage-taking under the Act shall not be surrendered if it appears to the High Court on habeas corpus that the surrender is in fact sought for the purpose of prosecuting or punishing the offender on account of race, ethnic origin, religion, nationality or political opinions. Habeas corpus proceedings will therefore offer a suitable remedy in the so-called "political offence" cases, particularly in extradition proceedings under the 1965 Act (s 9(2) of which has relaxed the rules of evidence in such cases).

Habeas corpus proceedings will also be appropriate and useful in seeking review of a committal order on the ground of the insufficiency of the evidence upon which the order is based. One of the issues facing Chilwell J in *Mewes v Attorney-General* [1979] 1 NZLR 648 was the extent to which a New Zealand superior Court is entitled to review on habeas corpus the decision of the committing Magistrate so far as the sufficiency of evidence is concerned. His Honour cited with approval the conclusion of Lord Reid in *Armah v Government of Ghana* [1968] AC 192, 235 (which dealt with the stricter test of a "strong or probable presumption" required by s 5 of Part I of the 1881 Act) that "the weight of authorities . . . supports the view that the Court can and must interfere if there is insufficient evidence to satisfy the relevant test." This view of the supervisory powers of the New Zealand High Court on habeas corpus in extradition proceedings under the 1965 Act was followed in *Re T* [1983] NZ Recent Law 203. This case concerned an application for a writ of habeas corpus concerning the review of a committal order issued under s 10 of the 1965 Act following a District Court extradition hearing. The High Court Judge considered in terms of s 10(1)(b) whether the evidence produced would have justified, according to the law of New Zealand, the applicant's committal for trial if the alleged act had occurred in New Zealand. Chilwell J concluded on the evidence before him that no reasonable minded jury could have convicted on it and that the committal by the District Court Judge had therefore been made without jurisdiction and was invalid. Accordingly, the applicant was discharged from custody. Much the same approach has been adopted by New Zealand Courts in relation to the proper role of a superior Court in habeas corpus proceedings concerning the sufficiency of evidence to found a committal order issued under s 5 of Part I of the 1881 Act. In *Ex parte Lillywhite* 19 NZLR 502, Stout CJ stated (at 509) that:

> If the evidence is such that, were it a civil case, the Judge would order a nonsuit, or, if a criminal case, would direct the jury to acquit, then the Court will discharge the accused, notwithstanding that the Magistrate has ruled there is a prima facie case.

Nevertheless, the learned Chief Justice remarked that a superior Court will not disturb the committal order where there are contradictory statements by two different sets of witnesses, and the question is which set is to be believed.

The role of habeas corpus in New Zealand extradition proceedings has not received any impetus by recent judicial statements by Chilwell J. In the *Mewes* case, and subsequently in *Re T,* His Honour aptly alluded to the nature of habeas corpus as involving issues of jurisdiction rather than an appeal on the merits, and pointed out in the former case (at 654) that:

> The Supreme Court Judge on a habeas corpus application has not, unlike the committing Magistrate, had the advantage of seeing and hearing the accused and other witnesses. Therefore, the occasions are rare that the Supreme Court Judge may exercise his discretion in the accused's favour.

Conclusion

The dual extradition regime under the 1881 and 1965 Acts has so far failed to follow the lead of the immigration/deportation regime in assimilating the legal position of Commonwealth citizens with that of aliens under the integrated approach contained in the Immigration Act 1964. Whatever the historical factors which may have necessitated the dichotomous approach to extradition, it is submitted that the day has arrived for substantive law reform designed to provide an integrated and unified extradition regime based on generally recognised extradition principles[3] applying the same law to, and ensuring consistency of treatment as between, foreign and Commonwealth countries alike. The dual extradition approach of the 1881 and 1965 Acts is awkward, unwieldy and unnecessarily complex, and there no longer appear to be any compelling reasons why the treatment of offenders should be made to depend on the status of the country which has requested the extradition (cf the differing standards of proof in committal proceedings as between these two Acts and, indeed, within the 1881 Act itself). The writer is pleased to report at the time of this writing that the New Zealand Justice Department is moving in this direction and it is hoped that the draft Bill proposed to be brought in in 1986 will prove to be in substance something more than the remedial patchwork type of amending legislation which has tended to characterise amendment in the New Zealand extradition field over the past 20 years or so. □

1 The 1966 London Scheme is essentially a non-treaty based multilateral arrangement embodying an agreement framework of co-operation on which Commonwealth Member States are free to pattern their own domestic legislation. The Scheme is in part a product of the breakdown of the 1881 Act. It was adopted by the May 1966 session of Commonwealth Law Ministers held in London and incorporates numerous features frequently found in extradition treaties and legislation. Although most Commonwealth Member States have implemented the Scheme in their domestic legislation (Australia in 1966 and the United Kingdom in 1967) resulting in uniform extradition rules, New Zealand has yet to do so (although it is currently preparing legislation).

2 *Evening Post*, Wellington, New Zealand, 8 August 1985, pp 1 and 3.

3 Although a universal extradition convention may be optimistic, a number of significant regional multilateral extradition schemes such as the European Extradition Convention 1957 and the 1966 London Scheme have emerged based on such principles.

Interpreting the proposed Bill of Rights (II):

By D L Mathieson, Barrister of Wellington

The first part of this article appeared at [1986] NZLJ 129. In this concluding part Mr Mathieson considers the difficulties the Courts will face in interpreting a Bill of Rights which has some superior status to an ordinary statute. He sees difficulties which he enumerates as structural, remedial, democratic, and interpretative source problems. He then considers the Canadian experience over the past few years with the Charter of Rights. He maintains that despite the assistance that might be available from Privy Council and Canadian decisions the New Zealand Courts would have to resolve the meaning of the Bill with the aid of legal tools yet to be invented. His conclusion is that the price of the benefits to be gained from such a statute is too high.

Part IV

Some may argue that the analysis of the Privy Council decisions in the earlier part of this article merely goes to show that very little by way of special interpretative principle is needed, and that provided the Courts eschew unimaginative austerity and engage in intelligently purposive interpretation, we can rely on the Courts to supply such principles gradually. The special principles needed should desirably be hammered out on the anvil of experience.

This argument would be hard to assail if the characteristic problem of interpretation facing the Courts after the adoption of the Bill of Rights were what I have described as "ordinary" interpretation. What is "treatment"? What are the hallmarks of a "disproportionately severe" punishment which Art 20 prohibits? Are the rules and aims of a secular commune capable of qualifying as a "religion" for the purposes of Arts 6 and 8? If these are the typical problems that the Courts, starting somewhere lower than District Court and possibly ending higher than the Court of Appeal, will have to face, the legal system is merely encumbered with a load of new uncertainties. Perhaps with some optimism we can opine that this does not amount to "intolerable uncertainty." (See White Paper, para 6.18 ff.)

Higher tier problems

Unfortunately for the proponents of that view, the reality is that on top of such problems many more general problems will perplex the Courts. The differentiating feature of these higher tier problems, if we may so label them, is that they will not be resolved merely by construing isolated words and phrases in their context in the Bill of Rights. They will often have to be grappled with before the more manageable linguistic issues can be sensibly addressed. These more general problems can be roughly classified in four groups:

(i) *structural* problems, ie questions as to the proper relationship between different Articles of the Bill;

(ii) *remedial* problems, ie questions as to the legal consequences that should follow, and the formal orders that should be made, after a breach of a fundamental right has been established;

(iii) *democratic* problems, ie those relating to Art 3;

(iv) *source* problems, ie questions as to the sources which may legitimately be consulted by the Courts.

For an example of a structural problem, consider the relationship between Art 22 and Art 3. Art 22 reads: "An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not guaranteed or is guaranteed to a lesser extent by this Bill of Rights". Professor Smillie contends that this means that "a full range of non-specified interests which either presently or in the future receive some form of legal recognition should be given due weight by the Courts and balanced against the specifically guaranteed rights in order to determine, in accordance with Art 3, what particular limits upon the guaranteed freedoms are justified in a free and democratic society". (Smillie, [1985] NZLJ 276, 278.) And he sees the combined effect of Arts 3 and 22 as being "to transfer from Parliament to the Courts ultimate responsibility for making the utilitarian calculation as to where the balance of public welfare lies between unrestricted enjoyment of the guaranteed freedoms and any particular limitation on them". (Idem).

If this view is correct, existing

rights, such as the right to own property, though not specifically referred to in the Bill, must be weighed (by some unformulated principle) against the guaranteed rights. One cannot be confident, however, that this interpretation is correct. There is no express textual support for it either in Art 3 or Art 22 or the official Comment on either. Article 22 *may* simply knock down the argument that some common law legal liberty has been impliedly abrogated or restricted through not having been listed. If so, such a legal right must not be allowed to enter into the Art 3 calculus, leaving Art 3 to stand on its own. Consequently, Art 3 would mean that limits on only the stated rights need to pass the triple test of "reasonableness", prescription by law, and demonstrable justifiability in a free and democratic society. Thus the common law freedom to contract with whomsoever one chooses would appear to be preserved by Art 22.

On Smillie's suggested interpretation, the Courts, when dealing with a challenge to s 28 of the present Commerce Act 1975 (price maintenance agreements) would have to balance freedom of contract against the public consumer interest that collusive price maintenance agreements should not be permissible because they restrict competition undesirably. On the alternative view, as there is no guaranteed "freedom of contract" in the Bill, but only the "right to freedom of association", the question is whether s 28 satisfies the triple test for legitimate limits in Art 3. That would mean that the Court's duty is to balance the public interest reflected by Art 10 with the public consumer interest in unrestricted price competition and to refrain from stirring "liberty of contract" as an additional ingredient into the mix.

Article 25 states: "Anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances". Assuming that the Court is thereby entitled to award exemplary damages against an official whose act (*Quaere* does "acts done" in Art 2 include pure omissions?) infringes a complainant's guaranteed right, on what principles should they be calculated? But such issues are not essentially interpretative: obviously Art 25 is capable of being interpreted only as conferring the widest possible discretion.

Literal construction of Article 1

General remedial problems of an interpretative kind arise under Art 1 and are likely to prove particularly intractable. The most general of them is whether Art 1 should be literally construed. If so, an inconsistency between a statutory provision and one of the guaranteed rights means that the former is of "no effect" even before any judicial declaration is made. On this view, while no one could successfully base a legal claim based upon his or her private opinion that an inconsistency exists, and would need the support of a Court before doing so, the offending provision after the judicial declaration has been made would be void *ab initio* and not merely from the date of the declaration onwards. *(Sed quaere* whether it would be void *inter partes* only or also *in rem* – this is a further interpretational problem not be resolved merely by a close scrutiny of the actual words of Art 1.)

A competing, and probably preferable, view is that the offending provison should, on the analogy of the settled administrative law rule for challenged official actions, be held valid until it is set aside. If that is correct, acts done by holders of statutory powers which affect persons other than the complainant, and which were done pursuant to the authority of the offending provision before it was judically struck down, will remain valid.

The legal and social implications of either solution are immense. There is some textual support for both; thus, in favour of the literal interpretation, it would be contended that "of no effect" must be interpreted in its ordinary meaning, that Art 1 does not say anything about judicial action, and that Art 25, in speaking of rights that "have been infringed or denied", implies that the infringement occurs before it is recognised judicially. But what seems clear is that the Courts would have to weigh the consequences of deciding either way, and would be forced into making a policy decision for or against the "literal" approach to Art 1. The solution ultimately reached would not depend on linguistic or textual considerations alone.

Further, it would be facile to claim that "purposive" or "generous" interpretation immediately points the way to a correct conclusion on this general issue, or that the "intention of the authors" supplies a guide, for there is no reliable evidence, as yet, on whether they have formed any relevant intention. Nor will it help the Courts at this point to be reminded (Comment in para 6.16 of the White Paper) that they are "only enforcing the will of the people themselves".

Much ingenious argument

Democratic problems of interpretation are those arising in giving meaning to Art 3, which will plainly be the focus of much ingenious argument. In discussing the "fourth and central feature" of Art 3, the official comment (see paras 10.30 and 10.31) tends to conflate two of the three independent tests which the Crown or other upholder of an impungned statutory provision will have to satisfy the Court are cumulatively satisfied, viz (a) is the limit a "reasonable" one? and (b) can it be demonstrably justified in a free and democratic society? Looking at the first test in isolation, by what criteria or indicia will the Courts decide when a limit is "reasonable"?

Some criteria there must be for otherwise everything rests upon the Judge's subjective opinion. Does "reasonable" connote *solely* the principle of rationality, (ie that there must be a rational connection between the restraint imposed and the aim sought to be achieved by the "limit" in question) and the principle of proportionality (ie that the limit must not be unduly severe, or otherwise out of proportion, to the identified "mischief")? Or does "reasonable" connote other principles and criteria which are still to be revealed? No one knows the answers. It is submitted that those answers will not be obtained merely from a resolutely "purposive" interpretation of the single word "reasonable".

Demonstrably justified limits

An even more difficult general

"democratic" problem arises under Art 3. If one wants reliable evidence as to what the people of New Zealand (*ex hypothesi* a "free and democratic society") consider are demonstrably justified limits on guaranteed rights, where better to look than at the limits imposed by Parliament itself in the statutory provision under attack? There is no body more representative of the wishes of all the citizens than Parliament.

Carrying this line of thought one step further, the Courts might come to hold that there is a rebuttable presumption in all Art 3 cases that whatever Parliament has laid down is demonstrably justified. This conclusion could be rebutted by showing, for example, that Parliament in its decision (say) to reintroduce corporal punishment for some criminals had defied or misrepresented the wishes of the people (by compiling sheafs of newspaper leaders and computerised analyses of letters to the Editor?). Article 3 indisputably casts an onus on the Crown to justify the impugned "limit" but if the foregoing is correct, it will often be an onus easily discharged.

Adversaries will counter that it is impossible to reconcile such a presumption of validity or constitutionality, even if it derives some tenuous support from Privy Council dicta (cf the discussion of principle 6 in Part III [1986] NZLJ 132) with the general thrust of the Bill of Rights. Parliament's product is to be tested by reference to the supreme law in the Bill; if it fails the test it is to be struck down. It would accordingly be akin to arguing in a circle to use its products as *prima facie* evidence of what the Bill permits.

As there is some force in both these opposing viewpoints, one can only conclude that the choice between them will rest on some as yet unarticulated value judgment. The official comment does not even see this problem.

Problems as to source (see paras 10.32-10.34)

The official comment recognises that if the Courts are going to apply the related rationality and proportionality principles to Art 3 they will need to be apprised of the purpose of the restrictive legislation. How was it evolved? What is its rationale? "Changing attitudes to the use of legislative history and related practices relevant to challenges to the validity of regulations will assist in finding the answers to those questions."

It is true that attitudes to *source* problems have changed. There are several reported instances, for example, of Courts paying some regard to parliamentary speeches, eg, *Police v Thomas* [1977] 1 NZLR 109, 119 (but only to demonstrate that there had been "considered attention by the Statutes Revision Committee"). For the traditional refusal to study parliamentary debates, see *Assam Railways and Trading Company v IRC* [1935] AC 445, 458. Generally, F A R Bennion, *Statutory Interpretation* (1984) para 241. It is established that the Courts can have regard to the "mischief" identified in a law reform committee's report. The traditional view, which is however often departed from in practice, is that they should not have regard to the remedy proposed by the committee, because Parliament may have opted for a slightly different one. (See, eg, *Eastman Photographic Materials Co v Comptroller-General of Patents* [1885] AC 571, 575; *Letang v Cooper* [1965] 1 QB 232, 240; *Black-Clawson Ltd v Papierwerke AG* [1975] AC 59; *Wacal Developments Pty Ltd v Realty Development Pty Ltd* (1978) 20 ALR 621.)

It is equally true, however, that in the search for the "legislative intention" even modern New Zealand Judges have not been prepared to travel very far. This is simply because as soon as one goes beyond the words that Parliament has used to express its intention in their context (in the widest *Hanover* sense, see *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436,) and the legislative history, one is dealing with materials that are as likely to mislead as to help.

The official comment cites *Re Simpson* [1984] 1 NZLR 738, 747. In that case the Court of Appeal was concerned with whether there had ever been a statutory adoption of Alice, who was born in 1893. Richardson J noted in passing that "although the desirability of requiring the recording of an adoption on the Register of Births was raised by one member in the debates on the Bill ((1881) 39 NZPD 284), that was not provided for until 1915 when s 8 of the Birth and Deaths Registration Amendment Act 1915 was enacted". The omission noted by this MP was evident from the 1915 Act which much later remedied it, so the reference to the 1881 debates was barely significant. There is in fact no clear example of a decision in which a Court in this century has done more than pay cautious attention to the rationale of a Bill as propounded by the Minister in charge of it.

Changing attitudes

Another case cited as evidence of "changing attitudes" is *Brader v Ministry of Transport* [1981] 1 NZLR 73. The Court of Appeal was there dealing with a challenge to the *vires* of the "carless days" regulations, (Part II of the Economic Stabilisation (Conservation of Petroleum) Regulations (No 3) 1979.)

It had no doubt that evidence was admissible "as showing the factual background and providing detail about matters of general knowledge", [1981] 1 NZLR 73, 78 per Cooke J. This evidence enabled the Court to conclude — though evidence was scarcely necessary for it was a matter so notorious as to be the subject of legitimate judicial notice — that "the imported product, petrol, is a fundamental commodity in the present New Zealand economy". The admission of that evidence was unremarkable. Its very description by Cooke J was probably designed to emphasise the distinction between general knowledge and objective historical facts on the one hand, and the contents of departmental papers, reports to the Minister and other such travaux préparatoires on the other.

However that may be, both *Re Simpson* and *Brader v Ministry of Transport* should be seen as limited and cautious departures from the extremes of the older prohibition against recourse to materials outside the words of the statute under consideration and its predecessors *in pari materia*. Attitudes have not changed fundamentally. There is still no call for every District Court in the country to be equipped with a full set of *NZ Parliamentary Debates*, or the appendices to the *Journals of the House*.

Canadian questions

In the Canadian Charter cases some of the Courts have, as we shall see, been prepared to go further. The principal decisions are discussed in Section V. But ministerial statements in debates have the character of advocacy and so should not be given undue weight: *Public Service Alliance of Canada v R* (1984) 11 DLR (4th) 339, 351. An "aura of mysticism" should not be attributed to the Charter: *R v Myers* (1984) 11 DLR (4th) 446, 453 where McQuaid J insisted that "the ordinary rules of interpretation" must be applied. It suffices for present purposes to ask the pertinent questions about source materials without debating how they should be answered.

Will the New Zealand Courts go as far as the Canadian Courts seem prepared to go? Will they tend to draw a distinction between those Bill of Rights cases where a "fundamental right" is asserted by a criminal defendant who lacks even the vestige of a defence on the merits, and those where a profound issue is raised by a pressure group in a superior Court about the relationship between (say) censorship legislation and the freedom of expression guaranteed by Art 10, so far as admitting explanatory source material is concerned, being much more liberal in the latter than in the former case? Will they admit departmental position papers? Census statistics? Extra-parliamentary speeches by the relevant Minister? Law Commission reports? What weight will they give, if any, to assertions that proposed legislation has been carefully checked for compatibility with the Bill of Rights? And so on.

All that can be said with confidence is that no one can reliably predict what the answers to such questions will turn out to be. Yet the final disposition of many Art 3 cases is likely to turn, at least in part, on the scope of the materials made available to the Court and properly admissible.

Part V

The White Paper notes that "many provisions of the draft Bill are closely based on the Canadian text. This will be of major practical importance for New Zealand lawyers and Courts will be able to draw on the rich and developing jurisprudence from Canada". (White Paper para 10.2.) Mr D A R Williams refers to this passage in "Some Operational Aspects of the Bill of Rights" in *A Bill of Rights for New Zealand* (Legal Research Foundation) 16 August 1985, 77, 86, and comments: "This will vastly simplify and reduce the burdens on the Courts and the legal profession if the Bill is introduced." Professor Brookfield also seems confident that we can derive great value from the work of the Canadian Courts, in "The Bill of Rights as Fundamental Law in the Light of the Canadian Experience", in ibid, 147 ff. He considers, for instance, that the Canadian "law is clear that, whether under the Canadian Bill or the Charter, there is no justifiable issue as to foetal rights. The balancing of those rights with those of the expectant mother has been left to the legislature. The New Zealand law under the Bill is likely to be no different."[1]

Canadian authority

In opposition to those views I submit that the Canadian cases so far reported will provide some suggestive arguments when the Courts have to interpret our Bill, but that the citation of Canadian authority by counsel will often merely complicate argument on the meaning of the Bill in our Courts. Moreover, many of the Canadian Charter cases will be readily distinguishable in New Zealand, (eg because the Charter contains, as our proposed Bill does not, the right to "liberty and security of the person" (s 71)). Other Charter cases, not distinguishable in that easy way, were decided in the light of Canadian social conditions to which there is no New Zealand counterpart, eg the problem of bilingualism in Quebec. More important still, the Canadian Courts have not so far arrived at solutions to more than a tiny fraction of the higher tier issues of interpretation.

The nature of the judicial task of interpreting the Canadian Charter of Rights and Freedoms has not been explored in depth in the literature that I have been able to locate. Driedger, in the second edition of his valuable work, *Construction of Statutes*, Butterworths, Toronto, 1983. See pp 243-246, disappointingly regards Charter issues as beyond his scope.

Professor Dale Gibson's Commentary, in Tarnopolsy and Beaudoin (eds), *The Canadian Charter of Rights and Freedoms* (1982), Chap 2, (See also Hovius and Martin (1983) 61 Can Bar Rev 354, and L D Barry, (1982) 60 Can Bar Rev 237) is a useful introduction to the interpretative issues; perhaps it could not have been more than an introduction when the Charter was then so new. One comment he makes is particularly penetrating: "Your right to freedom from discrimination on the basis of race may . . . conflict with my right to freedom of association. . . . In such situations Courts must balance and to some extent compromise the competing interests. They will not be assisted in the task by a presumption that the Charter should be construed liberally, since generous interpretations of the two conflicting rights would cancel out each other (ibid, 32).

Search or seizure

Reference has already been made to *Hunter v Southam* (1984) 11 DLR 641, 649.[2] This decision of the Supreme Court of Canada is still the most significant authority on matters of interpretative principle. But beyond reminding us of Viscount Sankey's metaphor of the "living tree", and reiterating Lord Wilberforce's call for "generous" interpretation of a document setting out fundamental human rights, *Hunter v Southam* provides us in New Zealand with rather meagre assistance.

The Court was concerned with the Charter section forbidding "unreasonable search or seizure". Dickson CJC, with respect, was right to insist that the meaning of "unreasonable" "cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction" (1984) 11 DLR (4th) 641, 649. He said that Lord Wilberforce's call required the Supreme Court to engage in a "broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects" (ibid, 650). But this, while it has an admirable ring, is not very helpful since (a) the "larger objects" of the Charter can only be stated in terms of nebulous platitudes (eg "to guarantee to all the people the full exercise of their fundamental rights") and it would be idle to pretend that that helps one

to state an intelligible criterion for distinguishing an unreasonable from a reasonable search; and (b) so many of the problems arising under the Charter are higher tier interpretative issues to which a purposive examination of language will not, without more, provide answers.

Reasonableness as a test

One higher tier issue, of great importance, was raised in *Hunter v Southam* itself. This is the question whether, when a specific Article introduces a standard such as "unreasonable" (Art 19) or "cruel" (Art 20), and it is held that the Article containing the standard has been breached, any further balancing is permissible under Art 3. If a statute "unreasonably" permits a search in defined circumstances it seems clear enough to me that this derogation from the guaranteed right must next be examined to decide whether it is a reasonable limit prescribed by law, etc and therefore saved from invalidity by Art 3.

But Professor Brookfield quoting (1984) 16 Ottawa LJ 97-110 in his contribution to the LRF Seminar, finds S A Cohen's suggestion more attractive, viz that whenever the test of reasonableness (or other such qualifying concept) appears in the provision protecting a particular right or freedom, no further assessment of reasonableness *is intended* under Art 3. (Does "is intended" operate as a subconscious disguise for a preference for individual rights over the Charter as a balanced whole, thus including s 1, our Art 3?)

Whichever the correct solution is, the Supreme Court cautiously preferred to allow it to remain moot. More help is gained from the following declaration of policy: "While the Courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the Courts to fill in the details that will render legislative lacunae constitutional" (1984) 11 DLR (4th) 641, 659.

An investigation into the Charter cases decided by the Canadian Courts discloses some more statements of interpretative principle. Thus in *Public Service Alliance of Canada v The Queen* (1983) 11 DRL (4th) 339, 349, the Federal Court stated that *Fisher's* case did not mean that "one is entitled to read into a constitutional document or charter of rights things that are not there". The various sections of the Charter must, as in the case of any statute, be read in their context (*Re Demaere and The Queen* (1983) 11 DLR 193, 199, per Hugessen J, with whom Urie and Ryan JJ of the Federal Court of Appeal concurred).

The meaning of the fundamental freedoms should be looked at in a historical context, and not simply with the aid of a dictionary, for otherwise "freedom of association" "extends to almost any contact between two or more persons. A law requiring separate toilet facilities for men and women would infringe as would a law prohibiting unnamed partners in a used car business or almost any restriction on the ability of people to form contract" *Black v Law Society of Alberta* (1984) 13 DLR (4th) 436, 464.

The development of the Charter should be a careful process. Consequently, "where issues do not compel commentary on these new Charter provisions, none should be undertaken" *Re Skapinker and Law Society of Upper Canada* (1984) 9 DLR (4th) 161, 181; *Re Service Employees IU and Broadway* (1984) 13 DLR (4th) 221 (Ontario CA). In the *Skapinker* case Estey J *per curiam* in the Supreme Court deliberately declined to determine, one way or the other, "the propriety in the constitutional interpretative process of the admission of such material to the record". This included presentations in the House of Commons and a statement by the Premier of Quebec.

Before the Charter was enacted the Supreme Court in *Re Anti-Inflation Act Reference* [1976] 2 SCR 373, unanimously agreed to consult, among other extrinsic sources, a Government of Canada White Paper tabled in the Federal House of Commons by the Minister of Finance as an introductory statement. It remains unclear whether the Courts are to examine the *effect* or the *purpose* of allegedly Charter-infringing legislation: while in some cases the result will be the same whichever approach is taken, that will not be so in all cases, eg the litigation challenging the Lord's Day Act. *Robertson and Rossitanni v R* (1964) 41 DLR (2d) 285, 494 per Ritchie J looked to the *effect* rather than the purpose: this provided a major plank for Berzil JA's dissenting judgment in the Alberta Court of Appeal in *R v Big M Drug Mart Ltd* (1983) 5 DLR (4th) 121.

Instances of conflict

I have not been able to find any more by way of answers to what I have called higher tier questions of interpretation. On particular sections of the Charter there are numerous cases of importance, and many of these will be genuinely helpful when the New Zealand Courts elucidate the particular Articles of our Bill, eg the meaning of "Court of competent jurisdiction" in Art 25, (see *R v Morgentaler* (1984) 14 DLR (4th) 184, 191 (Ontario CA), and the meaning of "fundamental justice" in Art 14, (see *Re Sim* (1984) 14 DLR (4th) 763 (British Columbia SC).

Unfortunately, there are also several instances of conflict among the Canadian decisions.[3] And some Canadian Judges are more inclined to state their conclusions than to reveal the reasons by which they reached them.[4] The mounting volume of Canadian cases at many levels is not accompanied by a steadily increasing persuasiveness. New Zealand counsel will necessarily have to undertake research into them, and cite them to the Court. But our Court of Appeal is just as likely to disagree as it is to agree with a relevant Canadian decision, unless perhaps it is a decision of the Supreme Court of Canada.

Part VI:

Lurking behind or above the particular questions of interpretation of the proposed Bill of Rights that will arise in the Courts at all levels of the hierarchy are several puzzles about the proper way to interpret this unique legislation, which has so many legal implications. Many problems can at present only be identified, not answered.

It will be uncertain for several years what the fundamental principles and general rules of interpretation of the Bill of Rights are. A determinedly "generous" and "purposive"

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Rights and wrongs: A reply to Mr Chapman's Bill of Wrongs

By Jeff Berryman, Associate Professor of Law, University of Windsor, Canada

Professor Berryman is a graduate of Auckland University and subsequently of Dalhousie University. He was admitted as a Barrister and Solicitor of the High Court of New Zealand in 1979. Since 1981 he has held teaching posts at the University of Windsor in Ontario, Canada. This article is written specifically as a reply to the earlier article by Mr Guy Chapman [1985] NZLJ 226. Professor Berryman replies point by point to Mr Chapman's arguments. He concludes by stating that New Zealand should embrace the concept of a Bill of Rights, and should focus attention now on the specific contents that would make such a document a truly indigenous one.

When I read Guy Chapman's article "A Bill of Wrongs: The Arguments Against the Proposed Bill of Rights" [1985] NZLJ 226 I was initially very perturbed. There is a certain provocation in both the title and in the characterisation of a Bill of Rights as an incubus. Implicit throughout the article is the opinion that adherents to a written Bill of Rights are, to put it charitably, misguided. Although feeling perturbed, I did not immediately put pen to paper. I believed that such an article would be met with a prompt rejoinder in subsequent editions of the *Law Journal* by voices far more articulate than my own. So far my wait has been in vain, and yet, there is much to be argued with in Mr Chapman's "Bill of Wrongs".

Before replying to the author's specific arguments I wish to make two preliminary observations. Firstly, before commencing to write this paper I undertook a review of the New Zealand academic legal literature on the issue. I was surprised by the paucity of writing on a New Zealand Bill of Rights, although there are some exceptions, see the special issue on constitutional law published by Victoria University (1985) 15 *VUWL Rev* (number 1), and a number of commentaries appearing in the *New Zealand Law Journal*. This is despite the fact that it has been an issue since 1964 when the then Minister of Justice, Mr Ralph Hanan, introduced such a proposal. See *Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights,* Wellington, Government Printer, 1965. I was further surprised to find that amongst legal academic circles there has been almost unanimity in opposition to such a proposal. This can be contrast with the growing number of *ex curia* statements[1] by those at the front line, namely the Judiciary, who have called for such an entrenched Bill of Rights. I am not quite sure what conclusions one

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interpretation will help resolve the easier linguistic issues, but will not help the Courts in making the decision on the "high tier" issues. Yet very often it will be necessary to resolve a higher tier issue before turning to the easier task.

Conclusion

I have argued in this paper that some, but on analysis comparatively meagre, help will be gained from a perusal of the Privy Council decisions or from the proliferating corpus of Canadian jurisprudence. The Courts will have to resolve the Bill's meaning with the aid of tools yet to be invented. The price of the benefits which we shall obtain from the Bill is so high in terms of the uncertainties in which we shall all flounder, practitioners especially, that we should refuse to pay it. □

1 Ibid, 162. I do not share the view that foetal rights are plainly non-justiciable under Art 14. It is at least arguable that a foetus is a "one", and that abortion means that the foetus is "deprived of life", forcing the Court to go on and investigate whether the statutory procedures and controls are "consistent with the principles of fundamental justice". Brookfield does not explain why he considers the Canadian judicial "hands off" policy is likely to be adopted in New Zealand.

2 For this to afford useful guidance to a Court interpreting the Charter it would first need to know what are the "natural limits" within which expansion of the living tree is to be welcomed. If we do not know how to discover the "natural limits" Viscount Sankey's famous metaphor is vacuous. In *R v Big M Drug Mart* (1984, so far unreported) Dickson CJC in the Supreme Court amplified what he had said in *Hunter v Southam* by emphasising that the Court must have regard "where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter", and that the Charter must be "placed in its proper linguistic, philosophic and historical contexts".

3 An analysis of the decisions up to 1983 is offered by G L Peiris, "Legal Protection of Human Rights: the contemporary Canadian experience" (1985) 5 *Legal Studies*, 261. This paper has benefitted from Professor Keith's kind criticism of its original form, but the views expressed are entirely my own.

4 Thus in the Ontario High Court's decision that the power of a board of censors "to censor any film" was invalid because no limits were "prescribed by law" (*Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583, briefly affirmed by the OCA in (1984) 45 OR (2d) 80) the Court's crucial assertion at 592 is: "It is accepted that law cannot be vague, undefined, and totally discretionary: it must be ascertainable and understandable". There is no discussion of an issue which has been prominent in the debates between positivists and their critics, viz is a vague/bad/discretionary law not law at all? And why is ascertainability the antithesis of "vague and undefined"? It is arguable that the conferment of a total discretion is the most appropriate way for legislature to control *some* activities. If also the slightness of Galligan J's reasoning in *Re Service Employees IU and Broadway* (1983) 44 OR (2d) 392.

should draw from this fact, but it does seem strange that it is the "old men", and I choose a masculine noun deliberately, in the Judiciary who assume the activist role of tilling the constitutional soil ahead of an academic community which, from all appearances, wishes it to lie fallow.

Secondly, and this observation relates more specifically to Mr Chapman's comments, there is underlying the article one vision of the function of law, justice, and the actors who participate in the legal system. The vision presented sees Judges, who are independent of politics, as administering specific principles of common law, which is free of ideological content, between litigants. In this vision the law can only be changed by a democratically elected parliament. There is nothing inherently wrong with this view of the law, but it is important to remember that it is just that, one *view* of the law.

It is interesting to observe that while the rest of the common law world is embroiled in ongoing debates as to the ideology of law; (see for example the often rancorous debate at Harvard University over critical legal studies,[2] and the focus of much feminist scholarship[3]) as to the interdisciplinary studies of law; (see for example the many contributions in the United Kingdom in the *Journal of Law & Society,* in Canada, in the *Windsor Yearbook of Access to Justice,* and in Australia, in the *Australian Journal of Law and Society* and *Australian Legal Services Bulletin*) and as to the values taught, and curricular development in law schools; (see for example, the amount of debate accorded that subject at annual meetings of the American Association of Law Schools, and Professor Harry Arthur's report to the Social Science & Humanities Research Council of Canada on *Law & Learning,* (Ottawa: Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) all these initiatives have gone largely unnoticed in New Zealand. In fact, if law schools are meant to be at the cutting edge of discussions *about* law we should be concerned about the apparent direction of some of our schools (see P Osborne, "Legal Education: Faculty of Law, University of Auckland, NZ 1985" paper delivered at the Legal Education Conference, Federation of Law Societies of Canada, Winnipeg, Oct 1985.) Again this development can be contrasted with statements from the Judiciary as to the need for more policy analysis in legal arguments before the Courts; compare the similarity in comments by the Rt Hon Mr Justice Richardson "The Role of Judges as Policy Makers", (1984), 15 *VUWL Rev* 46 at 50 and Canada's Chief Justice, the Rt Hon Brian Dickson, speech delivered at the Conference on Legal Education, ibid.

Mr Chapman raises five specific arguments to which I now wish to reply.

1 It is an incubus we do not need. Under this title the author states that the Government's White Paper is thin and shaky on justification; that trust in the democratic process has served us well in the past; and that our present law has effectively protected rights and liberties.

This argument is the view of a legal Luddite. Standing alone it is not an argument against a Bill of Rights. I presume that Mr Chapman would concede that those advocating a Bill of Rights would be happier if they were given one, and that, in good utilitarian terms, if the majority were not harmed by such a proposal, then we should have one, if only to humour the protagonists. For this reason Mr Chapman goes further to suggest in his subsequent arguments that real harm will result from an entrenched Bill of Rights.

Mr Chapman is right when he points out that the White Paper is thin on justification. But this is to ignore the political nature of the White Paper. It is written in a time when the Government is trying to achieve a bipartisan consensus. Naturally, to suggest any erosion of civil liberties under past governments would be counter-productive. However, I do not feel similarly constrained as the authors of the White Paper. I can recall the police crackdown on overstayers which saw random police examination of Pacific Islanders, including those who had New Zealand citizenship by birth, and which brought the response from the then Minister of Police Mr McCready that; "police are not picking on Polynesians in Auckland. It is just if you have a herd of Jerseys and two Friesians, the Friesians stand out." Or consider the prosecution of Reverend Burton for daring to preach peace. (*Burton v Power* [1940] NZLR 305, and see B Hodge, "Civil Liberties in New Zealand: Defending our Enemies" (1980), 4 *Otago L Rev* 457) and the cavalier and unlawful activities of the New Zealand police in arranging the return from Australia of a person they wished to arrest: *R v Hartley* [1978] 2 NZLR 191 (CA). Other civil rights transgressions which occurred during the Depression are revealed in Tony Simpson's book, *The Sugarbag Years,* (Auckland: Hodder and Stoughton, 1984) particularly the well-documented attempts of the Government to jam the Reverend Scrimgeour's radio programme prior to the 1935 elections.

Mr Chapman also points to England, with whom he suggests New Zealand shares a common historical heritage as a nation which has equally been well served by an unwritten constitution. Why then, one may ask is England the most frequent nation of all the signatories to the European convention on Human Rights, which has been called to account for Human Rights violations? (see Series A — Judgments and Decisions — Publication of the European Court of Human Rights.) Is Mr Chapman happy with the announced intentions of the Thatcher Government towards a new Public Order Act, or the questionable practices of the English police towards trade union disputes recently demonstrated in the miners' strike? (see P Thomas, H Power, and R East "The British Miners' Strike" (1985), 5 *Windsor Yearbook of Access to Justice* (forthcoming)).

Mr Chapman states that "democracy rests on trust, the trust that an elected majority government will behave with restraint". But this is democracy in the broad sense. I agree, if a government sought to abrogate free speech to the whole citizenry it would be fiercely opposed. But a Bill of Rights goes much further. It takes democracy into much narrower confines, into areas in which the legislature may not even be aware of some constitutional invalidity. For an example of such a piece of

legislation see Tony Simpson's account of the Royal New Zealand Armed Forces Amendment Act 1980 in *A Vision Betrayed* (Auckland: Hodder and Stoughton, 1984) p 85. Mr Chapman's view of democracy ignores the fact that a Bill of Rights is meant to protect minorities against the transgressions of majorities who by simple weight of numbers are able to protect themselves. It also ignores the fact that repeatedly in Westminister style Parliaments the governing party is now elected by a minority of the voters, the majority being split amongst two other parties. It further ignores the growing power of the executive, the impotence of parliament, and the inability of individual members of parliament to gain information from the governing executive upon which to make informed decisions: (see A Palmer, *Unbridled Power*, Wellington: OUP, 1979.)

2 It would freeze our constitutional development in an unalterable or not easily alterable state at a given moment in history.

There are two parts to Mr Chapman's argument. One, by analogy to the American constitutional provisions allowing a citizen to keep and bear arms, Mr Chapman sees a Bill of Rights as calcifying constitutional development engraining the values of one era. Two, he suggests a Bill of Rights cannot be a living instrument, ie, it is inconsistent to suggest that a higher law can be subject to changing interpretation.

There is a certain seductiveness in the analogy to the American constitutional provisions allowing a citizen to keep and bear arms. To the outsider, and particularly to a New Zealander who is used to strict gun control, the American provision is nonsensical. To the outsider it is easy to conclude that every right thinking American must disagree with the provision and that, if they had their time again, they would draft a Bill of Rights without such a provision. But there is simply no evidence to support this conclusion. The right to own a gun is as American as apple pie, and to suggest otherwise is to confuse one's own perception about gun control with that of an American.[4]

However, there is a useful point to be learned from Mr Chapman's analogy, and that is to ensure that any Bill of Rights encompasses generalities rather than specifics. It is futile to incorporate, for example, a right to life provision specifically related to abortion where there is no agreement as to what constitutes life (and increasingly medical science is clouding what definitions exist today), but that a right to a fair hearing when such a determination as to what constitutes life arises, is perfectly acceptable because it is a shared value of all citizens. For the most part this distinction is rightly drawn in the White Paper when it speaks of enshrining procedural rights supportive of democratic process, rather than specific substantive rights. Where substantive rights are included they are not absolutes. Their specific content must be interpreted in light of the provision relating to justified limitations, (Clause 3 of the Proposed Bill of Rights).

In passing, Mr Chapman suggests that entrenchment of higher law will calcify constitutional debate. I believe quite the reverse will happen. Government departments will be much more concerned with the constitutional validity of their actions. Minority voices which have been heretofore lost in the parliamentary process will gain a new avenue of legitimate participation by bringing constitutional cases. Groups in societies which have been traditionally disenfranchised from power, namely Maori, women, and the poor, will have an opportunity of gaining access to power where they have been relatively unsuccessful in the parliamentary process. If the experiences of Canada are anything to go by, debate on constitutional issues is far more informed and stimulating after than before the enactment of the Charter of Rights and Freedoms, for the very reason that such a debate is now more practically relevant.

Mr Chapman also ponders what a Bill of Rights would look like now if enacted in New Zealand in 1856 or 1913. Mr Chapman has a capacity for hindsight which I do not share. It may well have looked archaic today, but that would probably be as a result of the political and legal immaturity which existed at the time it was drafted.

A Bill of Rights is a statement of constitutional maturity. It is a declaration of commitment to democratic principles where they have been clearly engrained by practice over many decades. Nor will a Bill of Rights impede the advance of the constitutional clock. Who knows what form of government will be practised in our country in 2085? It may well be a benevolent dictatorship, or a fascist totalitarianism. It may be government by instant referenda, or as a state of Australia. But whatever form it may be, even if it has cast a Bill of Rights completely aside, it will have done so because that society's understanding of law, and the ideology of law, will have changed. What I am quite sure of is that any future society's legal system is unlikely to be imbued with Mr Chapman's legal positivism.

Finally, under this heading, Mr Chapman argues that it is pure sophistry and casuistry to suggest that a higher law can be adapted by interpretation to new conditions by a Court, when Parliament cannot do the same in exercise of its democratic process. It is perhaps flippant to suggest that the logic of this argument has escaped those nations which have entrenched Bills of Rights.

The flaw in this argument is the failure to distinguish the process of change between that undertaken by Parliament and by judicial process. The former is by the simple exercise of a government's majority. Little or no explanation needs be offered and certainly no rational articulation of policy objectives needs be given to Parliament or the electorate. In fact the increasing use of regulation to control government function even bypasses the limited opportunity for parliamentary scrutiny.

In the latter, the process of adaptation is much more complex. First, the proposed New Zealand Bill of Rights includes a limiting provision which overtly legitimises judicial activism in constitutional interpretation. At the same time it imposes a heavy onus on those who seek to justify with rational reasons that a specific form of legislation or governmental action is constitutionally valid, where all indicators would suggest that it is invalid. Second, a Court will have necessarily adopted a certain view about a Bill of Rights as manifested

in its earlier decisions which must then be accommodated in any new interpretation. Third, assuming the Court's acceptance of the new position it must adequately articulate reasoned explanations for the change of direction. In doing so, the Court may call on the research of many other disciplines for supportive rationales. In essence the difference between parliamentary and judicial change of constitutional protections is in the justificatory mechanisms.

3 It is inherently undesirable to insulate one sector of our law from democratic change and repose ultimate sovereign power in relation thereto in the Courts and Judges who are not democratically accountable.

Mr Chapman has grouped a number of themes under this heading. First, he suggests that the British preference has always been to repose ultimate sovereignty in Parliament alone. I think this is somewhat inaccurate. At home, Britain has always believed in parliamentary supremacy, but abroad in its colonies, it usually imposed federal systems with Courts heavily involved in settling demarcation disputes between federal and provincial responsibility and ultimately striking down legislation outside each respective arm of government's competency. In other circumstances it imposed higher law constitutions. New Zealand is something of an exception, having been able to rid itself of a federal system very early in its constitutional development.

Mr Chapman then moves on to put great store in the representativeness of a democratically elected Parliament, and its abilities to better secure rights and liberties. If the New Zealand Parliament were truly representative of New Zealand society, what a strange composition society would have! It would be between 80-90% white, middle aged males of which 20-30% would be lawyers. Mr Chapman's representative assembly is a fiction. It ignores the dynamic of modern politics where campaigns are fought at a national level on a single issue, concentrating on leadership and television charisma. This is not necessarily a criticism of this process, it is simply a realisation that a politician who appears to be all things to all people ends up representing nobody. When the homogeneity of a society breaks down and Parliament no longer represents all factions, other avenues for legitimate participation must be opened (see the *dicta* of the Court of Appeal in *Donselaar v Donselaar* [1982] 1 NZLR 97 at 106 per Cooke J).

Mr Chapman's next theme addresses the unrepresentativeness of the Judiciary, their political independence, and their qualities which make them suitable as Judges adjudicating between parties but not to exercise the power to strike down legislation.

As to unrepresentativeness, I am not too sure what follows from this assertion. There are hundreds of government departments which make decisions affecting each individual (eg Accident Compensation Commission as to entitlements to compensation, Reserve Bank of New Zealand as to lending policies) and their unrepresentativeness is not a basis to challenge their decisions. What we need to do is to distinguish between representativeness and competency. Being unrepresentative may affect institutional competency to discharge a particular function but it does not necessarily follow that true representativeness leads to competency. I have no doubt that New Zealand's Judiciary is competent to exercise the powers bestowed by any Bill of Rights. I am fortified in this belief by the apparent willingness of the Court of Appeal to assert itself as a responsible law making body (see the example set by the Court of Appeal in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA) at 476 and the comment by the Rt Hon Mr Justice Richardson "The Role of an Appellate Judge" (1985), 5 *Otago L Rev* 1).

As to political independence, I have always been amazed by the hypocrisy of the New Zealand legal profession. To the outside world there is presented a stoical view that judicial appointments are and should be independent of politics. Yet within the profession everybody trades in gossip, rumour, and facts as to the religious, and political persuasions of the Judiciary or those being considered for appointment; as to who was a partner with whom; and whether they appeared for the Crown at some time.

For the most part, the work of the Judiciary has little if any political overtones, however, on occasion, the Judiciary are intimately involved in making political statements. The actions of the Chief Justice in sentencing the accused in the *Rainbow Warrior* case seemed a pretty political statement to me. The judgment of Mr Justice Casey on the New Zealand Rugby Union's proposed tour of South Africa, and the judgment of the Court of Appeal in *EDS v South Pacific Aluminum Ltd* [1981] 1 NZLR 146 (CA) both make political statements.

They may all be above partisan politics, but they are still political acts. On this issue I believe that the public is ahead of the profession. I do not think the public expects, or would want, the Judiciary to be hermetically sealed. If and when a Bill of Rights appears, I would expect the public to want more input in a more open appointment process to the Judiciary, and for what reason could they be denied?

At the basis of Mr Chapman's argument relating to judicial suitability is a paradigm of litigation which I believe is no longer apposite. That paradigm sees litigation as a contest between two adversaries over a private matter. A more accurate paradigm would recognise that a significant amount of litigation is now multi-faceted involving complex supervisory tasks by the Court (T Eisenberg and S Yeazell, "The Ordinary and the Extraordinary in Institutional Litigation" (1980), 93 *Harvard L Rev* 465, A Chayes "The Role of the Judge in Public Law Litigation" (1976), 89 *Harvard L Rev* 128.) In this new paradigm much judicial energy is devoted to administering notions of procedural fairness and due process, the very skills which would be called upon in administering a Bill of Rights.

The last of Mr Chapman's themes under this heading introduces a parade of conservative decisions from North American Courts as evidence supporting the view that "Judges, more than democratic majorities ... may go badly wrong and fall decisively behind public

opinion".

I cannot dispute these cases. What I can do is provide an equal number of instances where Courts have insured constitutional conformity in the face of a recalcitrant legislature. For example, the American Courts have administered prison reform,[5] mental hospitals,[6] and desegregation of schools.[7] The Canadian Supreme Court has instructed a provincial legislature to reproduce its statutes in French to accord to a constitutional requirement in that province relating to bilingualism: *In the Matter of a Reference by the Governor-in-Council Concerning certain Language Rights Under Section 23 of the Manitoba Act 1870* [1985] 1 SCR 721.

The point which can be taken from Mr Chapman's cases is that even Courts cannot hold back the social advances of a nation. However, what they can do is ensure that the politically disenfranchised are given a legitimate avenue of participation in deciding the allocation of burdens and benefits which social progress brings about.

4 It is inherently undesirable to institute a higher law system.

Here Mr Chapman first argues that instigation of a two-tier system of law results in diminished respect for the subordinate tier. I have never thought that respect for the observance of law has had anything to do with the fact that all law is on one horizontal plane. I cannot believe that the public sees, for example, a newspaper's decision to defame someone, a minor driving infraction, and murdering somebody as demonstrating equal disrespect for the law, and yet these are all within Mr Chapman's one skein of the *law*. Even accepting Mr Chapman's premise, we clearly have examples of multi-tiered systems of law in our regulatory process. A particularly refined example exists in town and country planning matters. I do not think people have less respect for a Council's district planning scheme merely because it is the creation of a regulatory process rather than legislative.

Second, Mr Chapman raises the spectre of the litigious constitution. I do not know whether Mr Chapman is using the term in a pejorative sense. The basis of a Bill of Rights is to introduce the litigious constitution. We should embrace that concept as opening a new avenue of opportunity into the political process.

Finally, Mr Chapman introduces the apocalyptic view of a Bill of Rights: that it would introduce an ideological content to our constitution, where "mercifully" it has been free.

At first glance, I could not conceive of any constitution which could be free of ideological content or contention. What I believe Mr Chapman means by this assertion, is that his perception of our constitution is free of ideological content because it mirrors his own ideology, an ideology received as part of *his* British heritage. I cannot believe that Mr Chapman could find many adherents to his ideology amongst Maori or Pacific Islanders who don't share his British heritage. When the Court imprisoned Te Kooti for peaceably passing through the Bay of Plenty, *Goodall v Te Kooti* (1891) 9 NZLR 26, the law vented an ideology towards Maoridom. When the Chief Justice appealed to the Bill of Rights 1688 in *Fitzgerald v Muldoon* [1976] 2 NZLR 615, the law gave voice to an ideological position towards executive power. All law, which is hewed out of political process, contains ideology.

5 It necessarily partakes of general law the end whereof cannot be known.

Mr Chapman's criticism relates to the uncertainty and imprecision of a Bill of Rights drawn in broad terms as against present certainty.

There are two answers to Mr Chapman's concerns. Firstly, if one looks at the proposed Bill of Rights, the charge of uncertainty could only really be levelled at ss 6 to 10 and 12 to 14. Of these sections many of the rights they encompass have already been specifically legislated in the Race Relations Act 1971 and the Human Rights Commission Act 1977. In addition, as the White Paper reveals, there is already a large body of discussion and scholarship in other jurisdictions which could be called in aid of interpretation of these provisions.

Secondly, I query how much certainty exists in our law today. For instance, if our Courts are happy to breathe life into Art 1 of the Bill of Rights 1688, which by no stretch of the imagination contemplated a modern parliamentary democracy, (the enormity of the task was commented upon by the Chief Justice, ibid) then I have full confidence that our Courts will rise to the occasion of interpreting a home-grown Bill of Rights within acceptable parameters of political and legal norms.

Conclusion

I hope this paper has met the main thrust of Mr Chapman's arguments against entrenchment of a Bill of Rights. I believe a Bill of Rights is a concept which New Zealand should embrace. Discussion now needs to be focused on the Bill's specific content to make the document a truly indigenous product. In this endeavour, I hope the legal community will lead the way. □

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1 See Rt Hon Sir Owen Woodhouse "Government under the law", *J C Beaglehole Memorial Lecture* 1979 (Wellington: Price Milburn for NZ Council for Civil Liberties 1979). And see the inconclusive comments of Rt Hon Sir Robin Cooke "The Courts and Public Controversy" (1983), 5 *Otago L Rev* 357. Sir Robin Cooke, "Bill of Rights: Safeguard against unbridled power", *The Dethridge Memorial Address* 1984. Also see J Caldwell, "Judicial Sovereignty — A New View" [1984] *NZLJ* 357.

2 See the literature collected in T Finmen, "Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River" (1985), 35 *J of Legal Education* 180.

3 See generally P Hughes, "Feminist Equality and the Charter: Conflict with Reality" (1985), 5 *Windsor Yearbook Access to Justice* (forthcoming).

4 There is already significant gun control legislation in America. The debate over such legislation is how to accommodate the legitimate desires of law abiding Americans to make provision for self-defence, and the criminal desires of those who use guns to perpetrate crimes. See the "Second Amendment Symposium: Rights in Conflict in the 1980s (1982), 10 *Northern Kentucky L Rev.*

5 *Holt I* 300 F Supp 825 (Arkansas 1969). *Holt II* 309 F Supp 362 (Arkansas 1970).

6 *Wyatt v Stickney* 344 F Supp 373, (Alabama 1972) — see Note The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change", (1975), 84 *Yale L J* 1338.

7 *Brown v Board of Education* 347 US 483 (1954) — but see the examination of cases following this decision in Eisenberg and Yeazell "The Ordinary and the Extraordinary in Institutional Litigation" (1980), 93 *Harvard L Rev* 465.

Court of Appeal President:

An interview with Rt Hon Sir Robin Cooke

On 1 May 1986 Sir Robin Cooke succeeded Sir Owen Woodhouse as President of the Court of Appeal. In this interview the new President speaks about his background and interests and those of the other permanent members of the Court. He also discusses briefly some aspects of the work of the Court of Appeal, and looks at possible future developments.

I was wondering, Judge, if we could start with a personal comment. You are, I think, a member of one of the legal, and indeed judicial, families of New Zealand in that I understand that your father was a Judge before you.

Yes. My grandfather was Crown Solicitor in Palmerston North, and my father was a King's Counsel, President of the New Zealand Law Society and later a Judge. One of my sons is a third-year law student and is already demonstrating that the dialectic part of law can be indulged in without necessarily having to have a very wide acquaintance with the actual content of the subject. Which is probably the right priority. In belonging to a New Zealand legal family I'm very far from unique, of course. There are any number of such families, such as the Gressons, the Sims, the Richmonds, the Adamses, the Hardie Boys, the Tompkins, the Henrys, the Quilliams, the O'Regans, the Ongleys, and a happy link between the Chapman and Eichelbaum families. . . . I'm mentioning some who have a judicial connection but many others could also be thought of.

Yes. You were, I think, educated at Victoria University.

Yes. Perhaps I should link that with the previous matter. My family may be legal, but can hardly be described as having been ever affluent. However, I did have the advantage of a good education and excellent teachers at Victoria University College as it then was. In particular one remembers James Williams, Robert McGechan, . . .

That's the father of Andrew McGechan, QC?

That's the father of Andrew McGechan — he was a charming Australian — and Ian Campbell and others. I was fortunate enough to manage to get what was then called the University of New Zealand Travelling Scholarship in Law which was awarded every two years. My predecessor in that was Dan O'Connell, whom you knew — he became a leading figure in international law and held major chairs in that field and sadly died in his fifties. That took me to Cambridge which was something of a turning point in my life.

When was it that you went to Cambridge?

I went to Cambridge I think in 1950 —yes it was 1950 and you will remember that you and I first met there then. I worked my passage in the purser's office on the *Rangitoto*. In the end I spent approximately five years at Cambridge, having largely gone there to work as a research pupil of Professor E C S Wade, who was then a leading figure in constitutional and administrative law. As a result of that work under him I became in 1952 a research fellow of Gonville and Caius College. In the negligence law sense there was a serious risk at one stage that I might have stayed on permanently at Cambridge, which I found extremely attractive.

I think you still are an honorary fellow?

I have more recently become an honorary fellow of Caius; and when I first came back to New Zealand in the mid-1950s I was strictly speaking on leave from the College and was in two minds as to whether to stay here. But partly owing to the death of my father, and for other reasons, I thought that perhaps one should stay here and that I have done.

What type of practice then did you become involved in, in Wellington?

I decided that I would have a shot at practising as a Barrister only.

In those days there wouldn't have been very many in Wellington, would there?

I think, so far as I can recollect, there was none who had started simply as a Barrister at the virtual beginning of a practising career with the proclaimed if hopeful intention of doing that only, as opposed to holding some other position such as in a University. When a law clerk, we were all part-time students in those days, I had the good fortune to work in Chapman Tripp & Co for people such as G G G Watson and W P Shorland. There was some orthodoxy in the thought of going back to that firm if they would have me; but the five years or so at Cambridge had inculcated an instinct for independence and the idea of working in a large firm no longer had quite the old attraction. I had very modest chambers in Woodward Street, which the late Alan Hornblow was kind enough to provide, and I was helped in those early years by two senior Queen's Counsel, both getting towards the end of their careers, namely Sir Wilfred Sim and O C Mazengarb. They used to give me devilling work and the odd junior brief. Other work came in the course of time and the net result was that I ended up by practising for about 17 years as a Barrister only.

And it was in 1964 wasn't it that you took silk?

Yes.

Did that make any substantial difference to the type of briefs you got; did you find it made a great deal of difference?

Taking silk — I doubt it. It probably

came at a sort of logical stage in the course of one's experience in practice. It may have made some difference, as some kinds of work come to a Queen's Counsel simply because that is what he is, but I had after all been a Barrister only for nine years, so in retrospect I wouldn't have regarded it as a marked difference.

What sort of cases did you tend to get, or to specialise in — anything in particular?

At the New Zealand Bar, certainly in those days, it was extremely difficult to specialise, one had to turn one's hand to whatever turned up. I did always have, partly because of fields in which I had worked at Cambridge, when I had done some teaching as well as research, something of a special interest in constitutional and administrative law and tort. While I did get work in those fields to some extent, there was also a variety of other work and much of one's time tended to be occupied in appearing before various tribunals other than the ordinary Courts. Specialisation was really not something which was then a very feasible proposition, but what I did not do very much of at all, indeed very little, was criminal work. At least in terms of time, though, the balance has been more than redressed by a number of years of experience on the High Court and subsequently the Court of Appeal —where we have more than our share of it.

When you were in practice as a Barrister and then later as a silk, you took an active part in Law Society affairs, and I think you were on the Wellington District Law Society for some time.

Yes, I think I rose to the giddy heights of being Vice-President, possibly, of Wellington before I succumbed to judicial appointment. I was one of the Wellington representatives on the New Zealand Law Society Council. Both the Wellington and the New Zealand Councils were full of congenial people whom it was very agreeable to work with. I will abstain from naming them. But probably my main legal activities outside actual practice were first as a member of the Public and Administrative Law Reform Committee. In those days it was doing, and it still is in a different form now, I think quite significant work. It was under the chairmanship then of Dr J L Robson.

Was he the Secretary of Justice?

He was the Secretary of Justice in the Hanan era. That committee was responsible for the creation of the Administrative Division of what is now the High Court, and perhaps more importantly the Judicature Amendment Act 1972 which has proved to be quite a major change at least in the procedural area of Administrative Law. Apart from that committee, through a sequence of coincidences really, it fell to me in the end to edit, with valued help, the New Zealand Law Society's centennial book which we called *Portrait of a Profession* as to which a story may be told in a moment, but . . .

I noticed a book the other day with the same title . . .

Well, it was strange that a year or two later the Law Society in England, which is the Solicitors' body only, produced or commissioned a much more scholarly work than ours with, rather strangely, the same title. When this was mentioned to them they replied by letter to the effect that they hoped it would be accepted that it was such an excellent title that it would have occurred naturally to anyone. That was where the matter rested. However, that task fell to me largely because Ross Gore, who was intended to be the editor and had done a great deal of valuable preliminary research, and who also I should mention was my uncle, became ill and he was unable to carry on with the work. Somebody had to do it, and with the assistance of Peter Cornford and Dick Simpson and the guidance of Guy Smith, who was looking after the financial side, we managed to get something out anyway.

Also during that period you chaired a Commission of Inquiry; what was that one?

It was a Commission of Inquiry into Housing. The late Daniel Riddiford, who was Attorney-General at the time, asked me to do it. Probably that arose because — I mentioned tribunal work before — I did, as many other practitioners and Barristers did in those days and still do I see, quite a lot of Town Planning work and the field of housing was to some extent associated with that. I found the Commission a fascinating experience. It gave one some sort of insight into areas of social problems and the like, which otherwise one might not have had.

And also something of the business world?

Yes. Less of that though. Of course the financing of housing was one aspect of it, but I think what made more of an impression on me was what one learnt of the living conditions of New Zealand citizens. It was ordinary practice at the Bar that brought one most into contact with sections of the business world.

Then in 1972, wasn't it, you were appointed to the Bench?

1972, yes that's correct.

And who was the Chief Justice at that time?

The Chief Justice was Sir Richard Wild. Not long after my own appointment Mr Justice Barry O'Regan was appointed, and we were two of what used to be known as his boundary riders. That is to say we were based in Wellington but we sped around the country by aircraft and I think in the first two or three years, the first two years perhaps, of work in what was then the Supreme Court I used to be away for more than 20 weeks in the year, sitting all round the country.

Did that give you a certain knowledge, at least, of the standard of practitioners throughout the length and breadth of the country?

I think that is so, although of course the New Zealand Bar is fairly homogeneous anyway and one had many friends in practice in other centres.

And how did you find that work? You mentioned before about not having done much in the way of criminal work when you were at the Bar, how did you find the change to the Bench in that area in particular?

Well I think that the most valuable side of it, from the point of view of experience, was presiding over jury trials. I'm sure that no one should, if at all possible, go to the Court of Appeal without experience in summing up to a jury, and equally importantly in sentencing, which is perennially a difficult field where experience must count a good deal.

Well, you would have done some appellate work in the then Supreme Court in respect of appeals from Magistrates?

Oh yes, there is always a certain amount of that work.

When were you actually appointed to the Court of Appeal?

My permanent appointment to the Court of Appeal was in 1976. Before then I had been here de facto for some time. This was partly because Sir Owen Woodhouse was absent in Australia at that time for his work as Royal Commissioner there regarding accident compensation, but my de jure appointment was in 1976.

And, dealing with appeals to the Court Appeal I imagine is somewhat different from dealing with appeals from the Magistrates Court as a Supreme Court Judge.

Yes, especially as it has the collegiate feature. The Court of Appeal didn't seem altogether a strange arena to me because as a Counsel I had appeared there quite often. Before the first separate Court of Appeal, Gresson, North and Cleary. And then their successors, Turner, McCarthy and Richmond, so that at least I knew the form. In the days when I used to do cases before the first Court in particular the form was a good deal tougher I think than we are today. Perhaps, as your smile suggests, this is merely a standard symptom of the aging process, but others who practised in those now quite distant times may share the same impression of that first Court. It was a strong Court in more ways than one.

As far as the Court of Appeal in those days was concerned, what was the size of the Court when you were appointed, was it still three?

It was still three.

Well, who were the Judges when you were appointed?

The two Senior were Sir Clifford Richmond, who was the President, and Sir Owen Woodhouse. My permanent appointment was when the outgoing President Sir Thaddeus McCarthy retired.

Do you have any views on the difference in the nature of the work at appellate, permanent appellate, level as distinct from work at first instance — how have you felt it different?

Obviously one does not have the excitement, if that be the right word, of hearing oral evidence nearly as often. On the other hand one doesn't have what are sometimes the longueurs of jury trials; and I suppose one, generally speaking, has rather more difficult work, although there is plenty of difficult work going to the High Court of course. But the main difference is that one is sitting with at least two other colleagues. There is obviously an art which one has to strive to acquire, however unsuccessfully, of knowing when to compromise one's own opinions in the light of the opinions of others, when to defer, when to stand out, and generally how best to work in with a team.

You mentioned a moment ago that you thought the rigours of appearances before the Court of Appeal were perhaps not quite as tough, perhaps as demanding as they had been. What views do you have, if any, on the standard of presentation of appeals by Counsel?

Yes, well I thought you might ask me that question and it may take a minute or two to reply adequately. I hope you will excuse me if I do so at some little length — is that agreeable to you?

Please do.

In the first place there are excellent Counsel about and I'm sure always will be. Counsel who have the gift, in their oral arguments, of casting a new light on the issue or the facts, singling out the really crucial matters, putting them in an attractive way, seeing the wood and not being, to mix the metaphor, bogged down in the trees. It is interesting to see how Counsel who have these gifts develop as they go on and their field of experience widens, their confidence increases, and one can almost *see* them ultimately getting to the stage when they experience in themselves a sense of power in that, although they may not always succeed in the case, they have the ability to persuade the Court to at least think along certain lines. We are fortunate in having some of those and at all levels, both at the Senior Bar and at other levels. What I'm going on to say in no way derogates from that. But the other side of the coin is that with the much

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greater number of judicial appointments now available in New Zealand, after all there are five Appeal Court Judges, over 20 High Court Judges and almost 100 District Court Judges, the overall standard of the Bar has I think fallen somewhat, and this is aggravated by a development which we in the Court of Appeal have ourselves to accept some responsibility for.

In what way?

It is the deluge of paper. The photocopier and the word processor are among the co-offenders. When I was in practice I used to occasionally write out, and I mean write because it would be in longhand as time and typing facilities were not always available, a very brief sketch or summary of the sort of things I was going to say, and I would occasionally hand this into the Court.

Even in handwritten form?

Yes, even in handwriting, and I'm not sure that occasionally they didn't get their Associates actually to try to type out what they could make of it. Now that's about as far as it went in those days except in very exceptional cases when Counsel did put in something more for some special reason. In this

Court for a good many years now we have required a synopsis, but that has been expanded by many Counsel. Particularly in the bigger cases we get wads of paper, which come in not always at the same time but perhaps at different stages in the argument. Some of these I regret to say tend to ramble on. They tend to spend too much time in stating the obvious and further to go through, unless they can be stopped, a plethora of authorities, including a range of unreported cases at all levels, cases which do not necessarily throw any new thoughts on the subject. Generally speaking there is a tendency to be too prolix. The trees dominate the wood. I think that all of us in the Court of Appeal are concerned about this development and something will have to be done to restrain it unless addicts at the Bar reform voluntarily. I'm a firm believer in the value of oral argument. I can think of numbers of cases in which a few careful and concise but forceful submissions from Counsel have changed my thinking on the subject and sometimes altered the result of a case. Sometimes even a single striking sentence does the trick. I hope we will never lose the benefit of oral argument. We are not now getting the full benefit of it through people putting in a whole lot of written material and then tending to read it to the Court. And what I would like to see, without imposing time limits on Counsel, is some better system of putting an argument, or more thought being given to concise presentation. In writing by all means if they wish — it at least saves notetaking — but speaking succinctly to what they have written rather than reading it to us or ploughing through it. The weight of an argument is definitely not what it actually weighs.

In one way that would be a little like the American Supreme Court which has a very strict speaking time, but they rely overmuch on paper don't they in terms of what you were just saying?

No, I haven't got the American way in mind. As you say it would be too restrictive for us. What I think, if there is an analogy — and it's not a perfect analogy, it would be a nearer analogy — might be a Privy Council procedure, whereby the people exchange written cases in advance. Some Counsel, in their written cases, argue the case fully, others prefer to put it in a more concise fashion. That's largely a matter of taste, but having exchanged their cases in advance they then present oral argument, and that argument does proceed at a reasonable speed. Another disadvantage of what is happening in New Zealand is that the argument gets extremely slow by comparison with English Courts, and it may be Australian Courts, but my experience of them is limited and I would not be dogmatic about them. Certainly by comparison with English Courts, and I've spent a lot of time in English Courts, not just sitting on the Privy Council but much more time I've spent over the years, particularly when younger — well obviously when younger, back in the 1950s — I've spent many hours listening to cases argued in the Law Courts in the Strand, the Court of Appeal in particular, and there is no doubt that usually argument proceeds much more quickly there than it often does in our Court. Incidentally listening in Court to real cases is one of the best kinds of legal education. As a law clerk I indulged in it freely at the expense of my employers. It is a pity that it seems to be less fashionable now.

We have wandered a little bit from the question I started with about the standard of presentation of appeals by Counsel, and I was just wondering if there's anything you'd like to add further to that — the actual difference that there might exist between the way in which Counsel argue and in particular whether you notice any difference on a geographical basis?

There are some geographical traits which manifest themselves in the particular style that Counsel from certain cities have, but those I would regard as interesting even entertaining rather than going to substantial differences.

We won't ask for names!

It is quite fascinating to see how one decade after another of Counsel from a certain city may acquire a certain manner; but broadly speaking I don't think there are substantial differences in quality of argument between the cities. The good man stands out, wherever he comes from, and vice versa.

The country is small enough both in the number of the Bar and in the number of Judges to preserve a certain cohesion.

That is so. I used the expression a good man a moment ago but we must also be at pains to point out that the good woman stands out too. Of course unfortunately there are still fewer good women than good men.

Since your appointment to the Court of Appeal, one of the major changes has been the growth and size of the Court in that there are now five permanent Judges. I was wondering whether you'd have any comment to make on the type of cases coming on for hearing? Are they any different from when you first started in appellate work on a permanent basis?

Yes. I think there have been changes. Before I turn to the subject matter, perhaps a word or two about the volume of the work?

Yes, please.

When the separate Court of Appeal, as it is commonly called, although its statutory origins as a separate Court go back to the 1860s. When it became manned by Judges permanently appointed to the Court — and this operated from the beginning of 1958 — they dealt with something like 100 cases a year civil and criminal and they had three Judges. Now we are dealing with nearer 500 cases. We have moved in numbers to five. It would not be at all surprising if before very long we were increased yet again, although that is a matter of course for the Government. Until 1977, that's to say for roughly the first decade of the separate Court, we managed with three Judges. By 1987 it's not unlikely that the number will have doubled to six and this is simply a product of the great increase in the number of appeals coming forward. Why there is this increase, bearing in mind that the population is virtually static or has been for some years, it is difficult to know.

And also that the negligence action of course has disappeared.

That is true. One explanation is the greater availability of legal aid in criminal cases in particular and also in civil cases, but perhaps it is a reflection in part of a restless society. Also a society which is more conscious of its rights, where individual citizens and pressure groups are more alive to the possibilities of legal remedies, which

in itself in a way is a good thing. At all events there has been this major increase. In terms of numbers there are more criminal cases than civil but that is not reflected in hearing time as criminal cases, particularly the sentence appeals, generally take less time than civil cases. The volume of criminal appeals is such that something may well have to be done to change the system of dealing with them, and we can come back to that in a moment. As regards the subject matter of the cases, you mentioned the disappearance of the negligence action in the field of personal injuries. There is still a very important and developing area of negligence law but that relates essentially to economic matters and other fields outside personal injuries. The main change in the character of the work I think has been that there have been many more cases of the semi-political or public controversy type; and many more cases which have called upon the Court to try, cautiously but nevertheless definitely, to evolve something in the nature of a New Zealand common law, to develop the law in grey areas in a way which seems best suited to the circumstances, environment and nature of this country. What you could call more pretentiously the New Zealand ethos.

To what extent would this have been a conscious development on the part of the Judiciary; and to what extent did it, as it were, grow up and get noticed later and then be further developed?

That is a difficult question. I think everybody, not just the Judiciary but the profession as a whole, perhaps more the Judiciary though than the profession in some ways, is conscious of it now. The consciousness has obviously become more marked. It's present now in a way that it wasn't formerly, but I don't think there has been any sharp change. If you look at some of the judgments of the 1960s and 1970s, for instance by North, Turner, McCarthy, you will find a number in which there was a conscious appreciation of the need to develop a distinctively New Zealand law. One thinks of the *Bognuda* case and the *Jorgensen* case. Earlier too in administrative law one thinks of *Okitu* in 1952.

The Bognuda *case was the one relating to an excavation and right of support wasn't it?*

Yes, tort. Very much a Judge-made field.

In that one an American authority was accepted and adopted as I recall.

You are quite right. We have tended to look a little more widely for our authorities in recent years and we are always glad to have significant Canadian and American cases cited to us as long as it's not overdone. The important thing is to pick out cases which really do contribute something different in their thinking or some particularly clear exposition of the subject rather than just multiplying authorities.

As far as the cases that come before the Court are concerned you are, of course, totally dependent on the decision of Counsel and the advice that they give to their client as to whether an appeal is worthwhile. Is it too impolite a question to ask, do you get a lot of worthless appeals?

The answer is that we will always get some worthless appeals whatever methods are adopted. Unless there were a really Draconian leave requirement, which would have its dangers. To some extent it is possible to control the problem through the legal aid mechanism in that in the criminal field most appeals are legally aided. On the application for legal aid, which under our present practice is separately considered normally by three Judges, if the appeal has obviously no merit at all aid can be refused and is. But there is quite a fine line to be drawn between a hopeless appeal and an appeal that might be just arguable and it is in that area that there is perhaps some room for manoeuvre. I think when I first joined the Court we were inclined to be over generous in the grant of legal aid. We may have hardened a little in our attitude though it is still the case that if any one Judge thinks that there really is a seriously arguable case, aid will be granted.

And is that done on the basis as you just indicated, that one Judge looks at each case, or do whoever is going to sit on the particular appeal . . .

When the file comes in, the application comes in, one Judge goes through the file in some detail and writes a brief report. We even have, and I hope it doesn't sound too dubiously bureaucratic, a form which we actually fill in. This contains the Judge's summary of the matter and his recommendations.

This is just criminal appeals we're talking about?

Yes, legal aid, criminal appeals. This document with the Judge's recommendations is then considered by at least two other Judges and, as I have mentioned before, if they are unanimous, aid is either granted or refused. It also tends to happen that if even one favours the grant of aid it is given. Quite a number of cases are in fact rejected for aid at that level. That doesn't stop the appellant going on if he has his own resources and wishes to do so. We do get an occasional case of that kind, but the great majority of criminal cases come through the grant of legal aid. The growth in criminal work is such that some measures are necessary to alleviate the volume of it. The time of a permanent Court of Appeal is probably not well spent in dealing with quite a number of these criminal appeals, but it must not be overlooked that criminal law is a very important part of the legal system as a whole. I by no means share the view of those who treat it as a sort of poor relation which ought not to be adequately represented for instance in the *New Zealand Law Reports*. In terms of the relationship between the community and the Courts — the function of law in the community — criminal law is of the first importance.

And in terms, I suppose, of its effect on the individual concerned.

Of course. For the accused person criminal law must have an engrossing interest. And therefore I think the permanent Court of Appeal always must have an important role to play in criminal law. It would be shirking its responsibilities if it did not. At the same time, I believe we are not making the best use of judicial resources at the moment and the short-term answer may be, I emphasise *may*, a system whereby one permanent Court of Appeal Judge and two High Court Judges deal with a number of appeals.

This would be with criminal appeals?

Criminal appeals only, yes. Already we have a system which follows the recommendations of the Royal Commission on the Courts some years ago, whereby when the Chief Justice is able to make a High Court Judge available, he sits with us

primarily for the purpose of hearing criminal appeals.

I think he is actually commonly called the Criminal Judge, certainly within the profession as a pun.

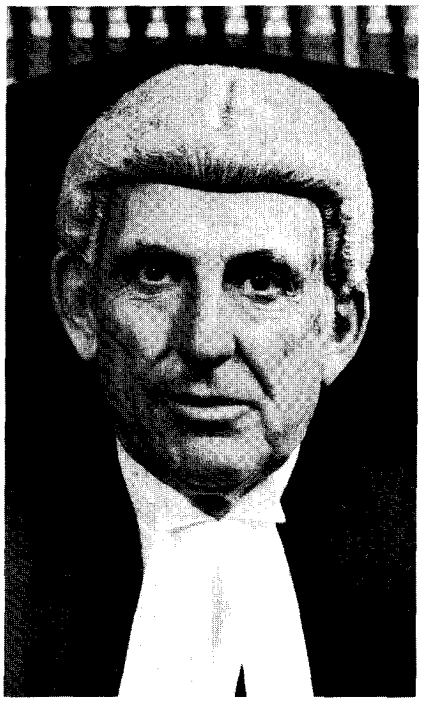
Yes, well it is not an expression that is in much use in our own Court but I'll bear that in mind! It requires only a small change really to expand that to having two High Court Judges and one permanent Court of Appeal Judge. That would have the advantage not only of enlisting the help of the High Court Judges more, and giving them appellate experience, but also preserving the continuity of the knowledge and experience of criminal law and how it operates throughout the country. This is a perspective and knowledge which is inevitably gained by any permanent member of this Court after he has been sitting here for some years. Trial experience also is obviously very valuable, but the perspective that can be acquired through dealing with countless criminal appeals over the years is something the meaning or significance of which should not be overlooked. If we move to this system I envisage that perhaps such a Court, which would be a division of the Court of Appeal, would hear a certain number of appeals in other centres, such as Auckland, Christchurch, Hamilton. The time might well come when the great bulk of criminal appeals could be dealt with in that way, that is to say one permanent Court of Appeal Judge, with the permanent members taking turns, and two High Court Judges. Then looking beyond that it could develop perhaps into a separate Court of Criminal Appeal to which all appeals in criminal cases tried on indictment whether in the District Courts or the High Court should lie, with an ultimate right of appeal to the Court of Appeal but only by leave. That reminds me to say that a requirement of leave is the other standard way of imposing some restriction on hopeless appeals, and thus ensuring that judicial resources are not wasted. In Australia the High Court has moved to the position where, as I understand it, no appeals can go to it except by leave. One would be reluctant — that's either in the civil or criminal field one would be reluctant — to see that introduced into New Zealand at the present stage; but in the long term it seems to me that in the criminal field in particular the situation could well arise when there should be a separate Court of Criminal Appeal, perhaps presided over by the Chief Justice or the Senior Judge of the High Court, with a right of appeal by leave only to the permanent Court of Appeal.

Well, what you're touching on at the moment, of course, relates to the division of work. The normal practice in the civil field at the moment, I understand, is that there are two divisions although on occasion the full Court sits. How is that decision come to? Is it at the request of Counsel or from the Court itself?

The decision whether to sit five or three is one made by the President. The initiative normally comes from the Court itself, although it is possible for Counsel to draw a case especially to the attention of the Registrar. In the past it has been relatively uncommon to sit five. The permanent complement was increased to five in 1979 — but for various reasons five Judges have not always been available. It is true that we have sat in two divisions from time to time, especially in criminal work, but obviously you have to have six Judges to do that and that has not been always possible. We have been very grateful to retired Judges and visiting Criminal Judges as you call them who

Appointment to Court of Appeal:

Mr Justice Casey



The Attorney-General recently announced the appointment of Mr Justice Casey as a permanent member of the Court of Appeal. Mr Justice Casey will fill the vacancy created by the retirement of Sir Owen Woodhouse and the consequent appointment as President of Sir Robin Cooke. The seniority on the Court of Appeal now is Davison CJ, Cooke P, Richardson, McMullin, Somers and Casey JJ.

Mr Justice Casey has in more recent years been sitting in Auckland, and previously he sat in Christchurch. He was appointed to the Bench in 1974. The Judge was Chairman of the Penal Policy Review Committee. The Criminal Justice Act 1985 was based on the report of that Committee.

During the Second World War Mr Justice Casey served with the Royal New Zealand Navy Volunteer Reserve. He was born in Christchurch in 1923, and was educated at St Patrick's College, Wellington and Victoria University of Wellington from which he graduated LLM (Hons). In 1948 the Judge married Stella Wright and they have been blessed with three sons and six daughters.

The Judge was a member of the New Zealand Law Society Council from 1972 to 1974. He became Vice-President of the Auckland District Law Society in 1974 after having served on the District Council since 1968. □

have helped to enable it to be done at times. The availability and experience of Sir Thaddeus McCarthy and Sir Clifford Richmond has been vital in recent years; the work simply could not have been got through without them. Whether you call it divisions or not, the main difficulty with having two Courts of three is that although you perhaps turn over the work more quickly, too much can depend on the precise composition of the Court, and the members of the Court who are not sitting can even lose touch to some extent with what those who are sitting are about.

You mean in a particular case?

In a particular case. It can be impossible or dangerous for someone who doesn't sit on a case to try to contribute anything useful to the solution. You can discuss the case but it is not the same thing as taking part in the hearing. Therefore from time to time when sitting in Courts of three we all occasion some surprise to our colleagues and get some from them. Sometimes the Bar may share that surprise. Still it must be much more difficult in England with 10 Law Lords and about 25 Lords Justices of Appeal.

The surprise at the Bar is always of course by Counsel for the unsuccessful party!

Yes, that's usually right. Yet I can remember occasionally being agreeably surprised by winning after the Judge's unaccountable behaviour at the hearing. From the point of view of obtaining a more uniform approach and ensuring, so far as possible, that all members of the Court contribute and that one has a balanced result, I'm keen on sitting five as often as we reasonably can for significant cases. This year we have already moved in that direction. We have sat five more often this year than we have done previously. It is a trend which I hope will continue although there will still always be many appeals which are sufficiently handled by a Court of three.

As far as the Court of three is concerned I take it this is not by any means a matter of always the same three sitting together. Obviously the Judges have to be divided up in some way so how does that occur?

Well that is one of the jobs that falls to the President in the nature of things.

Just to see the workload is reasonably shared?

Largely for that reason. It is done in practice month by month and one makes sure that each Judge sits approximately the same number of days; you can't do it exactly, one has to make allowances for absences for various reasons, sabbatical leave for instance, going to the Privy Council, some commitment to produce a paper for some conference or other, but generally speaking the work is shared equally. We do not sit in the same groups of three and the rotation must be the responsibility of the President. He has to bear in mind that some members of the Court have particular fields of expertise. Horses for courses comes into it within limits.

Is that true even as between the President and the next senior Judge? I mean is it normal for the next senior Judge to preside as it were with one group and you with the other, or is it not?

Not the same groups. The next senior Judge, Mr Justice Richardson now, will preside if the President is not sitting and from time to time one of the other Judges. The next senior one is Mr Justice McMullin and then Mr Justice Somers and Mr Justice Casey. It is not as though the particular presiding Judge, whether he's the President or any other Judge, has his own team. The composition is constantly changed: at least that is my intention.

I don't think there is any general view in the profession that that is not so, but I just thought it would be of interest to clear it up. You just mentioned the other Judges by name, I was wondering if we could perhaps talk about those for a moment. They all have different personal backgrounds obviously enough, and other distinctions too. What sort of variety of personal backgrounds do the members of the Court have, I mean in the way of age, outside interests and so on?

I think I'm fortunate to be coming to the Presidency at this stage where we have a five-member team which is well balanced and has quite diverse interests both outside the law and to some extent inside the law. You refer to age. The average age of the Court is slightly reduced by the replacement of Mr Justice Woodhouse by Mr Justice Casey, but at 58 it closely corresponds, by coincidence, with the present average age of the High Court of Australia. As to the distinctive interests and experience of our present side, Mr Justice Richardson had varied experience in practice . . .

He was originally from Invercargill wasn't he?

He started in Invercargill with Macalister Brothers, I believe, but in more recent years he was in a substantially commercial practice, one of the larger commercial firms in Wellington. In between times he was in the Crown Law Office, and a Professor at the Victoria University of Wellington. So he combines an academic and a practical background. As to extra-legal activities, he is a collector of paintings so that he adds a cultural cachet as well as a commercial one to the Court. He is also, as is well known, something of a tax specialist although his legal abilities extend well beyond that particular sphere.

And he's maintained his university interest hasn't he, as Chancellor of Victoria University of Wellington?

Chancellor of the Victoria University of Wellington — which I think is an excellent thing. In that respect he is like others, Mr Justice Tompkins for instance, was Chancellor of the University of Waikato, I'm not sure whether he still is. Mr Justice Speight was Chancellor of Auckland.

Well, Mr Justice Richardson is not the only one with a varied background. What of the other Judges?

In order of seniority. Mr Justice McMullin had a wide general experience as Counsel and practitioner including Crown prosecuting experience in Hamilton, though he is basically an Aucklander and indeed his home is still in Auckland. He was appointed to the Supreme Court at a relatively youthful age, had nine years' experience in that Court and he brings to the Court of Appeal valuable all-round qualities. He was Chairman of the Royal Commission on Abortion etc. He probably will not mind my saying that he is interested in the farming side of the New Zealand economy in a practical sense, which is

appropriate for at least one member of a current New Zealand Court of five.

I notice that he sets down in Who's Who *as a recreation, farming. Many farmers of course might feel that it was more than a recreation.*

I think you'd have to ask Mr Justice McMullin himself in which category he claims to fall. While in no way does he sacrifice his judicial time to those other activities, I am aware that they exist to a significant extent.

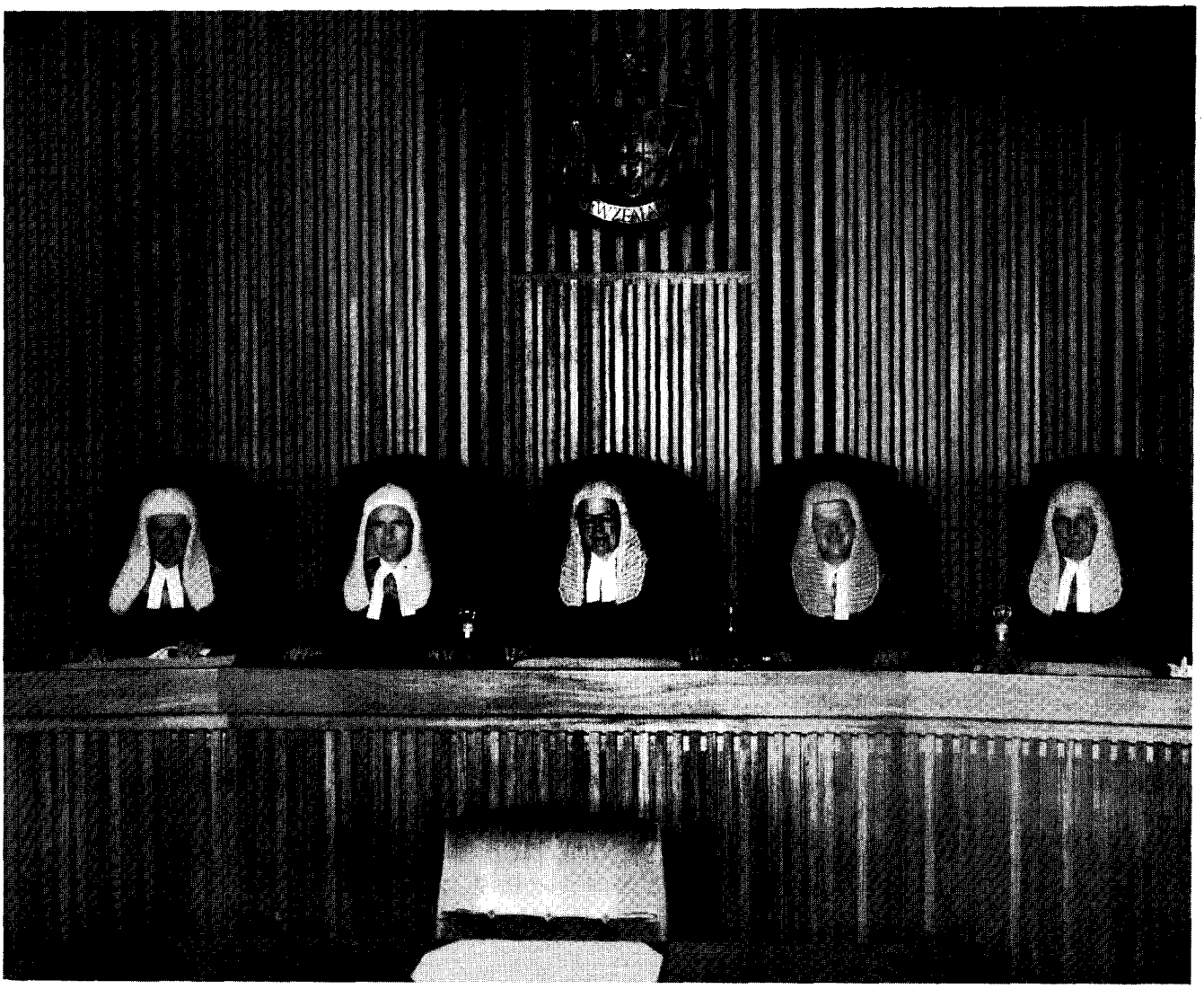
Mr Justice Somers was originally in practice in Christchurch wasn't he?

Yes, and in other ways too he is in the mould of our first President, Sir Kenneth Gresson, who was essentially an equity lawyer from Christchurch with a robust Canterbury outlook. But Gresson was educated at a school in Wanganui, whereas my brother Somers went to school in Christchurch. I think Mr Justice Somers is generally associated in the minds of members of the profession with fields such as equity and property law and he brings a distinctive knowledge of them to us. As well he is probably, of all the celebrated equity Judges over the years — and including the fathers of equity in England — the one most knowledgeable about rhododendrons. He has his home on a suitable property at Kaiapoi, thus giving us geographical balance. Indeed I am the only true Wellingtonian and I am just as fond of Cambridge.

And then there is the new permanent appointee Mr Justice Casey, who has had a rather varied judicial career at least, among other ways, in the geographical sense.

Yes. One of the strengths that Mr Justice Casey brings to us is derived from the fact that he practised in different kinds of communities. He is a Victoria graduate but after starting in the Wellington Public Trust Office he practised in Lower Hutt, Blenheim, Auckland, so he's familiar with the problems of provincial practitioners as well as having been a partner in what used to be Buddle Weir. His all-round capacity and courage as a Judge are well known and I think it is disclosing no secret to say that when he was appointed this year he seemed to all of us, and I know to all the High Court Judges, the obvious person to be appointed at the time. He was a very good hooker for St Pat's Old Boys and we believe that he will add strength to our balanced team also.

You use the phrase balanced team. Do you think that is an important attribute for a Court such as the New Zealand Court of Appeal, that it can have a variety for balance?



Court of Appeal — May 1986

Mr Justice Somers, Mr Justice Richardson, Mr Justice Cooke, President, Mr Justice McMullin, Mr Justice Casey

Yes. I think that is quite crucial. Although there is still the right of appeal, by leave in some cases, to the Privy Council, the fact remains that the Privy Council is so far away and expensive that only a handful of cases go there. For most practical purposes the Court of Appeal does settle the law for New Zealand and it is important that we should have a team of varied backgrounds and interests and that I believe we do have. The result, particularly if a Court of five sits, is that no one person will dominate the Court.

Have all the Judges had experience in the Administrative Division of the High Court, do you recall?

I can't answer that; there is no doubt that all have had the experience of sitting in administrative law cases, because in the ordinary work of the High Court today, as of the Court of Appeal, as of the profession as a whole, administrative law bulks so large that everybody does some of it. Whether they have all been members of the Administrative Division I'm not sure.

There are some other extra-judicial activities that members of the Judiciary are involved in, of course, from time to time. Parole Board, Council of Law Reporting, Rules Committee, that sort of thing. I think all of the Judges, the permanent Judges of the Court of Appeal, would have had some experience in certain of these areas anyway.

Yes. We have just mentioned Mr Justice Casey, who chaired the Penal Policy Review Committee. All of us have served on one or more of the bodies you have mentioned or the like. And Sir Owen Woodhouse is the most striking example, his name will always be associated with accident compensation.

You have now been a Judge for many years both at the Supreme Court, as it was then, level and subsequently at the Court of Appeal level: how would you sum up your experience as a Judge in personal terms — has it been a satisfying time and experience?

This must be in fact the 14th year. In terms of feeling that one is contributing what one can to the community there has been some measure of satisfaction. Mixed of course with periods of concern, because one does have very worrying cases from time to time. I still have intermittent regrets at having become a Judge, in the sense that the independence of the Bar is a rather attractive thing. Whereas in the case of my own father it seems to me obvious that he ought to have been a Judge, perhaps should have taken opportunities which he had of going on the Bench very much earlier than he did. He was altogether a more solid and more sterling citizen than I, and naturally equipped for the judicial role, whereas I'm not, I think, an official or establishment type person. Possibly some evidence of that is that in my 17 years as a Barrister in the capital city I never had a brief from the Crown. But I trust that no prejudice has resulted from that which is apparent in any judgment that I have given. Obviously life on the Bench, not least in the Court of Appeal, is extremely demanding in the time that one has to devote to it, though if our number is increased and when we get on a more even keel, maybe that won't be quite the problem that it has been. I hope not. It is essential to have outside interests, in my own particular case I suppose things like the opera, perhaps I should mention the theatre first because if you were to ask me what I would rather be doing — next to talking to you in this way of course —my preference would be to be at Stratford watching a Shakespeare production.

Not being on the stage itself?

No no, I've no aspirations in that direction and dislike public speaking, but I do love the theatre and opera. As it happens my wife and I are going this very weekend up to Auckland to see what the Mercury Theatre make of *Traviata.*

How did you like Bizet's The Pearl Fishers *which is on in Wellington at present, and I know you went to?*

I thought *The Pearl Fishers* was beautifully done. I hadn't seen it before. It has an almost classically absurd operatic plot, but melodious and very well produced. (Postscript by RBC. Both fine productions but *Traviata* more gripping because of that old fox Verdi.) But I am just as keen on watching rugby and cricket, when sometimes you don't know how it is going to end.

Rugby of course is a game that has become legally as well as politically contentious, with the famous South African tour case of last year.

The comment I would make about that 1985 case is this. There have been extraordinary remarks reported about how unsporting it was for the New Zealand Courts to issue an interim injunction. I even saw somebody referring to a dirty trick. That is something which I completely fail to follow. When this Court held that it was appropriate that members of rugby clubs should at least have the opportunity of challenging the validity of the New Zealand Rugby Council's decision to tour South Africa, one factor in our thinking was that even the Rugby Union ought not to be altogether above the law. When we allowed the action to proceed I think we all thought, I certainly did, that the Rugby Union had at least a good chance of success. What did turn out however, it seems, from reading Mr Justice Casey's judgment, is that the Rugby Union's document gave rise to considerable doubts as to whether the Council had indeed addressed themselves to the best interests of the amateur game in accordance with the rules of the Union. Mr Justice Casey's decision was not brought on appeal to this Court, so I express no view one way or the other on the merits of his decision. But any suggestion that there was something underhand about the Court proceedings seems to me to overlook entirely the actual reasons which led to the grant of the injunction.

Wouldn't it be the case that the propriety of legal rulings and the formality of legal proceedings is something that by and large is not understood either by the media or the general public, who only look at the end result and tend to think that everything else is totally irrelevant?

I couldn't agree with you more about that. Indeed I think it is well illustrated by that particular case. Those who speak about the injunction and in particular complain about it have very rarely actually read the reasons which the Courts have given in the course of the proceedings. One takes great pains, I'm sure Mr Justice Casey did, we certainly did on the occasions when the case was before us, to try to

explain in as clear language as one can find exactly why one is doing something; but the media have a limited amount of space or time and they tend to devote that space or time to reactions to and comments upon a decision rather than the decision itself.

To return to a personal matter. You mentioned the Privy Council as still dealing with some New Zealand cases from time to time. You yourself have sat on the Privy Council on a number of occasions now haven't you?

Yes.

I was just wondering if you found that experience noticeably different from appeal work in the Court of Appeal here in New Zealand, and if so in what way?

As already mentioned, the argument tends to proceed more quickly, depending partly on who is presiding. Another main difference is that on the whole the decisions are reached more quickly. It has been a practice in New Zealand to reserve many judgments. This applies not only in the Court of Appeal, but in the High Court and to some extent in the District Courts. It has been the practice that when judgment is reserved, often it is reserved for quite a long time, occasionally longer than one would wish. Certainly to reserve judgment for a month or two is not at all uncommon in New Zealand. In the Privy Council, although judgment is more often than not reserved, the actual decision is arrived at very soon after the argument ends, in that the Counsel retire from the Chamber . . .

Sorry, just to interrupt you, but that's the other way round from the practice here isn't it, in that there Counsel retire and the Judges remain?

. . . yes in the Privy Council that is so. Then in turn each of the members of the Board, commonly a Board of five, gives his opinion, starting wth the junior; the numbers are added up and that is the decision except in the very rarest of cases. Somebody is fastened on then to write the judgment or the majority judgment, and the writing may take some time. The draft is circulated, but basically in the overwhelming majority of cases the decision is taken I suppose within three-quarters of an hour or so of the actual conclusion of the argument. The argument may have taken some days, often it does, so one has had plenty of opportunity to reflect during the course of the case. At the end, immediately the argument is finished one is expected to give one's opinion, not with the formality of an oral judgment but with reasons, so that whoever is ultimately given the task of actually writing the judgment can collate the various views. If there is to be no dissent he tries to see that they are all fairly represented in the advice to her Majesty which ultimately emerges. One result of that, which it is as well for someone reading a Privy Council judgment to bear in mind, is that if there is any apparent lack of complete consistency in the reasoning it may well be due to the collegiate or compromise nature of the whole process. That is the main difference.

Is that a good thing or a bad thing?

I'm not sure that the Privy Council method doesn't have very real advantages. It causes the Judge to concentrate, knowing that he has got to give a reasoned opinion as soon as the argument finishes. It means that you tend to make quite sure that you understand the arguments and you look into the cases that are cited as you go along. It also follows that you do less research of your own on a case. If it is adequately argued that is a good thing. Whether that would be feasible in New Zealand I'm not so sure. A lot depends on how compact and well put together the arguments are. Also I have found when writing Privy Council judgments, as has been required occasionally, that some New Zealand habits die hard, in that one does quite often have the temptation to do some reading outside the range of materials which Counsel have cited. That entails a certain amount of travelling about London, as the library in Downing Street is distinctly limited.

What about the variety of cases that come before the Privy Council? Were they all that different or are they basically similar, even though they come from Jamaica, Malaysia and wherever else? Do they still tend to raise the same sort of basic legal issues?

Yes I think that the broad legal issues are very similar wherever the appeal originates. It is rather striking, and you can find this somewhere in *Portrait of a Profession*, that the earlier Privy Council judgments written by New Zealand Judges tended to be concerned with esoteric subjects such as the legal personality of a Hindu idol . . .

That was one of Sir Robert Stout's wasn't it?

That was Sir Robert Stout, and Sir Kenneth Gresson gave judgments about the Mohammedan law of gifts and the use of Sinhalese in trials in Ceylon. But it hasn't fallen to my lot at all events to delve into those sorts of fields. The fields that I have been concerned with in Privy Council judgments have been relatively familiar.

When you were talking about the increase in numbers of the Court earlier on, we need to bear in mind of course that ex officio the Chief Justice is a member but doesn't normally sit.

That is so. He doesn't normally sit and that has been increasingly the case. When I first joined the Court Sir Richard Wild sat occasionally but more and more rarely as the years went on. I sat with him, I suppose, in not more than half a dozen cases altogether. The point is that with the great increase in litigation which we have already discussed the man who is running the High Court has his hands full. Peering into the future, I suppose it would be more accurate or trendier to say that the person will have his or her hands full. At all events the result is that Sir Ronald Davison for instance very rarely sits with us, and he couldn't be expected to do so more often, with his responsibilities. The overall increase in judicial work at all levels is one of the reasons why it has been necessary to increase the permanent membership of the Court. And generally speaking it has been found all over the common law world best that appellate work be done by full-time appellate Judges. This is because everything becomes more complex and more specialisation is necessary.

Is there any final comment you would like to make?

If you don't mind my finishing with something trite, New Zealand is no longer in the colonial or the dominion stage. With a strong and hard-working team of five full-time appeal Judges, and possibly more, I should hope that we can live up to our responsibilities. □

Correspondence

Dear Sir,

re: In defence of offensive weapons

I was pleased to read the article by Don Mathias on offensive weapons ([1986] NZLJ 70) which has to a large extent summarised a growing area of case law and gathered together useful international case references. However as a provincial practitioner I would question the availability of self-defence to a charge under s 202A(4)(a). There may be situations in the more cosmopolitan atmosphere of Auckland where s 48 of the Crimes Act would protect a defendant if he or she could convince a Judge that it was reasonable (in the circumstances as that defendant believed them to be) to be armed in a public place. Presumably there would need to be an immediate threat to the defendant causing that defendant to arm him or herself; the weapon would have to be readily available and have been carried around for some other purpose beforehand. I would respectfully submit that the actions of a defendant in going home and then returning armed to a public place would not be considered reasonable.

While the issue of immediate danger has not been put to the test as such south of the Bombay Hills, two decisions by Mr Justice Bisson in the Hamilton High Court have precluded the carriage of "defensive" weapons in a public place. The first was *Smith v Police* (High Court, Hamilton, Bisson J, M 176/81) where the appellant was carrying a length of motorcycle chain while hitchhiking to the Sweetwaters Festival at Ngaruawahia. When questioned by the police the appellant said he (the constable) would probably have carried something just like it if he had lived where the appellant had lived. While he gave other explanations for the chain he admitted in cross-examination that he used it for protection. The District Court Judge accepted that the chain was intended for use to cause bodily injury and rejected the appellant's other explanations on the grounds of credibility. *Waenga v Police* (High Court, Auckland, Barker J, M1681/79) was distinguished because there self protection was not the dominant purpose of the weapon – in that case a heavy belt.

Interestingly enough *Smith's* case was not discussed in *Burnard v Police* [1986] BCL 962 a year later although Mr Justice Bisson arrived at a similar decision. In the latter case the appellant had a lock-knife attached to his belt while he was driving a vehicle which had apparently been used as a getaway car following a relatively minor scuffle outside a hotel. The appellant was questioned about his knife by two constables; to the first he said he used it mainly for fixing his motorcycle and cutting wire, but to the second he described the knife as his "defensive weapon". The second police constable said (at p 3):

> I considered he meant he feels he may be in a position to use it at some time for defence or what he considers as defence.

The appellant's evidence about his intention was in conflict with both constables' evidence and the District Court Judge accepted the evidence of the constables against that of the evidence given by the appellant. A number of New Zealand and Australian cases were considered, among them *Hesson v Strong* (High Court, Christchurch, MacArthur J, M91/70) which was distinguished because in that case the appellant had demonstrated that in self-defence he intended to use a knife only as a threat and not to cause bodily injury. In the instant case the appellant accepted in cross-examination that the knife "could be used as a weapon" and this reference was enough in Mr Justice Bisson's view to bring it within the ambit of s 202A(4)(a); and the mere fact it was described as a "defensive weapon" did not save the appellant. He said (at p 17):

> Persons carrying a so-called defensive weapon may be more ready to provoke or to get into a fight and then resort to their weapon to inflict injury to overcome or escape from a person they regard as an assailant. This kind of situation which a person has with him in a public place an "offensive weapon", whether for use in attack or defence, without lawful authority or reasonable excuse is contrary to the public interest and s 202A is intended to prevent it.
>
> To conclude an article is nonetheless an offensive weapon under s 202A(1) when the intention to use it for the purpose of causing bodily injury is only in self-defence.

This is my view negates any recourse to self-defence unless a defendant can convince a Judge at first instance that he or she would only use a weapon as a threat but not with any intention to cause bodily injury. I would welcome a reply from Dr Mathias or any other practitioner on how one could successfully apply s 48 of the Crimes Act to a charge under s 202A(4)(a) in the light of these two decisions.

C J Tennet
Hamilton

1986 Butterworths Travel Award

Mr Rex G Forrester is one of the recipients of the 1986 Butterworths Travel Award. Mr Forrester is an honours graduate of Canterbury University, having studied both Law and Philosophy.

He won a Tapp scholarship to Gonville and Caius College, Cambridge, where he is at present studying for a Masters degree, concentrating on judicial review, restitution, the conflict of laws, and civil liberties.

This one-year course is proving very relevant to New Zealand, as the faculty is geared to its large proportion of Commonwealth students, rather than confining itself to English law as practised in England.

Mr Forrester is also appreciating life in Cambridge, with its beautiful surroundings, ancient traditions, and the unique sense of community created by the collegiate system.

He plans to return to New Zealand after his year in Cambridge to be formally admitted to the Bar, and to practice in Christchurch. □