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# Parents, rights and responsibilities

We all know there is a great difference between the child's world and that of an adult. This often seems to be a cause of the vexations as well as the joys of parenthood. It is the period of change from childhood to adulthood that is commonly recognised as a period of great difficulty both physically and emotionally; and consequently it is also a period of difficulty for parents in adapting to the needs of those in their care and for whom they are responsible.

The great difference between being a child and being a teenager, a sort of quasi-adult, was well described by Charles Lamb in his delightful essay *My First Play*. He described the occasion, which happened when he was six; and then there followed about ten years when he did not visit a theatre. He went back when he was 16, and he wrote of that event:

> I expected the same feelings to come again with the same occasion. But we differ from ourselves less at sixty and sixteen, than the latter does from six. In that interval what had I not lost! At the first period I knew nothing, understood nothing, discriminated nothing. I felt all, loved all, wondered all – "Was nourished, I could not tell how." I had left the temple a devotee, and was returned a rationalist. The same things were there materially; but the emblem, the reference, was gone.

It is in that sentence that "we differ from ourselves less at sixty and sixteen than the latter does from six" that can be found the crux of the social difficulty that the House of Lords had to consider as a legal problem in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

The case has already been discussed in a lengthy article by W R Atkin at [1986] NZLJ 90, and in a reprint of an article by "Richard Roe" from the *Solicitors Journal* published at [1986] NZLJ 94. It is not intended to cover the same ground again, but merely to note some additional comment that the case has caused in England and Australia.

The issue in the *Gillick* case was simply stated by Lord Fraser at the beginning of his judgment in these terms:

> the main question in this appeal is whether a doctor can lawfully prescribe contraception for a girl under 16 years of age without the consent of her parents. The second appellant, the Department of Health and Social Security (the DHSS) maintains that a doctor can do so. The respondent, Mrs Gillick, maintains that he cannot.

The argument before the Courts was based on two principles. The first was that a doctor prescribing contraception for a girl under 16 is thereby facilitating or encouraging her to have sexual intercourse, which constitutes an offence on the part of the male partner. Secondly, it was argued, the giving of such advice without the consent or knowledge of the girl's parents was unlawful as being inconsistent with parental rights.

As to the first argument the majority decision of the Law Lords in reversing a unanimous Court of Appeal, can be said to be in line with the statutory provisions in New Zealand of s 3 of the Contraception, Sterilisation, and Abortion Act 1977, although the relationship of that section to ss 134 and 66 of the Crimes Act 1961 is perhaps open to argument. It seems most unlikely, however, in view of the public policy apparently laid down in s 3 of the Contraception, Sterilisation and Abortion Act 1977 that the issue of being a party to the crime could arise here.

The second issue of the consent or knowledge of the parents and of their rights is a different matter.

In his article at [1986] NZLJ 90 Mr Atkin puts forward the view that the *Gillick* decision is relevant to the New Zealand situation. He argues that the decision applies in New Zealand and that it has profound implications for the relationship between parents and children. Mr Atkin's contention that it is a significant decision in the field of family law is supported by a consideration of a number of notes and articles that have been published since the decision was reached.

Glanville Williams wrote two articles in the *New Law Journal* at [1985] NLJ 1156 and [1985] NLJ 1179. He can be said to have supported the result reached by the majority of the Law Lords on the criminal liability issue; but he was rather scathing and concerned about the method by which the decision was reached. Glanville

Williams would seem to have seen the "parental right" argument as an irrelevance – which is appropriate for one whose speciality is in the field of criminal law.

He is particularly harsh on the two leading judgments of Lord Fraser and Lord Scarman. His final conclusion is that

> for all the regrettable and unnecessary obscurities of the lords' pronouncements, the law is clear; and the decision is probably to be read as a decisive declaration of the doctor's non-liability.

In a case note in *The Law Quarterly Review* (1986) 102 LQR 4 John Eekelaar looks rather at the issues of rights as between parent and child. He finds the judgments of Lord Fraser and Lord Scarman somewhat difficult to follow. John Eekelaar described the different views of the Court of Appeal and of the House of Lords as follows:

> The Court of Appeal had approached the question by attempting to ascertain the scope of parental rights. Having decided that these remained undiminished, in law, until a child reached majority (or 16 in the case of medical matters, through the operation of the Family Law Reform Act 1969, s 8), the majority of that Court concluded that a child who fell under such parental authority had no independent capacity to consent to acts within the scope of that authority. Unless the parent consented, therefore, such acts could amount to a tort against the child. In the House of Lords, Lord Scarman and Lord Fraser (with each of whom Lord Bridge agreed) reasoned from the opposite direction. In their view, a child acquired capacity to have lawful dealings even if within its minority provided it had the requisite understanding and maturity to enter the transaction. This was a question of fact in each case. Lord Scarman concluded from that, that parental rights over the child "terminated" when the child acquired that capacity. Whether Lord Fraser made the same deduction from the premise is less clear.

Eekelaar then goes on to look at analogous situations in the law of marriage, of contract in respect of education, and of seduction. He then asks:

> What, then, are the rights of a parent regarding transactions of a child who has sufficient capacity? Lord Scarman is explicit in asserting that he has none. It is probable that this, too, is the result of Lord Fraser's speech, but it is less certain. Lord Fraser refers favourably to *Hewer v Bryant* [1970] 1 QB 357, 369, where Lord Denning MR described the parental right as "a dwindling right which the Courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice". But Lord Denning also said that he thought that "the legal right of a parent to the custody of a child ends at the 18th birthday". It is possible that he was simply pointing to the fact that Courts are reluctant to enforce parental rights contrary to the wishes of an older child, not asserting that the right itself disappeared before the child reached majority.

It would seem, in John Eekelaar's view that there are two quite different interpretations possible of Lord Fraser's speech. The first is that a parent retains a right of control over the child's dealings that can only be disregarded if it is in the better interests of the child to do so. Alternatively, Lord Fraser may have been dealing with parental rights only within the restricted ambit of medical treatment. This would appear to be so and is strengthened by his references to the doctor who disregarded the wishes of parents as a matter of inconvenience, being expected to be disciplined by the appropriate medical professional body.

John Eekelaar goes on to look at some of the implications of the decision if it is to be regarded as being of general application to the relationship of children to parents and indeed to adults in general.

> Whether parental rights now terminate when a minor child acquires sufficient capacity or whether they persist, albeit in a state of potential rather than of derogatory force while the child remains a minor, is of great importance. If the former is the situation, the legal position of children (with the requisite capacity) is immensely strengthened *vis-a-vis* any person or body holding parental rights with respect to them. It would be hard, for example, to see on what legal basis such a parent or body could dictate to the child the place where he should live. Suppose the parent were to resort to the wardship jurisdiction to uphold his position. Even if the Court agreed that the parent's view was in the child's best interests, it could not enforce it *qua* parental right, because there is none. Might it be enforced as part of the Court's inherent powers to act in a child's best interests? Technically, no doubt, it may. But there would be a very strong objection to doing this. How can the Crown, as *parens patriae*, claim a right to intervene in the lives of minor children which it denies to those children's parents? Thus viewed, the decision has opened up a potential fissure between the rights of parents and of the state (acting within the wardship jurisdiction). Within the spirit of the majority decision in *Gillick*, there is only one proper solution to the problem. This is for the wardship jurisdiction substantially to re-orient its approach in cases involving older children. Instead of directing its primary endeavour to ascertaining what is in the child's best interests, merely *having regard* to the child's wishes when implementing its decision, the Court now should first decide whether the child has sufficient capacity to make its own decision. If it has such capacity, then *the child's decision should determine the matter*, whether or not the Court thinks this is in its best interest.

Again, of course, the situation in New Zealand concerning the wishes of the child is covered by statute. In s 23(2) of the Guardianship Act 1968 not only is the welfare of the child paramount in custody and access cases, but the Court is obliged to take account of the wishes of the child, although only to the extent that the Court thinks fit. Wardship may be argued to raise other issues, but there should normally at least be some compatibility between various jurisdictions.

The *Gillick* case is not a simple one in its implications. John Eekelaar concludes on a rather unsure note both as to the true meaning of the decision and what it might mean for the future. He writes:

> Even if the result enhances the legal status of children

against the adult world, it must be tempered with realism. Both Lord Scarman and Lord Fraser stressed that full capacity was no simple matter. There will undoubtedly be a temptation to believe that unless a child takes the same view of its interests as an adult (or a Court) holds, it falls short of maturity. But how many adults act sensibly, especially in sexual matters? In this respect, there is virtue in a fixed age, below which a child is subject to parental direction, at least if a Court agrees with the parent's assessment of the child's interests. Such a position would not disable a child, who has sufficient capacity, from supplying sufficient consent to enter legal relations, but would provide a general supervisory power over the exercise of these relations. By linking parental rights to the question of a child's capacity (if this is indeed the majority view), the Courts may be drawn into determining almost unassessable issues of evaluation of the maturity of individuals. But perhaps that is the right course. The decision may be laying the foundations for a thorough re-appraisal of the public perception of the relationships between the generations appropriate to the approaching twenty-first century.

In a subsequent article in the *New Law Journal* [1986] NLJ 184 John Eekelaar took his analysis of the case much further. In a radical deduction from the Lords' decision he puts forward the view that custody, as such, should cease to be a legal category. He looks at the decision in *Re D W* (1983) 14 Family Law 17. In that case the Court transferred a 10-year old boy from his step-mother to his natural mother, against the boy's wishes and despite what the Court referred to as the boy's maturity. This was done on the basis that the Judge thought it would be better for him. Eekelaar comments:

> It is hard to see how such reasoning could be sustained after *Gillick*. The child, it would seem, had sufficient capacity to determine where he should live. A custody order could not transfer rights which no longer existed.

It is always a temptation to overemphasise a particular development in the law. If Eekelaar's views of the implications of the *Gillick* decision are correct then it is a case with truly revolutionary results. What Lord Scarman and Lord Fraser can be interpreted as saying is that parents have absolute duties to children in their care but no responsibility for them because outside agencies and the Courts *must* act in accordance with the express wishes of a child. Is it another case of all care but no responsibility?

John Eekelaar sums up his views on the question of custody, and presumably access, by looking at the form of the order a Court could be expected to make.

> Finally, once a child's decision has been ascertained, what order should the Court make? A custody order seems inappropriate since, as regards the right to possess, this achieves nothing. In so far as parental rights may survive in other areas (if any) in which the child has not acquired capacity, each parent continues to hold them. Unless, therefore, there are special reasons for wishing to *deprive* the absent parent of any such rights, it is hard to see the point in making a custody order. However, an order giving "care and control" to the parent with whom the child wishes to live may be useful, partly as a means of indicating how the dispute was resolved, but also to point up the fact that the parent with whom the child will now be living has day-to-day duties to care for the child.

In conclusion, attention is drawn to two further articles on the case. Susan Maidment at [1986] NLJ 233 takes the preceding argument of John Eekelaar one step further and argues that the child's wishes in effect are going to determine the financial arrangements between the parties in divorce proceedings. Susan Maidment is the author of the lengthy article in the *Cambridge Law Journal* [1981] CLJ 135 under the title "The Fragmentation of Parental Rights". She described the legal situation of parental rights at that time as being one of confusion. In view of what happened in the *Gillick* case her conclusion has a certain irony. She wrote:

> Countless commentators have called for a reassessment of parental rights. The vagaries of litigation are inadequate for the comprehensive review of the law that is so clearly timely. One must look to the legislators to grasp the nettle of a complete statutory codification of this area of the law.

In Australia at (1986) 60 ALJ 232 there is a case note by Shirley Rawson who provides a rather more restrictive interpretation of the decision than John Eekelaar. She sees it as referring to exceptional circumstances rather than being a new general principle. She writes:

> The relevance of the *Gillick* decision to Australia would probably be that doctors will continue to give contraceptive and abortion advice and/or treatment as directed by the appropriate authorities without fear of legal challenge from parents or guardians as long as they act responsibly in *exceptional* [author's emphasis] circumstances. It is clear from the statements of the majority Law Lords that the Courts, legislatures or the parents are only justified in prescribing controls which are for the child's protection or for the protection of the community as a whole, an idea espoused by John Stuart Mill in his essay *On Liberty*. However, the actual extent of the permissible intrusion by the Courts, legislatures or parents will continue to be a matter requiring further discussion and may result in the acceptance, as a matter of necessity, of the view that no firm effective rules can be laid down in this domain. In the United Kingdom, it would seem from recent press reports that former medical guidelines have been revised as a consequence of the pronouncements in the speeches of the majority Law Lords in the *Gillick* appeal.

Lord Atkin, in a celebrated passage in *Donaghue v Stevenson* said that the Biblical injunction to love your neighbour becomes in law that you must not injure your neighbour. The message of *Gillick*, at least as understood by John Eekelaar, might appear to be that the Biblical injunction of the Decalogue to honour your father and your mother becomes in the common law that neither children, doctors nor anyone else need take any notice of the old fogeys.

**P J Downey**

# Case and Comment

## Statutory interpretation and extrinsic materials in the Court of Appeal

*The cases*

The question of what reference can, and should be, made to extrinsic materials in the interpretation of statutes has been much discussed in recent years. In a note in the April issue of this *Journal*, the writer noted signs that our Courts may be readier now than they once were to refer to committee reports which preceded the legislation in question. In two decisions the Court of Appeal go a stage further, and refer to ministerial statements in the House of Representatives as an aid to interpretation. Once upon a time that would have been regarded as unorthodox to say the least. *Howley v Lawrence Publishing Co Ltd* (CA 77/84, 1 May 1986) is the less important of the two cases in this regard. It concerned the interpretation of the word "indecent" in the Indecent Publications Act 1963. Woodhouse P, saying that the 1963 Act was intended to liberalise some of the pre-existing restrictions on publishing, noted that on introducing the Bill in 1963 "the Minister of Justice referred to earlier remarks of his predecessor, when moving the second reading of the Indecent Publications Bill of 1910, to the effect that 'any proposed legislation which trenches, as this Bill admittedly does, upon the liberty of the press and the liberty of the subject demands from members of the legislature the most careful attention and the most jealous examination'." It may be said that this question was not of direct or specific assistance in the interpretation of the provision in question; nevertheless it was one of the factors which persuaded His Honour that the words "injurious to the public good" in the definition of "indecent" were inserted with the purpose of avoiding undue censorship.

The other case, *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] BCL 561, involves a much more obvious and significant use of a ministerial speech (and indeed of other extrinsic materials also). The case decided two main points: the first that Marac Life bonds are policies of life insurance, and second that the difference between the premium paid and the amount received by the policyholder is not "interest" within the definition of that word inserted in the Income Tax Act 1976 by the 1983 Amendment. In deciding the second of these points, all members of the five-man Court derived assistance from the Financial Statement presented by the Minister of Finance in moving the second reading of the Appropriation Bill in the House of Representatives in July 1983. Their Honours would not doubt have reached the same decision had their attention been confined to the statute in question read against the background of the common law and of other statutes on this branch of the law: indeed Cooke J noted that "the inference arising from the statutes themselves in *confirmed*" by the Minister's statement. But there is no doubt that that statement was relied on to support that inference. Cooke J stated that:

> in my view it would be unduly technical to ignore such an aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act.

All the other members of the Court made reference to the ministerial statement, Richardson J perhaps placing least reliance on it. McMullin J referred both to that statement and to a post-Act Public Information Bulletin issued by the Inland Revenue Department, and found it significant that in neither of them was there anything to suggest that the 1983 amendment was intended to catch the proceeds of life assurance policies.

> The Ministerial speech and the departmental bulletin may not aid Marac directly in the interpretation of the amendment because they make no specific reference to the exemption of the proceeds of life insurance policies, but they do assist it indirectly because neither of them contains a hint that the proceeds of insurance policies are intended to be caught by the new provision.

Somers J thought that the immediate target of the 1983 Amendment was finance arrangements involving a discount, or a discount with interest. He found that the Minister's statement, from which he quoted ten lines, supported that view.

Casey J said that the commercial and taxation background of the Amendment "demonstrated by the contemporary statements of the Minister and the Commissioner" persuaded him that they were enacted to catch money-market transactions.

In this matter the case goes a long way. Perhaps the Financial Statement, an integral part of the Budget which is published as a separate document as well as in *Hansard*, is in a different position from other ministerial speeches which are to be found only in *Hansard*. Perhaps, it might be said, the Financial Statement is more analogous to a committee report of the kind to which the Courts have

made increasing reference in recent years. But that argument is not entirely convincing. The Financial Statement is read in Parliament, and is an integral part of a debate on a Bill. As such, it is not much different from any other speech specially prepared for a Minister in moving the introduction, or second reading, of a Bill. *Marac* is likely to open the way to increasing attempts by counsel to cite *Hansard* to the Courts.

Of little less significance is the reference by members of the Court to the Inland Revenue Department's Public Information Bulletin. The older books on interpretation regard notes on an Act by a government department as inadmissible for purposes of construction. (See for instance the very strong statement in *Craies on Statute Law*, 7 ed, 1971, at 131.)

*Previous Standing of* Hansard

Until very recently it had always been supposed that the position in New Zealand with regard to the admissibility of *Hansard* to construe statutes was the same as in England. The English position is fairly clear: resort to *Hansard* is not permitted. The most recent authoritative statements are to be found in the House of Lords in *Davis v Johnson* [1979] AC 264 and *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191. In the latter, Lord Diplock observed that "the rule that recourse to *Hansard* is not permitted . . . is one which it is the duty of counsel to serve in the conduct of their clients' cases before any English Court of justice". That being so, he said, it was quite improper for a Judge to refer to it. No doubt there has been the occasional aberrant decision, and no doubt also Judges have occasionally expressed a wish that the rule was not as strict as it appears to be; but however one describes it, rule of practice or rule of law, there is no doubting its force. It would seem to be unaffected by the resolution of the House of Commons in 1980 permitting citation of *Hansard* without permission. It is perhaps a matter of surprise that there seems never to have been extended judicial discussion of the rule in New Zealand. However it has undoubtedly been accepted in the past that the position here is the same as in England, although, as in that country, one can find the occasional decision which arguably has departed from it (eg *Monk v Mowlem* [1933] NZLR 1255 at 1256; *Re AB* (1905) 25 NZLR 299 at 299; *Police v Thomas* [1977] 1 NZLR 109 at 119). The rule, being itself Court-created, can presumably be changed or abandoned by the Courts. (Indeed what real sanction is there for non-observance of it?) If *Marac*, and indeed *Howley*, do signal a change in the rule, they suggest that the Courts are making that change in virtual silence, for the desirability of departing from the old position is not really discussed in either of them. In *Marac* Cooke J observed simply that "it would be unduly technical to ignore such an aid"; and McMullin J referred to several Australian cases where "resort has been made to ministerial speeches, as reported in *Hansard*, to ascertain what mischief it is that a statute or statutory amendment seeks to remedy". Only after a number of single instances will we know whether there has been any truly significant change in practice, and the extent of it.

*Is change desirable?*

Many reasons have been advanced over the years for the rule that *Hansard* may not be referred to interpret a statute. Some of these reasons are theoretical, and smack of an approach to interpretation which is outdated today. Chief among them is the notion that what matters in statutory interpretation (as indeed in the interpretation of other documents) is what the words of the statute *mean*, not what their framers *meant* them to mean; to that extent actual intentions of ministers, parliaments, or even draftsmen are irrelevant. That view of the interpreter's function goes hand-in-hand with the parol evidence rule which excludes much extrinsic evidence of intent; the rule that parliamentary debate is inadmissible to aid the constuction process is clearly analogous to the rules that evidence of prior negotiations is inadmissible to construe a contract, and that a testator's statements of intent are inadmissible to construe a will.

But the parol evidence rule is much weaker in all respects now than it used to be, and the view of interpretation which it presupposes (that in all cases one can divine a single meaning from the words of a document without, as Thayer said, ever raising one's eyes from it) is obviously insupportable. Once it is acknowledged that the words of a document, and in particular a statute, are often unclear as they stand, and once it is admitted (as s 5(j) of the Acts Interpretation Act 1924 requires) that the Court's task in statutory interpretation is to give effect to the intent and purpose of Parliament, this particular objection to the admission of *Hansard* recedes.

A type of separation-of-powers argument has also been used to justify the old rule: Parliament makes the law, the Courts alone interpret it.

> The legislation is given legal effect on subjects by virtue of judicial decision, and it is the function of Courts to say what the application of words used to particular cases or individuals is to be. This power which has been devolved on the Judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law; and it would be a degradation of that process if the Courts were to be merely a reflecting mirror of what some other interpretation agency might say. (*Black-Clauson v Papierweke Weldhof-Aschaffenburg AG* [1955] AC 591 at 629 per Lord Diplock.)

But one suspects that justification for the rule dates back to a time when the Courts were astute to mould statutes to their own conception of justice, which in many cases meant giving them a very strict construction. While that can still happen with respect to certain statutes which are seen as endangering civil liberties, it is true that these days Parliament and the Courts are normally seen to work in co-operation rather than in opposition. In that state of things, a knowledge of Parliament's true intent (as derivable perhaps from *Hansard*) is at least useful.

A further argument is sometimes constructed around Art 9 of the Bill of Rights 1688, which provides that debates in Parliament are not to be questioned in any Court. As a consequence, it has apparently been

regarded as a breach of privilege (in both England and New Zealand) for *Hansard* to be tendered to a Court without the permission of the House of Parliament concerned. However this rule does not forbid the use of *Hansard* in the construction of statutes: it merely provides the procedure to be followed if *Hansard* is to be cited for any purpose whatever, and it is understood that on the occasions when permission has been sought it has been readily granted. In any event, the English House of Commons resolved in 1980 to waive this requirement of permission. That resolution seems to have made no difference to the English practice in statutory construction. The Bill of Rights argument thus seems ill-founded. (See Miers, 1983 Statute LR 98 and McGee, *Parliamentary Practice in New Zealand* (1985), 429-431.)

These theoretical objections thus carry little conviction today. The principal objections to the use of *Hansard* today have a more practical orientation. They are, *first,* that laymen rely on statutes as well as lawyers, and that they are entitled to regulate their conduct on the basis of the meaning of the statutory words as they stand without recourse to extrinsic documents. That is not a negligible argument, and it would be very unfortunate if *Hansard* were ever to be used to contradict the clear meaning of words in a statute. In the *Marac* case Cooke J acknowledged this. He said that "a Governmental statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it". But this argument only has validity if the statutory words are clear, as normally they are; indeed in a large number of cases they are too clear to merit litigation at all. But if the statutory words are unclear, so that the reader has no sure basis for reliance on one particular interpretation of them, is there any reason why *Hansard should not be referred to if it can clear up the ambiguity?*

*Secondly,* it is argued, *Hansard* will often be unhelpful. That, unfortunately, is probably true simply because the point before the Court will not have been considered. If it ever became the position that *Hansard* could be freely cited in Court, lawyers, to be safe, would have to make long searches of parliamentary debates. In the majority of cases it may well be that that search would yield nothing of value. Courts would no doubt be astute to curtail argument which relied on *Hansard* without producing any real substance. Just occasionally, however, there may be some gold among the dross.

*Thirdly, Hansard* will often be unreliable, for many speeches express the personal views of individual members. That is no doubt true of much of the debates. But a Minister's speeches, which are normally prepared for him by his department, usually contain authoritative statements of the purposes of the legislation, and the report of the Chairman of a Select Committee when the Bill is reported back often contains valuable indications of why the Bill has been amended in various ways. This writer, and, one imagines, many lawyers, often gain sustenance by privately referring to these speeches. One hopes that the knowledge that such speeches could be referred to in Court would not induce the writers of them to tailor them with that in mind.

*Fourthly,* reference to *Hansard* (and other documents) can unnecessarily prolong a hearing. That is also true, and Courts will need to be rigorous in controlling arguments which seem to be getting nowhere. By the same token, however, if a reference to *Hansard* provided clear evidence of Parliament's intent, it might in fact shorten proceedings.

*Fifthly, Hansard* (and other extrinsic documents such as committee reports) are not as readily available as the statutes themselves. Although at first sight not a compelling argument, it may turn out to be one of the most important in practice. That has apparently proved to be the case in Australia where legislation has rendered *Hansard* admissible. A recent count has indicated that there are only five complete sets of *Hansard* in the whole city of Melbourne. There is considerable pressure on them. The Courts there have adopted a rule of practice that a litigant wishing to rely on such materials must give his adversary, and the Court, 48 hours notice. One can imagine similar problems in New Zealand, particularly in the smaller centres.

Those are some of the arguments, and some possible answers to them. The arguments in favour of admitting such extrinsic materials are more shortly stated. They are simply that if a statute is unclear when applied to the facts of a case it is better to give the Courts recourse to extrinsic material rather than seek about for an answer in the obscure words of the statute themselves. Why as Lord Denning has asked, grope about in the dark when one can switch on the light (*Davis v Johnson* [1978] 1 All ER 841 at 851)? A search of *Hansard* probably will not produce light in many cases; but in the few where it does why not use it? Further, if the cardinal rule of interpretation in New Zealand is to give effect to a statute's purpose, why ignore what is sometimes the best evidence of what that purpose is — namely the departmental statement read by the Minister in the House?

Yet these arguments will not convince a good number of lawyers. The matter is controversial, and is likely to remain so.

*The limits of the rule*

But if such material is to be admitted, many important questions will have to be answered. Australia has solved most of them by laying down detailed rules in s 15AB of its Acts Interpretation Act. But in New Zealand, if the Courts proceed in the piecemeal way in which they seem to have begun, the limits of admissibility will take a very long time to work out. Some of the important questions are:

- Is such material to be admitted only to ascertain the mischief aimed at, or in addition to ascertain the legislation's meaning? Given the artificiality of the distinction, one assumes both.
- In what circumstances can resort to such material be made: Only where the statute appears unclear, or also to confirm the interpretation accorded to apparently clear words? Cooke J's statement in *Marac* suggests both. He said that such an aid may support a provisional interpretation, or help to identify the mischief aimed at or clarify some ambiguity. But if

the words of the Act really are clear, there would seem to be no need to resort to such extrinsic materials, for they cannot be allowed to alter that clear meaning anyway.

— Is *Hansard* to be admissible even in lower Courts? If so it could undesirably prolong their proceedings. Yet there would seem to be no valid or logical reason for denying such recourse in lower Courts if it is capable of producing the "right" answer.

Perhaps the new Law Commission, which is said to have statutory interpretation on its agenda will tackle these questions. If it does not, one may have to wait for the Courts to do so on a case-by-case basis. Perhaps, in any event, the signs perceptible in *Marac* and *Howley* will not deliver their apparent promise; perhaps they will in future be said to be distinguishable on their facts, and of no general significance.

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## Collateral benefits and damages for loss of earnings

In *Horsburgh v NZ Meat Processors etc IUW* [1986] BCL 117 substantial damages were awarded to the plaintiff, who lost his employment as a consequence of being expelled illegally from the New Zealand Meat Workers Union after refusing to pay an unlawful levy. The case is significant in its treatment of four issues in the law of damages. First, the period for which loss of earnings could be claimed. Here Cooke J awarded a sum representing three years' earnings, relying on the decision of the English Court of Appeal in *Edwards v SOGAT* [1970] 3 All ER 689. Secondly, whether general damages for loss of amenity were available in such cases. Cooke J declined to make such an award, relying on *Addis v Gramophone Co Ltd* [1909] AC 488. The remaining two issues raised by the case were whether income tax should be deducted from earnings-related damages, and the nature of the relationship between such damages and unemployment benefit. This note will concentrate on those issues. In each case the same problem arises concerning the potential collateral benefit to the plaintiff. As Freedland points out, a conflict of principle arises between "the view that damages ought not to be reduced by reason of such benefits which the defendant has not provided; and, on the other hand, that damages are intended to be compensatory rather than punitive, and therefore should not exceed the plaintiff's loss" (*The Contract of Employment,* 265).

The facts of the case are simple. In late 1982 the Canterbury Branch of the Meat Workers Union decided that all meat workers in that branch should contribute $10 per week to certain union members who were not working due to an industrial dispute. The sub-branch to which the plaintiff belonged passed a resolution requiring their members to make the contribution. After paying contributions for two weeks the plaintiff refused to pay any further levies. As a consequence of his refusal to pay he was expelled from the union by the branch executive. His dismissal followed shortly afterwards since, under the then system of unqualified preference, union membership was necessary to retain his employment. After an inconclusive approach to the Human Rights Commission the plaintiff issued a writ against the union, alleging that the levy was unlawful and asking the Court to grant relief. The defendants were unable to rebut the claim that the levy was unlawful. Regulation 5 of the Economic Stabilisation (Membership Fees, Subscriptions and Levies) Regulations 1982 prohibited any union from requiring any compulsory member to pay levies in the relevant period which exceeded those levies required to be paid in the year ending 20 August 1982. Cooke J rejected the defendant's application to treat the matter as one requiring relief under the Illegal Contracts Act 1970, since to do so would have entailed validating an offence under the regulations. In addition, it would be giving approval to a breach of s 182 of the Industrial Relations Act 1973. That section provides that no member of a union shall be required to pay any levy of an aggregate amount of more than $10 per year unless the levy has first been approved by resolution passed by a majority of the valid votes cast at a secret ballot of the financial members of the union. A declaration was granted that the branch executive acted ultra vires in resolving that the plaintiff be expelled and that his expulsion was illegal.

In considering the two "collateral benefit" issues arising from damages for breach of contract, the *Horsburgh* case breaks new ground in two respects.

(1) Whether the tax that would have been paid on the actual wages, had they been received, should be deducted in arriving at the sum to which the plaintiff is entitled. On this question the New Zealand Court of Appeal held in the wrongful dismissal case *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176 that taxation should not be taken into account in the assessment of damages for compensation for loss of office, so that compensation should be determined by reference to the gross earnings the employee would have received. In so holding, the majority in the Court of Appeal declined to follow the House of Lords decision in *British Transport Commissioner v Gourley* [1956] AC 185, which had been applied in the United Kingdom so as to reduce damages for wrongful dismissal in respect of the notional tax liability which was avoided by the dismissal (see, for example, *Bold v Brough, Nicholson & Hall Ltd* [1964] 1 WLR 201). Damages for wrongful expulsion have customarily been aligned with damages for wrongful dismissal, in view of their common contractual base and the identical result of the breach (see *McGregor on Damages* (13 ed 1972 at ch 27). Cooke J, following this approach, held that the basis of the claim in *Horsburgh's* case was sufficiently akin to a claim for wrongful dismissal to require the Court to follow *Hewin's* case, noting however that there was a sharp difference between the quantum and complexities of *Hewin's* claim and any possible claim by the plaintiff in *Horsburgh's* case, had he chosen to sue his employer. It might be added that there was a sharp difference between the quantum arrived at by Mr Horsburgh in suing his union and that which could have been expected from an action for wrongful dismissal against his employer. Had he sued his employer

at common law, he would have been fortunate to receive three weeks' pay by way of reasonable notice (the award being silent on this): in suing the union, he was awarded loss of pay over three years. In following *Hewin* Cooke J held that in the assessment of the amount of damages which should be ordered, tax on the earnings the plaintiff would have received had he remained employed was not to be taken into account.

(2) Whether a sum equivalent to the unemployment benefit received by the plaintiff should be deducted from any sum awarded for loss of earnings. Here Cooke J held that benefit payments arose as a matter of entitlement under the Social Security Act 1964 and, to a degree, mitigated the plaintiff's loss. As such, His Honour held that the amount paid in benefit should be deducted from the figure representing loss of earnings. With respect, in applying the rule as to mitigation of loss in this context two separate issues might be distinguished. First, whether the plaintiff had taken reasonable steps to mitigate his or her loss. Here, the usual requirement in cases involving loss of employment will be that the plaintiff has taken reasonable steps to find suitable work. This is, coincidentally, one of the qualifying conditions for unemployment benefit under s 58 of the Social Security Act 1964. Thus in satisfying the Court that avoidable loss has in fact been minimised, payment of the benefit may be a relevant consideration in providing evidence of willingness to seek work. But should actual payment of the benefit necessarily be treated as simple mitigation of loss? Arguably, when the Court comes to consider whether recovery should be allowed in respect of loss which the plaintiff has in fact avoided, the means of avoidance become relevant and the nature of any collateral benefit which the plaintiff has received must be examined. For example, a private scheme of unemployment insurance, funded solely by the plaintiff may well lead to payments which in fact mitigate the economic hardship consequent on dismissal. Yet should the defendant's liability be reduced in such a case by virtue of a payment to which he or she did not contribute? If not, what distinguishes the private insurance scheme from the state scheme so that benefits derived from the former are not to be taken into account whereas benefits derived from the latter are to operate as deductions? Whilst the relationship between unemployment benefit and damages for loss of earnings was not canvassed in any detail by Cooke J in the context of avoided loss, it is submitted that the nature of that relationship calls for close consideration in the light of English authority.

In England, the Court of Appeal's decision in *CA Parsons v BNM Laboratories Ltd* [1964] 1 QB 95 established that unemployment benefit should be taken into account when calculating awards of damages for wrongful dismissal. That decision was applied by the House of Lords in *Westwood v Secretary of State* [1985] AC 1. Yet in the *Parsons* case only Pearson LJ appeared to place significant weight upon the argument that the drawing of unemployment benefit should be seen as one aspect of mitigating the damage arising from loss of employment, the approach which apparently found favour with Cooke J in the instant case. Pearson LJ treated the issue in terms of causation and remoteness: the receipt of the benefit was not too remote to be taken into consideration, or not "completely collateral". The other members of the Court, Harman and Sellers LJJ, both stressed that under the English National Insurance Scheme the employer was required to pay primary contributions on which, in part, the employee's entitlement to the benefit depended. Harman LJ described this as equivalent to part payment of wages during the period of unemployment, whilst Sellers LJ held that the employer was entitled to the benefit of those contributions. It must be noted that in *Westwood v Secretary of State for Employment* Lord Bridge, delivering the judgment of the House, cited with approval the reasoning of Pearson LJ in *Parsons* whilst emphasising also the compulsory nature of the contributions to the scheme. In New Zealand, unemployment benefit is funded from current taxation in the same way as most other kinds of state expenditure, there being no equivalent of the compulsory contributions under the English social security scheme. Thus the reasoning underpinning two out of the three judgments in the *Parsons* case and, to a lesser extent, that of Lord Bridge in the *Westwood* case, cannot readily be applied to the New Zealand scheme (although Lord Bridge did describe the contributions to the English National Insurance Fund as being more closely analogous to a tax than to an insurance premium).

It then becomes of interest to consider how the English Courts have treated non-contributory social security cash benefits. Here, where the analogy with the funding of unemployment benefit under the New Zealand scheme is stronger, the fact that the benefit was not contributory has enabled the *Parsons* case to be distinguished, so that certain social security payments have not been taken into account (see, for example, *Ruffley v Frisby Jarvis & Co Ltd,* unreported, noted Kemp and Kemp, *Quantum of Damages,* 163, and *Basnett v J & A Jackson Ltd* [1976] ICR 63; cf *Plummer v P W Wilkins & Son Ltd* [1981] 1 All ER 91). The position is not clear-cut however since, in addition to being non-contributory, the benefits in question were discretionary. At a broader policy level, in *Parry v Cleaver* [1970] AC 1 (a personal injury case) Lord Reid suggested in this general context that it was contrary to public policy that a "wrongdoer" should get the benefit of "public benevolence in the shape of various uncovenanted benefits from the welfare state" (at p 14), although preferring to leave the correctness of the *Parsons* approach open. Similarly, in *Daish v Wauton* [1972] 2 QB 262 it was suggested that non-contributory social security cash benefits either constituted public benevolence, "and there is no sensible reason for distinguishing between public and private benevolence", or were akin to private insurance. There seems to be no compelling reason to differentiate between dismissal cases and personal injury claims in this respect (at least where the defendant in the latter is the employer) and the English Courts appear on occasion to have treated the relevant principles in the two types of claim as being interchangeable (see *Foxley v Olton* [1965] 2 QB 306). Whilst, in the *Westwood* case, Lord Bridge found no statement of principle in

*Parry v Cleaver* to cause a departure from the *Parsons* approach, a close analysis of the judgments in *Parsons* suggests that the structure by which the respective benefits were funded may have dictated this conclusion. It remains to be seen whether the general thrust of the reasoning in *Parry's* case and *Daish's* case concerning non-contributory benefits in England will survive the judgment in *Westwood v Secretary of State for Employment*. If, as seems likely, the contributory nature of the English scheme forms part of the ratio in both the *Parsons* and *Westwood* decisions, there remains an argument based on the nature of the New Zealand social security scheme for not deducting an amount equivalent to the unemployment benefit which has been received from any award of loss of earnings at common law.

It might be noted in passing that the Arbitration Court has never deducted unemployment benefit receipts from loss of earnings awards in cases of unjustifiable dismissal under the Industrial Relations Act 1973, (see, for example, *Auckland Clerical Workers IUW v Casval Holdings (NZ) Ltd* [1981] ACJ 509). The Arbitration Court's approach seems to be partially based on the belief, with respect mistaken, that the benefit becomes refundable in such circumstances. Nevertheless, whilst inevitable differences will arise between the remedies in unjustifiable dismissal and wrongful dismissal due to the language of the Industrial Relations Act 1973, it seems undesirable that disparity should arise on a common question which is not affected by any statutory provision (whilst the 1973 Act speaks of "reimbursement" the Court has treated that phrase as co-extensive with loss of earnings).

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## Matrimonial Property Act 1976, s 24 — unusual case of delay

*Rutherford v Rutherford*, High Court, Auckland, 23 May 1986 (M792/95), Baker J.

Towards the end of his judgment in this case, Barker J said:

> I agree with the submission of counsel for the wife that this case is quite out of the ordinary.

The position was that, in July 1985, the applicant wife filed a motion seeking leave to commence proceedings under the 1976 Act out of time against the respondent husband and an order determining their interests in matrimonial property under the Act. In March 1986, on an application by the husband for directions, His Honour had ordered the wife's application for leave to bring proceedings out of time to be heard and determined first, as, if leave were declined, the husband would not be put to the extra cost and worry of defending a substantive application.

Basically, the facts were that the parties were married on 26 June 1965. In May 1967 a home was purchased in the husband's name with the aid of a mortgage. Two children were born — in 1969 and 1971. The parties separated in late 1972 at a time when they were working on a farm and the home was rented. The husband obtained a decree absolute of divorce (on the ground of his wife's adultery) on 25 September 1973. Custody of the children was awarded, by consent, to the wife with reasonable access being reserved to the husband. Shortly after the final decree, the parties resumed cohabitation in the home. Until April 1975, they and the children lived there together. To the casual observer the parties were husband and wife. They separated eventually in April 1985 and the application for leave was filed on 11 July 1985. The house was still being occupied by the husband.

The wife claimed to have sought legal advice at the time of the divorce proceedings and a solicitor had advised her to wait until the proceedings were finalised. She saw that solicitor again before resuming cohabitation, and was then advised "to leave things as they were". She sought no further advice.

The Court presumed that the husband saw a solicitor at the time of the divorce, but it did not appear whether he received any advice at that time on property rights. The husband now asserted that he had ordered his affairs over the years on the basis that he was no longer married and that his (former) wife could have no claim for matrimonial property.

The wife's assertion was that she did not enquire about property rights until she saw her present solicitor some weeks before the filing of the application now before the Court. During the 12-year period of cohabitation after the divorce, she did the housekeeping, cooked the family meals and tended to the children's day-to-day needs. She was qualified as a Karitane nurse and occasionally worked as such. Most of her earnings went to purchase additional furnishings and furniture for the home; she paid her savings into the account into which the Family Benefit was paid and she bought clothes for herself and the children from that account. The parties had separate bank accounts. The husband paid the wife housekeeping. The wife had some $1,500 in personal savings when she left in April 1985.

From about 1979 to 1984, the husband had worked as a builder, and, subsequently, as a property developer. Counsel for the wife acknowledged, but was unable to concede, that it would be virtually impossible, in an unusual application of this nature, to seek orders in respect of property other than the matrimonial home. To require the husband to reconstruct his business records so as to ascertain what was "balance matrimonial property" at the time of the 1972 separation would be, it was submitted, unduly burdensome. As to the family chattels, it was alleged by the husband that there was an oral agreement to divide them. The wife acknowledged that she took some of them at the time of separation but did not concur with the suggestion of an agreement. In any event, the family chattels existing at the date of the 1972 separation would, after 14 years, have little current value; there was nothing of an antique or intrinsically valuable nature suggested.

His Honour was not provided with any evidence of the value of the home at any time — not even with a Government valuation. The Court could only assume "that the value of a house in a fairly salubrious suburb of Auckland has increased by reason of inflation between 1972 and 1986". The wife claimed that, after the resumption of cohabitation the house was improved and extended, and that she had helped

materially with the alterations and the decorating.

As His Honour observed, an application for leave to bring proceedings out of time made under s 24(2) of the 1976 Act extends to cases where the time for applying expired before the commencement of the 1976 Act (1 February 1977). The time limit for applying, both under the 1976 Act (see s 24(1)) and the former Matrimonial Property Act 1963 (see s 5A), is one year after decree absolute.

Barker J looked to *May v May* (1982) 1 NZFLR 165; 5 MPC 92 (CA) as the relevant leading decision. There, the decree absolute was made in November 1974. In June 1978, the wife had applied for extension of time. During their marriage, the parties had lived on the family's farm. The farm did not pass to him until 1978. In 1963 and 1967 the husband had been able to acquire neighbouring blocks, on one of which the parties lived until their separation in 1969. The wife alleged that the husband had been enabled to buy one of these blocks through her contribution.

Holland J, at first instance, declined to allow the wife's application for extension of time because the delay was substantial. His view was that Parliament had not provided that the same generous provisions of the 1976 Act should apply to all divorced couples, regardless of when the divorce had occurred. Spouses, in his opinion, should know their rights and it would not be just to make the 1976 Act retrospective in its operation. The Court of Appeal (which dismissed the appeal brought by the wife) held that the limitation period might be overcome when there was a hardship amounting to an injustice; in any inquiry, consideration of the merits of the claim, prejudice to the respondent, length of delay and the explanations offered for the delay, would generally be relevant.

Barker J said:

> It therefore seems appropriate, to consider the present application under the various headings referred to in *May's* case; this was the approach adopted by Sinclair J in *Sefton v Sefton* [1985] BCL 854.

Barker J observed that the numerous cases were of limited help since each turned on its own facts, and in none of them was the delay anything like as great as in the present case. On the other hand, in none was there the unusual feature of a lengthy period of post-divorce cohabitaiton exceeding the length of the legal marriage.

(a) *The length of the delay itself.* There was, in the Court's view, a "very substantial delay — some 11 years out of time". Barker J went on as follows:

> As Dr Fisher QC points out in the second edition of his well-known work at p 549, the greater the delay, the less likely there is to be an extension. Normally such a delay would rule out success automatically; however, the extraordinary facts of this case save this application from such a summary fate.

(b) *The explanation for the delay.* The cases showed that, when there was an understandable explanation for the delay, the applicant's chances of a successful application were enhanced; for example, where there have been negotiations to settle or the registration of a caveat or correspondence between solicitors. If the application related to "after acquired assets", then there was little prospect of success. Here, the explanation for the delay was not strong. The advice tendered to the wife seemed inappropriate.

(c) *The merits of the wife's claim.* The wife would clearly have had a claim in 1974 to some share in the home and might have had a claim to other matrimonial property existing at the time of initial separation. It was not practicable to claim for that now. Under the matrimonial causes legislation then in force, she might also have had a claim for a lump sum settlement.

(d) *Prejudice to the husband.* This was a major argument in his favour. Cases such as *Erickson v Erickson* [1972] Recent Law 203 showed that if the husband had remarried in reliance on his having sole ownership of matrimonial assets, there was real prejudice in granting a late application. That was not the case here. Had the wife here applied, say, 12 months after the decree absolute in late 1974, she would undoubtedly have been awarded some share in the home. She had been married for seven years (sc when the initial separation took place) and had clearly contributed by way of housekeeping and bringing up the children. The prejudice to the husband really lay "in the fact that he might now have to give the wife more than he would have in 1974 (a) because of the more favourable (to the wife) provisions of the [1976] Act and (b) because the property has increased in value through inflation".

His Honour noted that, even allowing that the approach of a Court at that time should have been as determined in *Haldane v Haldane* [1976] 2 NZLR 715 (PC) the wife would have received a 25-30% share of the home. Without knowing more, it was impossible to be dogmatic about her likely entitlement except to say that, in the state of the then law, she would have been unlikely to have obtained a 50% share. Further, said His Honour, had she then received a share in the home, the husband might have been given some opportunity of buying her out at the then market value of her share in the equity in the house. Alternatively, she might have been given the right to stay in possession, provided she had custody of the children and she might also have received some share in what would now be seen as the "balance matrimonial property".

Counsel for the husband submitted that the wife obtained the advantage of living in the home and being maintained as if she had been married. This submission, Barker J said, took no account of the benefits to the husband of having a "wife" to act as his housekeeper, to mother his children, and generally to keep the family unit together. The parties appeared, in the Court's opinion, to the outside world as if they were married — a factor taking the case "completely out of the ordinary".

(e) *The overall justice of the matter.* Did the above extraordinary factor outweigh any injustice to the husband, because the ultimate inquiry must look at the overall justice of the matter? In the view of Barker J, the justice of the situation indicated that the wife should be allowed to proceed out of time. There would be hardship amounting to injustice if she were not permitted

to make a limited claim. Section 33(6) of the 1976 Act allowed the Court to impose terms — which would be that the proceedings were to be restricted to a claim in respect of the matrimonial home only. It would be unjust to allow the wife to claim in respect of other matrimonial property "after all this time. The prejudice to the husband would be just too great."

His Honour thought it not permissible to impose a term as to the date as to when the home was to be valued in terms of s 2(2) of the 1976 Act. His Honour referred to *Meikle v Meikle* [1979] 1 NZLR 137 (CA) at 154, per Cooke J, and stated that the trial Judge would need to determine the date of valuation after considering the whole circumstances, including evidence of improvements effected by both parties after the initial separation and of the discharge by the husband of encumbrances and of the wife's monetary and non-monetary contributions.

His Honour accordingly gave leave to the wife to bring proceedings under the 1976 Act, but restricted only to seeking a share in the matrimonial home. Costs were reserved, and it was noted that the wife was on legal aid.

The only other case that occurs to the writer which concerns ex-spouses who have entered into post-dissolution cohabitation as de facto spouses is *Harnett v Harnett* [1971] P 255; [1971] 1 All ER 98. There the ex-husband cohabited with his ex-wife for 11 years after she had obtained a divorce from him in France. The French decree was prima facie entitled to recognition in England. Many years later, the ex-husband asked the English Court to declare that the French decree was valid in England. It was held that he was not estopped from denying the validity of the French divorce decree, but it was also indicated that the position would have been otherwise had children been born to the couple during the period of cohabitation as de facto spouses. At the same time, however, it was observed that there were great difficulties about applying a doctrine of estoppel to a legal decree affecting status. □

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## Insurance — the imputation of knowledge. Defence of a summary judgment application

The case of *Helicopter Equipment Ltd v The Marine Insurance Company Ltd* (Auckland Registry, CP 144/86, 27 May 1986, Hillyer J) represents something of a change in the law relating to the interpretation of s 10 of the Insurance Law Reform Act 1977. It also contains pertinent comment relating to procedural requirements under the new Summary Judgment procedure in the Code.

### The facts

The case concerned the importation of a second-hand helicopter and parts by the plaintiff from the United States. The plaintiff had been recently incorporated expressly to carry out this type of business. It desired to insure this and other future shipments, and approached brokers for that purpose. The brokers in turn approached several insurers, and obtained a number of quotes for the cover. The plaintiff accepted the defendant's quote and in due course a standard-form Marine Open Policy was issued. On arrival of the container in New Zealand the helicopter was immediately seen to be damaged. A claim was made by the plaintiff under the policy. The damage to the helicopter would normally have been covered by the policy but the defendant declined cover on four related grounds:

(a) Non-disclosure of the second-hand nature of the helicopter
(b) Non-disclosure of a previous claims history of a related Company
(c) Misrepresentation by the plaintiff that it had no previous insurance history
(d) Non-disclosure and/or misrepresentation of the true insurable value of the helicopter.

### The Action

The plaintiff sued on the policy claiming damages in the amount of the loss suffered. A point of procedural interest is that the proceedings were originally commenced by way of writ and statement of claim, but early on an order was made by consent that they be continued as though commenced by the summary judgment procedure. (For analogous situations relating to other forms of proceeding, see *Kaikoura County v Boyd* [1949] NZLR 233; *Stringer v Ruddenklau* [1952] NZLR 71; *Procter v Procter* [1979] 1 NZLR 338. It is not clear what the Court's attitude would have been had the defendant not consented to the order.) The application also claimed judgment as to liability, judgment as to part of the damages claim for which, it was alleged, there was no defence, and an order directing the trial of the issues as to the remaining prayers in the statement of claim. This splitting of the claim is partly authorised by Rule 137 of the Code, and is also in line with the English Order 14 practice (see *The Supreme Court Practice* 1985, Vol 1, para 14/1/7).

In accordance with the Code, the plaintiff had filed a number of affidavits verifying the statement of claim, deposing to the plaintiff's belief that there was no defence to the allegations therein, and setting out other background factual matters. A further affidavit from the broker's local manager was also before the Court (unsworn though treated as sworn). These affidavits set out to answer the four grounds of avoidance advanced by the defendant. They alleged that the broker knew at all material times of the matters referred to in grounds (a), (b), and (c), and also set out the basis of the valuation used, in answer to ground (d).

There was one affidavit filed by the defendant, sworn by the NZ managing attorney of the defendant. That affidavit addressed itself solely to the relationship between the broker and the defendant. It alleged that at all times the broker was the agent of the plaintiff and not the defendant, and that the broker did not receive any commission or other payment from the defendant. Because there was no agency, therefore, the defendant had no knowledge of matters set out in grounds (a)-(c).

### Section 10, Insurance Law Reform Act 1977

The plaintiff argued (1) that s 10 of the Insurance Law Reform Act applied to this case, (2) the knowledge of the broker was to be imputed to the defendant, (3) the

defendant's grounds (a)-(c) were not available to it to avoid the policy, and (4) that the defendant had no defence to the claim. The plaintiff maintained that there was a distinction in s 10 between an "agent" of the insurer pursuant to s 10(1) (where the "agent" must act for the insurer and within the scope of his actual or apparent authority) and the "representative of the insurer" pursuant to s 10(2), which term is defined in s 10(3). A person is a "representative" if he or she is entitled to receive commission or other valuable consideration from the insurer; there is no necessity that the "representative" act for the insurer. As Hillyer J noted:

> In other words [counsel for the plaintiff] said a person could be a representative of the insurer, even though he was not an agent of the insurer (pp 11-12).

This proposition is contrary to opinions expressed in a number of academic texts dealing with New Zealand insurance law (see Sutton *Insurance Law in Australia and New Zealand* at p 199 para 5.41; Tarr *Insurance Law in New Zealand* (1985) at p 86; *CCH Australia and New Zealand Insurance Reporter* at para 4.295) and the distinction has not been drawn in recent cases referring to the section (see *Opossum Exports Ltd v Aviation and General (Underwriting Agents) Pty Ltd* [1985] CCH ANZ Ins Cases 60.624 at 78.833 where a broker was deemed to be within s 10(2), but without discussion; *Hing v Security and General Co (NZ) Ltd* [1986] BCL 221). Despite this conflict, Hillyer J held that the Court could still determine the summary judgment application, citing in support Robert Goff LJ in *European Asian Bank v Punjab & Sind Bank* [1983] 2 All ER 508 at 516.

As an aid to interpretation the Court had no hesitation in referring to the Report of the Contracts and Commercial Law Reform Committee entitled *Aspects of Insurance Law*, (The Court cited *NZEI v Director-General of Education* [1982] 1 NZLR 397 per Cooke J at 409, and *Worsdale v Polglase* [1981] 1 NZLR 722 per Davison CJ at 727 in support of such a reference; see also Burrows [1986] NZLJ 100), and noted the Report at para 27, which clearly stated that brokers were included in the definition of "representative of the insurer". The Court also noted that the draft Bill attached to the Report had been amended in Parliament by the adding of the words "who acts for the insurer during the negotiation of any contract of insurance, and so acts within the scope of his actual or apparent authority" to s 10(1). The draft s 10(2) had been left untouched. Hillyer J therefore held that:

> It seems that the intention of the legislature was that before a person was deemed to be the agent of the insurer, he must act for the insurer, and act within the scope of his actual or apparent authority, but a representative of the insurer need only be entitled to receive commission or other valuable consideration in consideration etc (pp 15-16).

It is submitted that this distinction is plainly correct on the words of the statute. Equally it is also submitted that it is correct in a commercially rational sense. As noted in the Report, the question is simply one of placing the risk of default or lack of skill on the part of the broker. Either the insurer or the insured must bear that risk, and the legislature's decision that the former should is understandable and desirable. The converse rule has often led to injustice in the United Kingdom, and there is a potential conflict of interest in making the broker's errors the sole responsibility of the insured whilst at the same time permitting the broker to earn commissions from the insurer. If the insurer pays the broker for the business, then the insurer should bear the risk of the broker's default; if the insurer is unhappy with a particular broker, then the solution lies in the insurer's right to refuse business from that broker. The innocent insured should not be made to shoulder that burden.

**Decision**

Having held that s 10(2) did apply, it then became a question of fact as to whether the broker in this case had received valuable consideration from the defendant. It was clear from the invoices exhibited to the affidavits that the plaintiff had been invoiced for the full premium by the broker. The defendant in turn had invoiced the broker for an amount equal to the full premium less 10%. The defendant, in its affidavit, had tried to explain away this 10% deduction, claiming:

> The real nature of the transaction is that the defendant reduces the premium by a fixed percentage rate, to allow [the broker] to claim the amount of that reduction as a brokerage charge. This practice is adopted pursuant to an industry agreement between the Insurance Council of NZ Inc, and the Corporation of Insurance Brokers of NZ, of which [the broker] is a member. The defendant always treats the figure, . . . as the net figure on which the premium rate is fixed. There is nothing to prevent [the broker] or any other broker rebating part of that brokerage back to the insured party.

Hillyer J rejected this:

> That however overlooks the fact that according to the policy of insurance, issued by the defendant to the plaintiff, the plaintiff was bound to pay a premium at a certain rate. No agreement was reached between the plaintiff and [the broker] whereby [the broker] was to deduct any portion of that amount before paying it to the insurance company. Indeed, the affidavits of [the plaintiff's managing director] and [the broker's local manager] specifically say that there was no discussion at all between them as to the payment to be made to [the broker].
>
> On the other hand there clearly was an agreement between [the broker] and the defendant that the defendant would accept something less than the full premium and would permit [the broker] to retain 10% of the commission. That in my view is valuable consideration (p 17).

Section 53 of the Marine Insurance Act 1908 did not affect this conclusion. The Court therefore held:

> I conclude therefore, that [the broker] was receiving a valuable consideration from the

> defendant, and as such [the broker's] knowledge is imputed to the defendant. The defendant therefore, is deemed to know that the helicopter was second-hand and not new, and that [the plaintiff's managing director], through [the associated company] had previously been involved in the cancellation of damage and burglary policies (p 18).

Similarly grounds (c) and (d) were quickly disposed of, the former because the plaintiff was a new company and could therefore not have had any previous cover or claims experience, and the latter by virtue of the fact that the plaintiff's explanation of the valuation method had not been put in issue by any evidence in answer.

**Summary**

On the question of law, the Court has in this case held that, regardless of whether or not a person acts for the insured, the imputation of knowledge in s 10(2) will be made where, as a matter of fact, the intermediary receives or is entitled to receive, commission or other valuable consideration from the insurer for the services rendered. If, as was suggested in the defendant's affidavit, this finding represents a ruling contrary to accepted thinking within the insurance industry, then the conclusion is inevitable that the industry have been benefitting from a misconception as to the true position of brokers since 1977.

**Procedure**

A defendant to a summary judgment application, if wishing to raise defences or rebut allegations made by the plaintiff, must go on oath to do so, There is no other way. In this case the defendant sought, at the hearing, to raise two further grounds of avoidance, one as to the packing of the helicopter and one as to causation, and thus to show that there were available defences. There was no affidavit evidence advanced to establish or support either ground. Rule 141 provides for affidavits in answer, and the Court held that this method is the sole route open to a defendant:

> The whole purpose of the summary judgments procedure is to provide a rapid method of arriving at the true issues between the parties, and to prevent delay. For that purpose, the plaintiff goes on oath alleging that he believes there is no defence to the allegations in the statement of claim, and setting out the grounds of that belief.
>
> The defendant in turn, must go on oath, setting out the defence he alleges. He is not entitled to come before the Court on the application for summary judgment, and raise some possibility which the plaintiff may well be able to counter by evidence, without giving the plaintiff warning of his intention to do so.

Whilst in this case a statement of defence had been filed, the Code does not contemplate such a document as forming any part of the summary judgment procedure (see Form 13, and cf Forms 5 and 6; the question as to whether a defendant in a summary judgment application which is undetermined 30 days after service can then file a statement of defence was left unresolved), and the Court held:

> ... in my view a mere allegation in a statement of defence, not referred to in the affidavit by the defendant in reply, has no place in the summary judgment procedure. The affidavit in the summary judgment procedure says that the plaintiff believes that the defendant has no defence to the claim in the statement of claim. If that is not contradicted on oath a defendant could raise at the summary judgment hearing suggestions of no substance, which the plaintiff has had no opportunity of answering (p 22).

This, with respect, is correct, and necessarily so. If it were otherwise, a defendant could raise spurious defences in the unsworn statement of defence and use them to avoid an otherwise justified judgment. To allow such a loophole would pull the teeth of the new procedure. □

**A I M Tompkins**
**University of Auckland**

## Standard of care for bailees

*Stag Corporation v Taimex Trading Ltd* [1986] BCL 133; *Southland Hospital Board v Low* [1986] BCL 85; *Conway v Cockram Motors (ChCh) Ltd* [1986] BCL 224.

A bevy of recent bailment cases may stir a cobweb or two in the halls of commerce and beyond. A point of long dispute concerns the bailee's duty of care under a gratuitous bailment. The traditional approach dating back to the judgment of Holt CJ in *Coggs v Bernard* (1703) 2 Ld Raym 909 holds the gratuitous bailee liable for the loss of or damage to the chattel in his custody only if caused by gross negligence on the bailee's part. A bailment for reward imposes upon the bailee a duty to take reasonable care, by contrast. In reality since the late nineteenth century the Courts have paid lip-service to the distinction, not least because the liability of the gratuitous bailee was tested according to whether he had displayed such care as an ordinarily prudent man would use in keeping his own property *(Bullen v Swan Electric Engraving Co Ltd* (1907) 23 TLR 258 (CA) at 259; *Port Swettenham Authority v T W Wu & Co.* [1979] AC 580 (PC) at 589; *China Pacific SA v Food Corpn of India* [1982] AC 939 (HL) at 960). Since it can be presumed that a man of ordinary prudence would take reasonable care of his own possessions, it would be difficult to point to the difference in the standards of the gratuitous bailee's duty of care and that of a bailee for reward. In the *Port Swettenham* case Lord Salmon said as much (at 589). Earlier Ormerod LJ in *Houghland v R R Low (Luxury Coaches) Ltd* [1962] 2 All ER 159 (CA) had abandoned the concept of gross negligence as meaningless and the distinction between bailments for reward and gratuitous bailments as artificial (at 161); rather, the test in respect of all bailments was simply, in the circumstances of the particular case has a reasonable standard of care been observed? This should have been sufficient to dispel all doubt but much was undone by the Court of Appeal in *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 (a case of bailment for reward) affirming the difference in the respective duties of care owed by the gratuitous bailee and the bailee for reward.

All three of the New Zealand cases decided in 1985 support the same standard of care for bailees of both types, although this is not to

say that in the particular circumstances of a given case the fact that the bailee is a gratuitous bailee is necessarily immaterial. In *Conway's* case it was accepted "that the obligations of a gratuitous bailee and of a bailee for reward are so nearly identical that it is unnecessary to determine into which class the respondent [the bailee] fell". Both *Stag Corporation* and *Southland Hospital* are direct authority for the view that the gratuitous bailee is liable only for "ordinary" negligence, ie he must display reasonable care in the circumstances of the particular case. Furthermore, Cook J in *Southland Hospital* confirmed that the onus lies upon the gratuitous bailee in whose custody goods are lost or damaged to show that the loss or damage has occurred despite reasonable care on his part. It is well established that the bailee for reward bears this onus, and any doubt that Lord Salmon's dictum in the *Port Swettenham* case (that the onus is always on the bailee, gratuitous or for reward [1979] AC 580 (PC) at 589), reflects the position in New Zealand law, is removed.

**Stag Corporation case**

In *Stag Corporation* the defendant bailee (Taimex) accepted that it bore this onus. The case is a good illustration of the rule that this onus is discharged by the bailee adducing evidence of reasonable care, notwithstanding that there is no evidence as to how precisely the loss or damage came about. The plaintiff Stag had delivered to Taimex 737 chamois skins for grading, drying and packaging. These procedures were duly completed, and despite requests to Stag to remove the skins, Stag dragged its feet and prevailed upon Taimex to retain the skins. No charge was made or intended to be made for the extended storage; what had begun as a bailment for reward was now a gratuitous bailment. The skins were destroyed in a blaze which gutted Taimex's premises one evening. There was no indication as to how this fire started, but it so happened that earlier in the day a portable heater used in the same building for the drying of skins had caught alight. Not surprisingly, the plaintiff thought this too coincidental to be passed over and argued that the only inference to be drawn was that the heater caused the second fire in some unknown way, from which it followed that there must have been some absence of proper care in Taimex's dealing with the heater.

But in fact the evidence showed that the first fire had been extinguished with little difficulty and minimal damage, that the heater itself had been removed from the building, and that the site of the fire had been sprayed with a fire extinguisher and any remaining debris removed. Heron J concluded that Taimex had taken all reasonable steps in dealing with the first fire, and therefore the onus upon it was discharged. The point did not arise, but if the test is now reasonable care in the particular circumstances of the case, the fact of the bailee being a gratuitous bailee may well be a relevant circumstance in this type of situation, where the bailee has undertaken the bailment reluctantly and to the detriment of its own interests.

**Southland Hospital Board case**

*Southland Hospital Board v Low* is noteworthy for its somewhat unusual facts and the construction placed upon a bylaw exempting the bailee from liability. Here the engagement ring worn by a patient in Southland Hospital at the time of her death was missing when her body was removed from the mortuary two days later and could not be found in a subsequent search. In an action brought by the trustees in the estate of the deceased in the District Court, the Board was held liable for the loss of the ring as bailee, notwithstanding that the Board's liability was ostensibly excluded by a bylaw in the following terms:

> The Board shall not be responsible for loss or damage, however caused to the property and moneys in the possession of any patient on admission unless such property and moneys are handed over to and taken charge of by the Secretary for a duly authorised officer and an official receipt given. All property and moneys subsequently brought in and retained by the patient shall be so retained at his own risk in all things.

On appeal Heron J considered the following questions:

(1) did the hospital become the bailee of the ring on the patient's death?

(2) if so, was it in breach of its duty of care?

(3) if in breach, was it protected by the bylaw?

His Honour held that the hospital became the gratuitous bailee of the ring on the patient's death. This was because Heron J considered that a bailment arose as soon as any article of property became the sole responsibility of the hospital; this might occur by a patient voluntarily relinquishing control, but would occur equally on involuntary termination of control, as in the event of death. Needless to say, this puts hospital authorities in something of a spot — does a hospital become a bailee of a patient's possessions during periods for which the patient is unconscious?

Heron J then found that the onus of showing that the requisite standard of care had been observed had not been discharged; no steps were taken, for example, to make an inventory of possessions found on a patient's body on death. Finally, the hospital could not in this instance rely on the exemption provision contained in the bylaws. This could not be construed as continuing to have effect following a patient's death: it envisaged a situation in which a patient could choose between retaining his possessions or handing them over, but could not be applied to a siutation where no such choice could be made.

**Conway case**

The decision in *Conway v Cockram Motors (ChCh) Ltd* is chiefly of interest for the gloss it places on the earlier case of *Petersen v Papakura Motor Sales Ltd* [1951] NZLR 495. Both concerned the theft of motor cars from the showrooms of motor dealers with whom the cars had been left in order to be sold. In both cases the cars were unlocked with the ignition keys hidden above the sun visor enabling the thief to drive them out. In *Petersen* it was not contended that the practice of leaving a vehicle in the showroom unlocked with the keys in the vehicle itself was negligent, since this is a necessary precaution to ensure prompt removal of the vehicle in the

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# Books

## *The Common law in Singapore and Malaysia*

*Edited by A J Harding*

*Published by Butterworth and Co (Asia) Pte Ltd, Singapore*

*Reviewed by the Hon Mr Justice Tompkins*

With New Zealand's steadily increasing involvement commercially, socially and culturally with its Asian and Pacific neighbours there is an increasing awareness amongst the legal profession of the need to learn more of the legal systems of those neighbours. The recognition of this need has resulted in the profession's increased involvement in LAWASIA with the opportunity it presents to participate in conferences and specialist seminars where these systems are examined.

Ascertaining the relevant law applicable to a particular contract in, say, Indonesia with its amalgam of civil, Islamic and local customary laws, can be a daunting task for a New Zealand lawyer but the profession will be relieved to learn that at least in Singapore and Malaysia the common law is alive, well, and indeed thriving.

This volume of essays has been published to mark the 25th anniversary of the *Malaya Law Review*. Mr Harding, a senior lecturer in the Faculty of Law at the National University of Singapore, has collected a series of essays designed to illustrate what he describes as an important, interesting but difficult question to answer. How far has the common law, product of an alien culture and history, disseminated and introduced by the agency of imperial British rule, been applied or adapted to suit conditions vastly different from those in which it was created? And how far can and should it be so applied or adapted?

The conflict between the common law and an alien culture is well illustrated by the chapter on the common law and Chinese marriage custom in Singapore. The author of that chapter, Mr Leong Wai Kum, argues persuasively that the common law failed to adapt to this particular custom instead of adapting the custom to the common law.

The chapter on the Privy Council as the Court of last resort in Singapore and Malaysia is of particular interest in the current New Zealand climate. Appeals to the Privy Council from Malaysia are about to be abolished but there appears to be no such move in Singapore. The chapter contains an interesting statistical analysis evaluating the legal impact of the Privy Council in these two countries.

Then there are chapters on aspects of the criminal law, land law and three chapters on administrative law, dealing with the abuse of discretion, the writ of certiorari and the application of the rules of natural justice.

These essays are more than a historical perceptive. The analysis of the manner in which the common law has been adapted in Singapore and Malaysia in a range of areas with references to judgments on matters that are also live issues in New Zealand, emphasises the existence of a common law jurisdiction the decisions of which are seldom referred to in New Zealand Courts. This book should encourage counsel in New Zealand to look to Singapore and Malaysia for precedents as well as the traditional sources of England, Australia, Canada and the USA. □

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**Continued from p 230**

event of fire. In *Conway's* case Hardie Boys J went further and said in effect that a motor dealer would be negligent in not taking this step. However, so common was this practice that the real question was whether the dealer had taken proper care to keep the car in question safe from an intruder with knowledge of the practice.

The facts were that having obtained entry to the showroom the thief was unable to open the doors leading to the street and so resorted to the simple expedient of driving the vehicle through not only the doors but also a chain strung across the driveway. Hardie Boys J held that the dealer was not entitled to rely upon the locked doors and chain as sufficient to prevent theft, without taking the further precaution of an alarm or patrol by security guards. This is one dimension beyond *Petersen's* case where the dealer's breach of care consisted of the provision of wholly inadequate locks on a side-door by which the thief gained entry, and on the external doors of the showroom itself by which the car was removed.

**Andrew Borrowdale**
**University of Canterbury**

# Court buildings and facilities:
## Remarks by Sir Ronald Davison, Chief Justice

*On the occasion of the call to the Inner Bar of Mr D L Mathieson, Mr J A L Gibson, and Mr M A Bungay, on 19 June, 1986, the Chief Justice, after welcoming the new Queen's Counsel, reviewed the present unhappy situation regarding Court accommodation in the three main centres of New Zealand. His Honour's remarks are published herewith for the information of the profession.*

Mr Mathieson, Mr Gibson, Mr Bungay,

May I on behalf of the Judges presiding in this Court today congratulate each of you upon the occasion of your call to the Inner Bar.

In the short ceremony which we have all just witnessed, you have joined the ranks of Queen's Counsel, and you follow in the footsteps of many distinguished lawyers who have gone before you. The rank of Queen's Counsel is not granted lightly. It is the reward of those who have proved their ability as advocates of distinction in the practice of the law.

Appointment as Queen's Counsel also carries with it responsibilities.

First there is the responsibility to uphold the status and integrity of the rank of Queen's Counsel. Your new rank elevates you in status within the legal profession and it behoves each and every Queen's Counsel to uphold the integrity and dignity of that rank.

Second it has been traditional for Queen's Counsel to aid in the training of junior counsel by example and by having juniors appear with them in Court. I hope that this practice will continue.

Third Queen's Counsel must accept that they are frequently in the public eye. They may be said to be in the shop window of the legal profession and the role they play is significant in establishing the standard of the legal profession in this country.

This occasion may not be inappropriate to refer to one aspect of the justice system which has been in the news of recent months and one which is of fundamental importance to the system and to the public generally. I refer to Court buildings and facilities.

In each week hundreds of the citizens of Wellington of all ages attend Court buildings in one capacity or another for the purpose of hearings of a judicial nature. This impact of the justice system needs little elaboration from me because people understand how much Court decisions affect their lives, even if sometimes they are not directly involved in them.

The public is very much aware of the part Courts play particularly through the criminal law, in the maintenance of safety of persons, and law and order. Our District Courts have wide jurisdiction now in jury trials as well as summary jurisdiction. Common characteristics of jury trials that come before the High Courts in New Zealand are several accused at one trial, rising sometimes to double figures, lengthy trials, grave offences, including too often crimes of severe violence, and many related to illegal drugs. To accommodate such trials in the High Court it is absolutely essential that proper modern buildings with adequate amenities be provided. Criminal trials of the nature I have just described affect directly very many of our people other than the accused. There are lawyers, witnesses, relatives, friends, jury men and women, Court officials, Judges, probation officers, police, media representatives, and members of the public, who all may seek, or are required, to be in the Court building during these trials.

Apart from the criminal law there are the Family Courts dealing with vital social matters concerning marriage, property and children, which are perhaps of equal importance to any cases which come before our Courts. It is an established fact that the District Court and High Court are involved in litigation in the civil field of greater complexity, length and value of property than in the past. The rapid expansion of tribunals is another fairly recent development and, of course, courtrooms are required for their important work.

The foregoing remarks are meant to emphasise that the justice system of a country is as vital to its well-being as are like social institutions such as central and local government, hospitals, schools, universities and recreation centres. To highlight the plight into which the Courts of law in this city and in other cities find themselves, I ask the public to contemplate the fact that, apart from the Court of Appeal which is a national institution, no new building devoted entirely to the Court system has been erected in Wellington this century. What condition do you think our government, medical services, welfare services, education system and sport and recreation would be in if no new building had been erected for those uses for almost one hundred years?

In recent weeks, attention has rightly been focused upon the condition of the District Court, and I endorse the comments that have been made about the severity of the conditions under which that very important Court must conduct its

business in this city. It is pleasing to note that Cabinet approval for the preparation of definitive sketch plans and working drawings for a replacement building for the Wellington District Court were announced last year by the Minister of Justice, the Rt Hon Mr Geoffrey Palmer. At the time of that announcement he had this to say:

> For too long the capital's District Court complex has been neglected. The Court has been working under appalling conditions. Various additions, renovations and temporary provisions over the years have led to hardship for the judiciary, the legal profession, Court staff and the public alike. The Government is concerned to see that the long overdue upgrading of this country's Court facilities proceeds as quickly as resources will allow. The effectiveness, efficiency and dignity of our justice system demands this.

The Minister with those remarks in no way exaggerated the position of the District Court, and they are equally applicable to conditions in this High Court.

The unfortunate situation is that in the three major centres of Auckland, Wellington and Christchurch no new permanent High Court buildings have been erected this century.

In Auckland the old High Court buildings is in mothballs, so to speak, and the Court operates in temporary premises converted from a factory to which additions have been made.

In Wellington the present building is totally inadequate for the needs of the Court and is structurally a risk which should not be long continued. I am amazed that the public who are required to attend the Courts in the building tolerate the conditions they find here.

In Christchurch, too, the High Court is operating in temporary premises which were formerly an art gallery. The facilities available are now inadequate for the number of Judges required to be stationed there.

Therefore I am pleased to know that the Minister has taken steps to activate a programme which will provide for improved facilities in all three cities.

In Auckland work will begin in 1987 to upgrade the old Court building and construct adequate additions at the rear to form a new High Court complex. Construction of a completely new District Court in Auckland is now well under way.

In Wellington I am pleased to say that the feasibility study for a new High Court building adjacent to the Court of Appeal in Molesworth Street, which is the natural and proper location, has been prepared and that study is presently being considered by government officers, by the Law Society, and by Judges. Building construction is expected to commence in 1988 and hopefully be completed by 1991. In addition, a new District Court for Wellington is being planned as I have earlier indicated.

Christchurch is perhaps the most fortunate because there a new combined High Court/District Court complex is shortly to begin. Tenders closed in March and a contract has been let.

These steps I have just referred to are most welcome to the Judiciary which has for far too long been operating under conditions which negate the greater efficiency which we, together with all those who work in the Courts and the public too, would wish to find in our justice system.

The implementation and completion of the plans to which I have referred is now a matter of prime importance. Given the facilities, I am sure that the Courts can provide a speedy and efficient justice system to satisfy the public needs.

Gentlemen, I hope that before long you, along with many others, will enjoy practice in new, modern and efficient facilities.

To those who have been called within the Bar today, I wish you each one success and satisfaction in the practice of the law in your new rank of Queen's Counsel. □

Wellington
19 June 1986

# Recent Admissions

| | | | | | |
|---|---|---|---|---|---|
| Singh, M L | Christchurch | 31 January 1986 | Vautier, B A | Auckland | 18 December 1985 |
| Smith, S G | Wellington | 17 December 1985 | Vincent, R D | Auckland | 18 December 1985 |
| Sorensen, H T | Auckland | 18 December 1985 | Vincent, S C | Auckland | 18 December 1985 |
| Spring, P J K | Auckland | 18 December 1985 | Waite, M M | Auckland | 18 December 1985 |
| Stubbs, P G | Auckland | 18 December 1985 | Walter, F B | Auckland | 18 December 1985 |
| Style, R L | Christchurch | 31 January 1986 | Webb, M G F | Wellington | 17 December 1985 |
| Tamihere, J H | Auckland | 18 December 1985 | Wickes, J A | Auckland | 18 December 1985 |
| Tattersfield, J G | Auckland | 26 March 1986 | Wilkin, G L | Auckland | 18 December 1985 |
| Tee, T B C | Christchurch | 18 December 1985 | Wilks, A M | Auckland | 26 March 1986 |
| Thompson, M O | Christchurch | 18 December 1985 | Williams, C J | Auckland | 18 December 1985 |
| Thomson, S MacD | Auckland | 18 December 1985 | Wilson, M J | Auckland | 18 December 1985 |
| To'oala, T T | Auckland | 18 December 1985 | Wood, D J McG | Christchurch | 31 January 1986 |
| Toepfer, M McL | Auckland | 18 December 1985 | Woods, P J | Wellington | 17 December 1985 |
| Toh, B B | Auckland | 18 December 1985 | Worthington, F A | Christchurch | 18 December 1985 |
| Tolhurst, M W | Auckland | 18 December 1985 | Wright, P J | Auckland | 18 December 1985 |
| Tremewan, L | Auckland | 18 December 1985 | Yaw, C S | Christchurch | 31 January 1986 |
| Turner, K H | Auckland | 18 December 1985 | Zindel, S J | Wellington | 17 December 1985 |
| Urlich, K S | Auckland | 18 December 1985 | | | |

# Judicial Appointments

On 30 June 1986 the Attorney-General announced the appointment of two new Judges of the High Court. Mr Robert Andrew McGechan QC of Wellington is being appointed as a permanent Judge. Mr John Anthony Doogue of Nelson is being appointed as a temporary Judge in the first instance but will be appointed permanently when the next vacancy occurs later in the year. It is understood that Mr Justice McGechan will sit in Wellington and Mr Justice Doogue will sit in Hamilton.

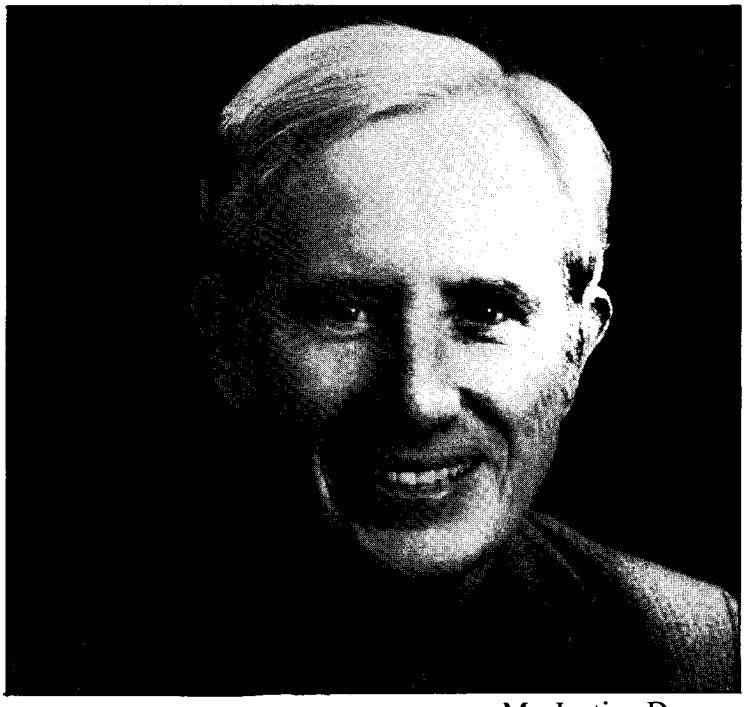
Mr Justice McGechan

## Mr Justice McGechan:

Before commencing practice on his own account as a barrister in 1976 Mr McGechan worked in the firm of Scott Hardie Boys and Morrison. He became a partner of that firm in 1967.

Mr McGechan is Deputy Chairman of the Wanganui Computer Centre Policy Committee and at an earlier time he served as Wanganui Computer Centre Privacy Commissioner for a period of six months. The new Judge is a member of the Council of the Wellington District Law Society, and he has been Deputy Chairman of the Society's Disciplinary Tribunal. He is also Chairman of the Motor Vehicle Dealers Disciplinary Tribunal.

The new Judge has an interest in matters academic and is a part-time lecturer at Victoria University of Wellington. He is a member of the Editorial Board of the New Zealand Universities Law Review and in the past has been a member of the New Zealand Law Society Committee on Legal Education. He was recently appointed to be a member of the High Court Rules Committee. He has been a Queen's Counsel since 1984.



Mr Justice Doogue

## Mr Justice Doogue:

Mr Justice Doogue, who is a graduate of Victoria University, has had experience in the law both in New Zealand and in England where he worked for a firm of solicitors for three years. Prior to going overseas he was employed for about six years in the firm then known as Leicester Rainey and McCarthy.

On his return from England he joined the firm of Hogg Gillespie Carter and Oakley in Wellington as a partner. He was with that firm for nine years.

In 1973 he moved to Nelson to joint the firm of Hunter Smith & Co. He is the immediate past President of the Nelson District Law Society and was President during its centennial celebrations. He has been active in New Zealand Law Society affairs and is a member of the High Court Rules Committee.

Outside the law the new Judge has been active in such matters as Amnesty International and was indeed the first Chairman of the New Zealand section between 1966 and 1971. He is Chairman of the Nelson/Marlborough National Parks and Reserves Board. He has been a member of the Nelson Land Settlement Committee and President of the Nelson Institute. He is a past President of the Suter Arts Society. □

# The Waitangi Tribunal: Its relationship with the judicial system

*By E T J Durie, Chief Judge, Maori Land Court and Chairman, Waitangi Tribunal*

*In this article Chief Judge Durie explains the role and function of the Waitangi Tribunal in relation to other elements of the judicial and political system of New Zealand. He points out that the Tribunal as constituted, and with the predominantly advisory functions that it has, represents a unique choice for dealing with grievances of an indigenous people. The Tribunal has a semi-legal approach which Chief Judge Durie sees as consonant with the Treaty of Waitangi as being not just a potential source of particular legal rights, but a political statement of policy. In his view if the Waitangi Tribunal serves only to divide then its place in the life of the nation is doubtful; but if it serves to reconcile and heal it will be founded on a firm basis.*

The Waitangi Tribunal results from a political response to Maori pressure in the 1970s, for recognition of the Treaty of Waitangi and a settlement of many grievances. The response, in 1975, was to establish a Tribunal with particular functions of considering contemporary Maori grievances where a Crown policy was involved, measuring the policy against the principles of the Treaty of Waitangi, and if prejudice was apparent, making recommendations to Government whereby adherence to the principles of the Treaty might be perfected and the prejudice removed or compensated.

The purpose of this paper is to consider the relationship of the Tribunal with the judicial system. It is after all, a Tribunal. It makes not only recommendations but findings of fact and interpretation. It is chaired by a Judge. He has been assisted by two other persons, appointed for three-year terms by the Ministers of Justice and Maori Affairs, and one of them has consistently been a legal person. Although the procedure of the Tribunal has been bent to the particular needs of Maori claimants, it is still bound by the rules of natural justice, and with only some modifications, is governed by the same rules as affect other Administrative Tribunals.

**Not a Court of final determination**

Its place in the judicial system is therefore an important consideration, presuming it important to have an integrated legal system, for it has the accoutrements of the law — and yet it is not a Court of final determination. It does not make final judgments, or orders. It does not award costs and it has no facility to enforce its determinations. It fits the Maori description of Mr Busby as "a man-o-war without guns". In the legal framework it would seem to rank as a permanent Commission of Inquiry as part of a para-legal process. It can opt for the more relaxed procedure provided for Commissions of Inquiry. As a Commission, the Tribunal is of the type of that both investigates and advises. In advising, the Tribunal addresses not just the relevant Ministers of the Crown, but the public, for the place of the Treaty of Waitangi in our national life is of public relevance. Quite recently the Tribunal's membership has been extended to seven. A research team has also been provided for with a particular function in the inquiring process. Provisions have been made to appoint Counsel.

The Waitangi Tribunal represents, in my view, a good intuitive response from the politicians, for although the Tribunal is not in the main stream of the law, neither are many Maori claims. The advantages and disadvantages of the structure for the conciliation of Maori grievances must be seen in the context of the sorts of claims the Tribunal has or may have to deal with.

**Character of Maori claims**

Maori claims, like the claims of nearly all indigenous minorities, are both justiciable and non-justiciable in character. Many are really political matters. Particular claims for the recognition of customary hunting and fishing rights, are the sorts of claims that could be readily transmuted to defined rights by statutory enactment (and might be said to have foundation in common law as well). Such rights, if given, would be justiciable. But hunting and fishing claims raise wider issues of whether resource management and development policies should reflect particular cultural preferences. To the extent that a development may impinge upon a prescribed fishing right, an action for damages may well be provided for in the general Courts, but many Maori people are really saying much more, that their particular view of environmental management should be adopted as a matter of national policy. The wider issue is not strictly

within the ambit of legal rights but of broad policy.

Other claims, all relevant to the Treaty of Waitangi in one way or another, run the gamut from specific claims in respect of lands or fishing to claims for greater Maori participation in contemporary society with the sharing of political power and economic resources. It needs to be borne in mind that the Treaty of Waitangi was not directed to the cession of land or the sale of rights, but rather to assuring the place of Maori people in the life of the country as a fundamental basis for annexation and European settlement. On that basis the Treaty is not just a potential source of particular legal rights for the indigenous people, but a political statement of policy. The Treaty, as a result, has been a rallying point for diverse claims. I will list but some of them.

1 There are claims to particular land, hunting and fishing rights.
2 There are claims with regard to rivers, lakes, foreshores, and harbours.
3 There are claims to the just redress of past dispossessions and land losses.
4 There are claims to the better accommodation of Maori preferences in law, including for example, environmental laws, land laws, laws affecting the placement and adoption of children, laws governing the right to bring group actions and even laws on criminal matters and the punishment or treatment of offenders.
5 There are claims to a greater involvement in national administration, in the Legislature, Public Service, Judiciary and Local Government.
6 There are claims seeking a greater awareness of Maori attitude, culture and beliefs within the general public and the more sensitive provision of many Government services.
7 There are claims to the maintenance of Maori language, customs, tradition and identity; not just the freedom to indulge in customary practices but, according to the claims, the right to the state assisted propagation of them.
8 There are claims to the right to self determination through tribal or other special bodies.
9 There are claims to a greater share of resources allocated for such things as broadcasting, welfare programmes and economic development.
10 And there are claims to "sovereignty" for Maori people.

Many claims may seem outlandish or fanciful to the uninitiated. Some appear inconsistent with others, particularly since there is no one Maori view of what is meant by "Maori Sovereignty". But such claims are not peculiar to Maori people. Overseas commentators have noted the same broadening of native claims in Canada, United States, Australia and other places. Those countries have been dealing with such claims in various ways and for much longer than we have.

**International context**

The wider claims have reached also an international circuit. A United Nations working group under UNESCO is currently endeavouring to give some definition to the rights of indigenous populations in the context of the much wider lego-political claims of today.

In Canada native claims are categorised according to whether they are "comprehensive" and seek a settlement in respect of the much wider range of issues, or are "specific claims" in respect of alleged breaches of particular Treaty rights or common law Aboriginal rights. Even with regard to specific claims it is felt that a strictly judicial response is insufficient. There are now substantial administrative efforts to provide research and stimulate negotiations with a view to a once-and-for-all settlement with tribes.

In the USA a political solution, not dependent on a settlement of some claim, is apparent in President Reagan's Indian policy to fund the tribes to economic self sufficiency and to maintain tribal self management.

In Australia the Australian Law Reform Commission has been involved in researching the desirable laws and procedures necessary to recognise native land, hunting and fishing rights. Again, proclaimed Aboriginal "rights" to self determination, at least in domestic affairs, falls also within the Commission's purview.

In these countries the judicial response is supplemented by particular research or supply agencies to address the wider issues of the place of native peoples in national affairs.

In New Zealand we have opted for the Waitangi Tribunal and our choice is, I think, unique. The Tribunal is not empowered to make a final and binding determination of claims, but given the political nature of most of them, I do not think it should be, or that Maori claims should be constrained by a need to fit the parameters of strict legal rights. The Tribunal may point to a possible settlement with regard to a particular grievance and with a particular tribe, but the Tribunal is not restricted to the pursuit of a specific settlement as a final and binding end to all claims by any tribe. It does not presume that a settlement can be a once-and-for-all affair, for a political or social contract between two people is by its very nature something to be developed over time. It is not capable of a finite settlement at any particular stage in history.

Perhaps more significantly we have not adopted the Canadian opinion that tribal claims can be bought off with a price paid for the cession of rights. Aboriginal rights are endemic. They belong as much to future generations as the present and cannot be for sale.

Nor have we opted for the political response of simply funding tribal development to self sufficiency. I have no difficulty with the policy, but until there is also an examination of past grievances, I do not think many Maori will feel satisfied. I doubt many Maori will be able to seek the road ahead until the road behind has been cleared for we are as a people locked into history. There is a Maori opinion that your future lies behind you for what in fact confronts you is your past and we are still largely constrained by that opinion.

Nor have we followed the Australian example of seeking a framework of particular laws in advance. We have opted instead for the longer term development of a political, social and legal framework from the experience of a case by case analysis and the continuance of

political negotiations outside of the Tribunal.

**Semi-legal framework**

I think then, that a body that investigates, researches, makes findings on past practices and current policy in light of the Treaty of Waitangi, and then recommends in the context of modern practicalities, is a body suited to our circumstances. It has the benefit of a judicial tradition to bring some order to its proceedings and provide a most necessary relief from real or imagined political interference, at least for so long as the Tribunal itself is continued in existence. At the same time, and perhaps because it has not a power of final decision, it is not so wedded to the normal rules of law that it cannot, subject to what a review Court might say adapt its procedures to accommodate Maori claimants.

The semi-legal approach has other advantages too. It enables specific findings of fact and interpretation in the context of particular cases. Perhaps its recommendations are not as important as the building up of a data base from which more informed national strategies can be planned, at least in those cases that do not involve the allocation of a specific amount of compensation for a specific loss.

The legal input is important in my view. It is not just that it might serve to restore Maori faith in legal processes, but that the hearing of Maori claims is not restricted by political exigencies as they have been in the past, and that the facts are settled, or determined as best they can be, before the search for a settlement is made.

The New Zealand approach is also in my view, consistent with the de facto integration of most Maori into western ways and our national life. That is not to suggest at all that the Maori has been assimilated or has lost his own identity. Nor would I denigrate the current resurgence of Maori group identity and traditional tribalism. It is rather that in New Zealand it is not so practical to talk of the division of authority by territorial rearrangements or to suggest prescriptive rules to govern the individual's choice of a way of life. The Maori must rather talk of the sharing of power according to functions and concepts.

The decision to extend the Tribunal's jurisdiction to take in old land claims to 1840, was also accompanied by decisions to extend the Tribunal's membership to seven, the Chairman and six others of whom four shall be Maori, and to provide a research team that might report on claims ahead of any hearing. The effect in my view is to reaffirm the Tribunal's inquisitorial and advisory role, for by these amendments the Tribunal assumes less of a "Court-like" appearance.

**Tribunal membership**

If it was Parliament's intention to affirm this inquisitorial and advisory function then the extended membership should not be viewed as an attempt to redress an imbalance by loading the dice in favour of Maori people (although I admit it may place a particular responsibility on non-Maori members). The Tribunal serves an important function in explaining a Maori world to a predominantly western society. It is presumptuous to assume that there is one Maori view of the world or not to recognise that being Maori is largely a western concept. Maoris are first and foremost tribal people, and there are many tribes, and many views. Hopefully the extended membership will extend the tribal base for I think tribal differences are most important in any consideration of future directions.

It is also helpful, in Maori terms, that those chosen for the Tribunal should be able to assist their people to work through the past in order to grapple with a perspective for the future. That requires a special skill and vision but one for which most Maori leaders have a particular aptitude by virtue of their tribal history and experience. It would be helpful if the legislature had made that clear. In the legal view, a good arbiter is one well removed from the claim. In Maori tradition, political and judicial roles were not severed in leadership. It was considered instead that the leader who knew intimately the circumstances of the people was the best arbiter of their destiny.

**Advisory non-justiciable role**

I began this paper by referring to the non-justiciable character of many Maori claims, the need for a broad vision, and for a Tribunal in the nature of a Commission to act in an advisory, or indeed a missionary role. That is not to say that all Maori rights are not justiciable. Certain specific rights should in my view be specifically incorporated into the general law to fall within the purview of the general Courts. The Tribunal has already recommended some changes to fishing and environmental laws on that basis. Now, the draft Bill of Rights would take those proposals several stages further by making the Treaty of Waitangi itself part of the supreme law of the land. I do not wish to debate the Bill of Rights in this paper but to say only that it would place the Treaty of Waitangi clearly within the normal judicial structure. That I think would be a good thing in so far as it exposes to judicial treatment some "rights" that are justiciable, but I offer the caution that the Treaty represents more than a source of legal rights. I would find it more helpful if the Bill endeavoured to list a number of specific rights thought to emanate from the Treaty or from the common law doctrine of Aboriginal rights but without denying those social and political elements of the Treaty that transcend the strictly legal. In other words, I am not convinced that the formulation of the most beneficial basis for a Maori-Pakeha relationship ought to depend solely on a judicial response, while conversely, it is apparent that the protection of some native rights ought not to depend solely on political appeal.

What then is the future of the Waitangi Tribunal as it charters an unclear path between judicial and political responsibilities. It is a pertinent question to ask at this time as the Tribunal embarks into a most difficult area, the settlement of outstanding land claims. At one level, the arrangements for the Tribunal invite the criticism that it will be too slow to deal with pressing matters. Quite clearly the Tribunal is not geared to handle a heavy work load with expedition. Its Chairman and members have other duties, and its increased membership will likely add to administrative difficulties, not diminish them. The Tribunal has already a backlog, and the backlog will certainly increase. But on the other hand, while I anticipate mounting criticism of delays, there would seem to be some sense in

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# New rules on advertising (II): Do the New Zealand Law Society rules go far enough?

*By Joanna Manning of the Faculty of Law, University of Auckland*

*The first part of this article was published at [1986] NZLJ 214. In this concluding part Joanna Manning looks at the American experience in detail. She concludes that the liberalisation of the touting rule is to be welcomed, which is not a view that everyone in the profession will share. She contends that the lifting of restraints will increase public access to the legal system and enhance public confidence in the profession. The author is a lecturer in law at Auckland University from which she graduated in 1980 before continuing her studies at George Washington University School of Law. She has been involved in legal practice for periods in Auckland and Washington DC.*

**Specified types of advertising**

The states' reaction to *Bates* was mixed. Typically only certain specified types of advertising were authorised. Most states maintained a restrictive approach, permitting little more than that which *Bates* had held constitutionally mandatory. As at February 1980, 29 states had adopted Proposal "A" while 19 had adopted Proposal "B" with two states doing nothing and Texas simply suspending all rules inconsistent with *Bates*. All states except two allowed newspaper advertisements; ten specifically disallowed radio advertisements, and 12 disallowed television advertisements. Twenty-three states required that legal advertising be "dignified". Only 11 states permitted lists of routine services to be published.[2]

**Permissible regulation of advertising**

The Supreme Court decision of 25 January 1982 in *In the Matter of RMJ* 102 S Ct 929 (1982) illustrates that some states had not gone far enough in revising their rules on lawyer advertising after *Bates*. Missouri had revised its absolute rule prohibiting lawyer advertising in the light of *Bates*. In an effort to strike a balance between total prohibition and full-scale advertising, its new rule restricted advertising to newspapers, yellow pages of telephone directories and periodicals. An addendum to the rule, imposing additional restrictions, provided that if a lawyer chose to advertise areas of practice, he or she must utilise the descriptive terms set out in the rule. Deviation from them was not permitted. Missouri's rule also regulated the use of professional announcement cards. It did not permit a general mailing: cards could be sent only to "lawyers, clients, former clients, personal friends and relatives".

Upon commencing private practice in St Louis, Missouri in April 1977, the appellant placed several advertisements in local newspapers and the yellow pages of the local telephone directory. These contained the information that the appellant was licensed to practise in Missouri and Illinois, as well as the statement that he was "admitted to practice before the United States Supreme Court" — information not expressly permitted by Missouri's rule. The advertisements also included a list of the areas of his practice differing from the prescribed descriptions — "personal injury" instead of "tort law"; "real estate" instead of "property law" — and included areas not listed. He also mailed announcement cards to addresses not included in the class limited by the rule.

Powell J's opinion defined more precisely the area of permissible regulation of advertising after *Bates*. Restrictions on misleading

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moving slowly in dangerous waters if the ship is not to be sunk. There has been quite a deal of support for the workings of the Tribunal to date, but it is as well to bear in mind that the Maori claims dealt with so far have happily harmonised with the politics of other special interest groups — the environmental groups in particular, and those opposed to certain industrial developments on economic grounds. What happens when the Maori claims are diametrically opposed to the balance of public convenience?

**Reconciliation and healing role**

The answer I suspect will lie largely in the vision of the Treaty of Waitangi itself. I doubt that the Treaty was meant to set people apart but rather to find a place for two people. In similar vein, if the Waitangi Tribunal serves only to divide, I doubt it will have a place in our national life; but if it serves to reconcile and heal, it will at least be founded on a secure base. The Tribunal must therefore be interested in social justice in the widest sense. That sort of justice can be illusory and overly subjective when sought without reliance on established legal principles. I think therefore the semi-judicial function of the Waitangi Tribunal provides a most important safeguard for the Tribunal operations, but I am not yet convinced that it ought to be other than in the nature of a Commission. □

advertising continued to be viable. Inherently misleading advertising and that indicated by experience to be in fact deceptive could be prohibited absolutely. But potentially misleading advertising only could not be absolutely prohibited. Restrictions must be no broader than necessary to protect the public. Even advertising with no misleading potential at all could be regulated, providing it was done narrowly and the state could demonstrate a substantial interest in its regulation.

The restrictions on listing areas of practice and the jurisdictions in which one was licensed to practise created by the rule were held unconstitutional limitations on the appellant's speech. These had not been shown to be misleading and Missouri had asserted no substantial interest in them. The Court reached the same conclusion on the restriction of the class of persons to whom announcement cards could be posted.

There is still much difference of opinion in the United States on how much advertising should be permitted. Once started, however, the first changes were extremely rapid. The nature of the practice of law was literally changed overnight in 1974 when US Supreme Court declared mandatory fee schedules to be in restraint of trade in violation of the Sherman Anti-Trust Act 1890 in *Goldfarb v Virginia State Bar* 421 US 773 (1974), and again in 1976 when it held that an absolute prohibition on lawyer advertising offended the First Amendment to the US Constitution's guarantee of "freedom of speech" in *Bates v State Bar of Arizona* 433 US 350 (1976).

**Narrow ruling**

The holding in *Bates* was deliberately narrow. The Court, limiting its decisions to the facts before it, held that the various states could not restrain publication in a newspaper of a truthful advertisement about the availability and price of routine legal services. A disciplinary rule promulgated by Arizona's State Bar purporting to do so was unconstitutional.

However Blackman J writing for the Court said that it was still permissible for the states to regulate false or misleading advertising. For instance quality claims or solicitation might be found so likely to deceive as to require total prohibition. A disclaimer or warning might be necessary in some cases to avoid deception, and the states could regulate the time, place and manner of advertising. *Bates* itself dealt with publication in a newspaper. So, like the NZLS's April 1985 rules, *Bates* permitted only publication in the printed media in words only of the availability of routine legal services. The only difference was that in *Bates* the Court sanctioned the publication of fees — something not permitted by the April 1985 rules.

There has been no general agreement since *Bates* in the states about the proper ambit of lawyer advertising. On 10 August 1977 in quick response to *Bates* the House of Delegates of the American Bar Association approved a report recommending the appointment of a Commission on Advertising. Its draft Proposals "A" and "B" were circulated to the states as alternatives for their consideration. Proposal "A" is regulatory in nature, specifically authorising certain types of advertising — in print, on the radio, and after amendment in 1978, on television. Proposal "B" is less restrictive and approximates full-scale advertising. It is directive, permitting any form of public communication except "false, fraudulent, misleading or deceptive statements or claims".[1] Proposal "A" corresponds with the NZLS's approach in the April 1985 rules, while Proposal "B" is strikingly similar to the later December 1985 rules. The report recommended the amendment of state codes in accordance with Proposal "A".

**Permissive approach**

On 2 August 1983, the House of Delegates of the American Bar Association adopted a set of *Model Rules of Professional Conduct*. These are dominated by the permissive approach, exemplified by the former Proposal "B". False and misleading communications generally are prohibited, as are communications likely to create "unjustified expectations" about the results a lawyer can achieve. The Comment to the rule states that this would prohibit the publication of results obtained on behalf of a client or advertisements containing client endorsements, since these may create the unjustified expectation that similar results could be achieved for others without reference to individual circumstances.

In a recognition that "questions of effectiveness and taste in advertising are matters of speculation and subjective judgment" and that "[t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income" (ibid, at 59). Rule 7.2 permits advertising of a wide variety of information on all public media, including television. Rule 7.4 permits a lawyer to indicate areas which s/he does or does not practise in, but limits the circumstances in which s/he can claim to be "specialist" to those specialisms recognised by the state where s/he is licensed to practise. The Association considered this necessary to avoid deception by falsely implying formal recognition as a specialist.

The Model Rules are obligatory only if adopted by the state. Since the ABA adopted them in August 1983, many states have yet to react to them. They do, however, stand as an implicit challenge to the more restrictive approaches adopted by many states. The widely varying points on the spectrum between absolute prohibition and full-scale advertising selected by the states, the Supreme Court's decision invalidating Missouri's post-*Bates* rule in *In the Matter of RMJ* and the adoption of a relatively unrestrictive Model Code by the ABA illustrate that the advertising controversy in the United States is far from resolved.

**Solicitation of business**

The same ambivalence is illustrated in the two decisions decided by the Supreme Court on 30 May 1978 on the issue of solicitation left open in *Bates*. In *Ohralik v Ohio State Bar Association* 98 S Ct 1919 (1978) an attorney solicited the business of the driver and passenger in a car accident. He visited the driver in hospital on two occasions where she was in traction before persuading her to sign a contingent-fee contract. He also visited the passenger at home on the day she was released from hospital. She orally agreed to a contingent-fee

arrangement. He secretly recorded conversations with both women about the accident.

Eventually both discharged him, whereupon he filed suit against them for breach of contract. When her claim was settled, the driver paid Ohralik one-third of her recovery in settlement of his lawsuit against her.

In an opinion written by Powell J, who had dissented in *Bates* on the First Amendment issue, the Court held that a state could constitutionally forbid face-to-face solicitation for pecuniary gain under circumstances likely to pose dangers that a state had a right to prevent. He considered *Bates* distinguishable on the ground that solicitation is quite different to truthful advertising about the availability and terms of routine services. While they share the same informational function, solicitation lacks the distance of advertising. It may thus exert a pressure not present in advertising. An immediate response is often demanded. It encourages speedy and uninformed decision-making without the opportunity for comparison or reflection (ibid, at 1919).

The Court, in a "parade of horribles", enumerated the evils of solicitation. Because a lawyer is a professional trained in the art of persuasion and the person solicited is often unsophisticated, injured or distressed, the dangers of improper influence are enhanced. Overtures of an uninvited lawyer may distress simply because of obtrusiveness and invasion of privacy. Since it is removed from public scrutiny, solicitation is harder to police or counteract. The Court concluded that these inherent evils demonstrated a need for the prophylactic regulation of solicitation to protect the public. It was not necessary to prove actual damage resulting from solicitation prior to regulating it.

**Availability of free legal assistance**

In *In re Primus* 98 S Ct 1893 (1978) the Court distinguished the activities of Primus from those of Ohralik. Primus was a co-operating attorney with a branch of the American Civil Liberties Union. She sent a letter to a woman advising her of the availability of free legal assistance for her case. The Court considered the letter to be protected by the First and Fourteenth Amendments' guarantee of "freedom of association", rather than as involving rights of freedom of speech with which *Bates* and *Ohralik* were concerned. It said Primus was urging collective activity to obtain meaningful access to the Courts, which had been protected in the line of cases commencing with *NAACP v Button* 371 US 415 (1963). (See also, *Railroad Trainmen v Virginia Bar* 377 US 1 (1964) and *United Transportation Union v Michigan Bar* 401 US 576 (1971) ).

Also of significance was the fact that Primus, unlike Ohralik, was not motivated by pecuniary gain. Sending a letter, compared with a face-to-face approach, did not involve the same degree of breach of privacy and substantially lessened the possibility of undue influence or overreaching. Thus while the prophylactic regulation of solicitation was permissible because of the potential for the various dangers recited in *Ohralik,* greater precision in regulation was required in the context of political expression and association.[3]

The two cases are extreme examples of solicitation of business. *Ohralik* involved almost as blatant a case of "ambulance chasing" as could be imagined, while *Primus* was concerned with the activities of an attorney acting on behalf of a non-profit organisation for no pecuniary gain in a situation where there was little potential for undue influence. The posture of the two cases presented to the Court, which decided them on the same day, prevented it from considering solicitation falling between the two poles, in particular what Marshall J called in his concurring judgment "benign commercial solicitation".[4]

**Advertising and solicitation**

The rather skewed artifical presentation of the issue and the striking example of abuse provided by *Ohralik* pushed the Court to the contemplation of the evils of solicitation without a consideration of the benefits it, like advertising, could serve. Thus it carved out only a narrow exception for the clearly desirable non-commercial solicitation illustrated by *In re Primus.* The philosophy of these decisions appears to be inconsistent with that in *Bates.* Only Marshall J noted the inconsistency:

> In view of the similar functions performed by advertising and solicitation by attorneys, I find somewhat disturbing the Court's suggestion in *Ohralik* that in-person solicitation of business, though entitled to some degree of constitutional protection as "commercial speech", is entitled to less protection under the First Amendment than is the kind of advertising approved in *Bates*. . . . The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in *Bates* 98 S Ct 1928 (1978).

He considered that while the dangers of commercial solicitation are greater than those of publication by advertisement, a total ban on solicitation unduly restricts the free flow of information. Its dangers could be addressed by more specific restrictions.

It is submitted that advertising and solicitation are, as Marshall J recognises, more closely allied than *Primus* and *Ohralik* would suggest. Both disseminate potentially useful information to the public. Direct mail solicitation, in particular, can be seen as a form of advertising. The Court did not distinguish between commercial solicitation by mail, which offers less of an opportunity for overbearing the will of the recipient, and direct solicitation in person, or between coercive and non-coercive solicitation.

Not surprisingly, since *Ohralik* and *Primus* required no affirmative change to state codes, the solicitation rules remain generally unaltered as a result of these decisions. Face-to-face solicitation remains illegal in all states, except Maine and the District of Columbia, whose codes prohibit solicitation which would be false, fraudulent, misleading, deceptive, coercive or done through duress or aimed at a client in a physical or mental condition which would make it unlikely that he or she could exercise reasonable judgment. The states' rules have generally survived constitutional challenge.

**Direct mail communications**

Thirty-seven states prohibit direct mail communications. In many other states, however, their legality is unclear, depending upon whether direct mail communications are classified as advertising or solicitation under the particular state code. The cutting edge of litigation in the states has involved this question. The cases illustrate the unsatisfactory inconsistency between *Ohralik* and *Bates*. The result of the litigation turns upon a fine distinction between protected "advertising" and unprotected "solicitation". In many cases this is a distinction without a difference.

In *In matter of Koffler* 420 NYS 2d 560 (1979) the Appellate Division (Second Department) of the Supreme Court of New York addressed the distinction. The respondent attorney had placed an advertisement in the real estate section of a daily newspaper, quoting his fee for a real estate closing. Thereafter his firm mailed 7,500 letters to homeowners and real estate brokers, enclosing copies of the advertisement and offering to do closings at a still cheaper rate.

The legality of the letters, enclosing the advertisement, was in question. It was not disputed that the advertisement was legal. The respondent relying upon *Bates*, challenged the constitutionality of the state rule in so far as it applied to the letters. The Court held that the letters could not be classified as a form of advertising, but constituted solicitation which could be properly proscribed.

The difference was that the letters were sent out to particular individuals, whereas advertising informs the public generally. However, it is significant that, in recognition of the respondent's good faith reliance on *Bates* and the difficulty of classification, the Court declined to impose a sanction. Instead it gave notice that future violations would not go unpunished.

Despite the New York Court's belief in the "significant [difference]" (ibid, 571) between advertising and solicitation, the Supreme Court of Kentucky reached precisely the opposite conclusion in *Kentucky Bar Association v Stuart* Ky, 568 SW 2d 933 (1978). Letters mailed to two real estate firms quoting prices for routine transactions were not solicitation, but "advertising by letter" (ibid, at 934) protected by *Bates*. None of the evils of solicitation in person were present. The fact that the advertisement was in the form of a letter did not increase the likelihood of those evils occurring.

Thus, in one case the mailing of 7,500 letters was held to be solicitation and properly prohibited, while in the other two letters constituted permissible advertising. On the one hand, publication in a newspaper was legal, but mailing of the same advertisement to 7,500 people was not. The illogicality is plain and stems from the inherent inconsistency between *Bates* and *Ohralik*. It is submitted that the Supreme Court of Kentucky's approach is preferable, since it recognises that solicitation, like advertising, can help people learn about the nature and availability of legal services.

Its approach is consistent with that taken by the ABA's Model Rules. While recognising the potential abuse inherent in direct private solicitation and thus prohibiting it altogether, Rule 7.3 nevertheless permits general rather than specific, targeted mailings, recognising that these are more akin to advertising than solicitation:

> General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more sceptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation. (House of Delegates of the ABA, *Model Rules of Professional Conduct* (2 August 1983), note 21, comment to Rule 7.3.)

**Touting prohibition unjustified**

It is submitted that the retention of the touting prohibition in New Zealand is unjustified. While it is recognised that direct solicitation of business carries a greater potential for abuse than does advertising, this danger does not justify its total prohibition. This great potential for undue influence and overreaching resulting from direct contact between solicitor and potential client can be met by increased regulation of solicitation than of advertising.

Repeal of the touting rule, to be replaced by a permission and regulation of areas of potential danger to the public, is justified because:

(1) Solicitation and advertising are closely allied. Each is important in educating consumers and through the dissemination of valuable information about legal services, assisting them in the fundamental task of locating the cheapest available producer of acceptable quality. The present touting rule would not permit face-to-face solicitation of any kind. Even the relatively non-coercive, non-commercial solicitation afforded by the example in *In re Primus* would not be permissible.

(2) The present touting rule introduces an uncertainty in the case of direct mail communications. Their legality will depend upon whether they are considered to be advertisement or solicitation.

(3) The present touting rule probably operates to the prejudice of smaller firms, sole practitioners and newer entrants.[5] For larger, established firms the traditional reputational model of lawyer selection still works well in bringing clients and firms together. Access to information through business and social contacts is high. Restrictions on touting enhance the importance of more covert forms of solicitation, which are difficult to challenge. The point has been made forcefully by one American commentator:

> [The] rules appear on first sight to be broad and absolute. But they are practically meaningless — at least for a particular class of lawyers and clients — because of certain exceptions to the anti-solicitation rules. . . . [T]hose who are customed to retaining lawyers, say, for their tax or estate work, and those who have attorneys who are relatives and

> friends, are the kind of people who can be solicited despite the rule. As to that socio-economic class of people, there is no impropriety in solicitation. . . .[L]awyers have been known to take tax deductions for membership fees in country clubs, on the ground that such fees are an ordinary business expense — that is a means of discreetly soliciting business.[6]

**Impact on smaller firms**

Liberalisation of the touting rule suggests a relatively insignificant impact on large-firm lawyers. However this model has largely broken down for smaller firms and sole practitioners, who tend to represent people of moderate means. This sector of the population has a relatively high level of unmet legal needs.[7] For them the cost of legal services is critical. It is here that demand is at its most elastic. Relaxation of the advertising restrictions has gone some of the way to enabling these lawyers to reach consumers hitherto inaccessible to them. Lifting the touting restriction forecasts greatest impact on smaller firms and younger and sole practitioners and the people they represent.

**Barristers' services**

The NZLS in its examination and overhaul of the rules on lawyer advertising concluded that the objections to restrictions on the advertisement of solicitors' services did not apply to advertisement by barristers of their services. The primary distinction responsible for this difference in conclusion is presumably that while solicitors are engaged directly by the public, barristers are briefed through an intermediary, the solicitor, and the public cannot approach a barrister directly. The informational function of advertising is satisfied because a client has access to the advice of his or her solicitor on the selection of a barrister. If solicitors have sufficient information and access to adequately select counsel, there is no harm to the general public.

This rationale however is based on the assumption that choice of counsel is properly the solicitor's and that the client will or should be content to abdicate that choice in favour of his or her solicitor or at most acquiesce in that selection. Surely the better view is that it is the client's interests which are at stake, not those of the solicitor, and accordingly the ultimate decision should be the client's.

A solicitor's advice is of course very valuable and likely to be the most influential, but it ought not to provide the only avenue of information upon which to base selection. It would be preferable for the client to have access to an independent source of information to supplement at least, or if need be, challenge a solicitor's selection.

The present rules assume too that solicitors are knowledgeable about the services offered by barristers and that the advertising restrictions create no difficulties for them. If solicitors are experiencing difficulties in choosing suitable counsel, it is assumed there are "ways" in which less well-informed solicitors can obtain reliable information, such as District Law Societies or *The Law List*.

One suspects, however, that some solicitors, especially those in country areas, do experience difficulties in selecting counsel or discovering specialists in particular fields of law. A "half-way house", which would permit barristers to advertise their services to solicitors only perhaps in a card-only form, could well address informational difficulties experienced by solicitors in making a selection on behalf of their clients and deserves consideration.

In addition the question of whether barristers should be permitted to publicise those areas in which they specialise needs addressing. Solicitors are prohibited from doing so as a result of the fear that the public would be misled by the false implication of formal recognition as a specialist. But if advertising by barristers was permitted to solicitors only, this danger virtually disappears. In any event there would seem to be no reason to place barristers on a different footing from solicitors in prohibiting them from publicising fields in which they practise.

**Use of in-house specialists**

The trend towards larger firms providing the full range of legal services discourages the briefing of counsel in favour of the use of in-house specialists. The firms have an advantage in that they can advertise. The difficulties experienced by new barristers in establishing themselves at the Bar and by barristers in competing with the larger firms are likely to be felt more keenly. It is suggested that these difficulties are related to restrictions on barrister advertising and could be alleviated by their relaxation.

Reliance upon reputational advertising is probably no easier for barristers, especially new competitors, than for smaller firms of solicitors and sole practitioners. Advertising could be important in assisting new, less well placed barristers to break into practice at the Bar and enabling barristers to compete on more equal terms with solicitors. While only tentative conclusions are reached here, the real point is that the case against barrister advertising has not been convincingly put. If barristers are to continue to receive unequal treatment, the reasons should be thoroughly explained to them. Since the existing rules may unfairly prejudice barristers, the suggestion of a "half-way house" permitting publicity to solicitors warrants consideration. The question of barrister advertising remains an area for debate and potential reform.[8]

**Hardening of attitudes**

In the United States, as here, there was no overnight rush to take advantage of the Supreme Court's decision in *Bates*. As *Bates* recedes with the seventies, it appears, however, that the minority who do advertise is growing year by year. At the same time the proportion of lawyers who "absolutely will not advertise" has also grown, indicating a hardening of attitudes. In a 1978 Law Poll only 3% of respondents had advertised. In 1981 the Poll indicated that 10% had done so. The increase continued — 13% had publicised their services in 1983.

There was a dramatic surge in the proportion of lawyers who absolutely would not advertise from 49% in 1979 to 67% in 1981. Of interest is the fact that 34% favoured allowing direct solicitation for their legal businesses in 1983 (Law Poll, 69 ABAJ 892 (1983)).

A trend has been noted that established firms continue to rely primarily on reputation to attract clients, while the propensity to advertise is strongest among lawyers

in lower income brackets. In July 1979 the ABA found that 14% of lawyers with incomes of $25,000 or less had advertised, whereas only 3% of those in the over $50,000 bracket had done so.[9] The 1983 Law Poll also indicated that advertising is concentrated among smaller firms. Only 5% of firms of ten or more had advertised, while 23% of firms of three or fewer had (Law Poll, 69 ABAJ 892 (1983)).

**Forms of advertising**

Advertisements in the yellow pages and newspaper classifieds remain the most common form of attorney advertising. The majority seem to be adhering to conventional print or the electronic media. A few however have employed unconventional approaches such as printing tee-shirts with the firm's name, personalising number plates, or dressing up in costumes. The most notorious is Ken Hur, a trial lawyer from Madison, Wisconsin. He ran a trailer from an aeroplane "Call Ken Hur" at a football game and drives a hearse with "No Frills Wills $15" written on the side. His television advertisement pictures him emerging from a lake in scuba gear, suggesting members of the public "in over their heads" consult him for bankruptcy advice.

The available evidence suggests that those larger firms who do advertise tend to prefer to employ outside public relations experts, while smaller firms remain faithful to advertising. According to the 1983 Law Poll, of those larger firms which had advertised, 14% had used outside public relations firms and 20% had used in-house resources for public relations activity (supra, Law Poll).

Of most interest is the emerging trend that advertising appears to have facilitated the development of legal clinics and chains, specialising in the delivery of routine legal services in greater volume at a lower cost than those of traditional firms. Advertising has communicated to a sector of the population whose legal needs have not been adequately serviced in the past. These consumers, people of moderate means, are more isolated from word of mouth reputation information.[10]

Many do not seek out legal advice because of the feared cost of legal services, a fear which is in many cases unjustified.[11] For them the cost of legal services is crucial. They are particularly concerned to obtain routine legal services at reasonable prices. While advertising is still in its infancy, the available evidence suggests that it has assisted lawyers to tap this potentially limitless and hitherto latent demand.

**Effect of advertising**

A study carried out by Timothy Muris and Fred McChesney, has measured the effect of advertising on price and quality, by comparing the Los Angeles-based Jacoby and Myers, the oldest and one of the most successful legal clinics, with traditional firms in the locale which did not advertise.[12] They argue that the increased volume of business generated by advertising pushes lawyers to make changes in the delivery of legal services and realise economies of scale. They cite at least four cost-saving methods, which higher planned volume would allow lawyers to take advantage of: increased specialisation; implementation of systems management; greater use of paralegals; and greater substitution of capital for labour (pp 183-189). They stress that lower costs will result in lower prices, regardless of the degree of competition in the profession: "even a profit-maximising monopolist's price will fall when its costs fall" p 189. To the extent that the profession is more competitive, however, there is an added incentive to pass on cost savings to consumers. More efficient producers will attract a larger share of the legal services market. Accordingly average prices will fall.

These benefits of increased planned volume are possible, because there is a considerable degree of standardisation in lawyers' services. Many are routine, and thus susceptible to high volume, low cost production techniques. In the past, say Muris and McChesney, the full advantage of such economies of scale has not been exploited by lawyers because restraints on advertising have prevented the generation of necessary volume.

Their comparison indicated that clinic prices were lower than those of traditional non-advertising firms, at least for routine legal services. They also devised two tests to evaluate the possibility that these differences were attributable to quality differences. The first test compared clients' subjective evaluation of Jacoby and Myers to reactions of clients of other firms; the second employed an objective measure of quality, by comparing the performance of Jacoby and Myers with that of traditional firms in the area of child support awards.

They concluded:

> Our evidence conclusively rejects the proposition that firms charging lower prices will necessarily produce lower quality services. Further, the evidence indicates that by some measures the one clinic studied actually provides *better* quality than its traditional competitors (pp 205-206) (emphasis in original).

The ability of the clinic to drop prices was achieved by low-cost techniques made possible by an increase in demand through advertising, rather than reducing the amount of care taken on each case. Lori Andrews suggests that "perhaps some of the factors that the professon sees as indicating quality are merely indications of status, which a member of the public might decide to forgo".[13]

Jacoby and Myers consider advertising to have been crucial to the success of their business. In ten years of operation the firm has grown from a single clinic to over 80 offices. It advertises on national television in four major cities.[14] Joel Hyatt, founder of America's largest chain of low-cost storefront law offices, with 118 offices in 17 states, has reportedly spent $2 million on television advertising. (*Taking Issue with Burger,* USA Today, 15 February 1984). For these firms, advertising becomes a commitment which cannot be discontinued. The Oakland-based firm of Yanello and Flipper suffered a precipitous decline in business when it stopped advertising for a while.[15]

**Relevance for New Zealand lawyers**

While the scale of these operations is foreign to this country, the point of relevance for New Zealand lawyers is that advertising appears to encourage the development of storefront offices and clinics offering routine legal services at

**Continued on p 255**

# Judicial control of executive discretion in deportation

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*Judicial review is one of the more significant developments in the common law in the past 50 years, and is increasing in importance rather than decreasing. There continues to be a careful vigilance in respect of administrative actions, and in particular, of administrative discretions. In this article, Mr Hodgson looks particularly at the area of deportation, considering the circumstances when the Minister, or his officials, can be said to have the authority to deport someone, and in what ways the judiciary will exercise control of decisions in this area,*

Expulsion of aliens from New Zealand is regulated by two Department of Labour-administered Acts of Parliament — the Immigration Act 1964 and the Undesirable Immigrants Exclusion Act 1919. Virtually all New Zealand deportations today, however, are executed pursuant to the provisions of the Immigration Act 1964 with the 1919 Act intended to supplement those provisions in certain exceptional situations. This article will endeavour to outline the circumstances in which the deportation power arises, the relevant decision-making processes, and the nature, extent and effectiveness of judicial control over the exercise of executive discretion in this field.

**1 Grounds for Expulsion**

The grounds for expulsion under the Immigration Act 1964 range between general clauses in which the executive discretion is relatively unfettered to specific, objective clauses which narrow the exercise of the executive discretion considerably. Indeed, in some cases, an offence against the Act is an essential prerequisite of deportation. The first group of persons liable to deportation are "prohibited immigrants". Section 2 defines the term "prohibited immigrant" to mean "a person who is prohibited from landing in New Zealand pursuant to s 4 . . . and . . . a person who is deemed to be a prohibited immigrant by s 17". Section 4 makes it unlawful for four classes of persons to land in New Zealand without being in possession of an entry permit and the appropriate certificate. The four classes are:

(i) mentally disorded persons;
(ii) persons suffering from any disease specified by Order in Council;
(iii) persons who have at any time been convicted of any offence for which they have been sentenced to a term of imprisonment for one year or more;
(iv) persons who at any time have been deported from New Zealand or from any other country.

Section 5(1)(a) makes it an offence under the Act for such a prohibited immigrant to unlawfully land as such in New Zealand. Pursuant to s 20, upon conviction in the District Court of New Zealand for an offence against s 5(1)(a), the Court shall direct that the prohibited immigrant be held in custody or released on bail with a view to deportation (subject to the possibility of a s 20A appeal which will be dealt with in a later section). Section 20 leaves the Court no discretion in the matter of deportation. Section 20 makes it mandatory for the Court to order deportation following conviction.

The second group of persons liable to deportation are the Part II "overstayers". Section 14 deals with the issue of temporary entry permits to visitors and makes it an offence for any person to whom such a permit has been granted to remain in New Zealand after the expiry of the period for which it has been granted where an extension thereof has not been previously granted. Once again, under s 20, upon conviction in the District Court for overstaying, the offender is liable to immediate and mandatory deportation subject to a s 20A appeal against deportation. Such appeal is to the Minister of Immigration and there is no right of appeal available to any higher Court against the deportation itself.

The third group of persons liable to deportation are those who have committed serious criminal offences within specified periods under s 22(1) and who accordingly face the prospect of imprisonment. Here,

the Minister of Immigration has a discretionary power to order any person who is not a New Zealand citizen (that is, Commonwealth and alien citizens alike) to leave New Zealand where that person has been convicted of such an offence within a specified period of having taken up New Zealand residence or is the subject of a judicial deportatation recommendation.

The fourth group of persons liable to deportation are those persons (not being New Zealand citizens) in respect of whom the Minister of Immigration certifies that their continued presence in New Zealand constitutes a "threat to national security". Pursuant to s 22(2), such persons may be ordered to leave New Zealand by Order in Council.

The fifth group of persons liable to be ordered to leave New Zealand are those suspected of being involved in terrorism. Section 22(3) provides that the Minister of Immigration may order any person who is not a New Zealand citizen to leave the country where he "has reason to believe" that that person has engaged in (or is a member of an organisation that has engaged in) an act of terrorism in or outside New Zealand. In the case of acts of terrorism committed outside New Zealand, the Minister must be further satisfied that by reason of such acts, the person's continued presence in New Zealand constitutes a threat to public safety.

Finally, to round out the New Zealand statutory deportation framework, s 6 of the Undesirable Immigrants Exclusion Act 1919 provides that the Attorney-General, if so directed by the Governor-General in Council, may order any person to leave New Zealand if satisfied that such a person is "disaffected, disloyal, or likely to be a source of danger to the peace, order, and good government of New Zealand". The width of the executive discretion under s 6 is thus matched by the wide-ranging grounds upon which the discretionary powers may be exercised. Section 7 further authorises the Attorney-General, if he deems it necessary in the public interest, to order the arrest without warrant and preventive detention pending deportation of the person ordered to leave New Zealand. There is virtually no scope for procedural fairness at first instance under the Act from the deportee's standpoint. Moreover, no appeal is provided to enable the deportee to challenge the exercise of the Attorney-General's substantial discretion to order deportation. This is not surprising having regard to the Act's intended operation as a continuation of wartime measures. Indeed, the Act has not been used in peace time (*Clements v Attorney-General* [1981] BCL 675).

**2 The Decision-Making Process**

The cases of prohibited immigrants and overstayers may be conveniently dealt with together since the proceedings at first instance and on appeal are essentially the same. Where a person is convicted by a District Court Judge of the offence of unlawfully landing in New Zealand as a prohibited immigrant contrary to s 5(1)(a) of the Immigration Act 1964, or the offence of remaining in New Zealand after the expiry of the period for which her or his temporary permit was granted without having been granted an extension of the period contrary to s 14(5), the District Court "shall", in addition to or instead of any penalty that it may impose for the offence, direct that the offender be held in custody pursuant to s 20 pending deportation. All of the procedural safeguards flowing from the administrative law principles of natural justice enure to the benefit of the offender in the first instance judicial hearing before the district Court. Upon conviction, the offender may attack his imminent deportation in two ways. First, he may appeal to the High Court against his conviction on an immigration offence pursuant to the appeal provisions of the Summary Proceedings Act 1957. Under s 107 of the 1957 Act, the offender (as well as the Department of Labour) may appeal on a question of law only to the High Court by way of case stated from the decision of the District Court. Alternatively, the offender may under s 115 of the 1957 Act pursue a right of general appeal to the High Court from her or his conviction in the District Court. All general appeals are by way of rehearing (s 119(1)) and may include questions of fact as well as of law. It is important to note that the appeal mechanisms under the 1957 Act only allow the offender to appeal from her or his immigration offence conviction, with the issues of whether deportation would be harsh or unjust being beyond their scope. In the event of a successful appeal against conviction by the offender, however, the basis of a s 20 deportation is removed.

**Appeal to the Minister**

Apart from relying on the appeal provisions of the Summary Proceedings Act 1957 to quash an immigration offence conviction, the offender may appeal to the Minister of Immigration under s 20A of the Immigration Act 1964 against deportation. However, the grounds of appeal are limited. In a written reply by the Minister of Immigration to Parliament (Order Paper dated 17 October 1985), it was disclosed that in the period 1 August 1984 to 17 October 1985, 467 appeals were prosecuted under s 20A. Pursuant to s 20A, where a person has been convicted of any offence referred to in s 20(1) (such as overstaying or unlawful landing by a prohibited immigrant), that person may, within 14 days after the date on which the conviction is entered, request the Minister of Immigration in writing to make an order that she or he "be not deported from New Zealand". On any such request, the Minister may make such an order under s 20A(2) if he is satisfied that, "because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand". In *Faleafa v Minister of Immigration* (1979) unreported, Supreme Court, Auckland Registry, A293/79, Barker J stated (at p 7) that the offender has the clear burden of satisfying the Minister as to the existence of the s 20A(2) criteria. As an administrative rather than a judicial appeal, it may be that the requirements imposed upon the Minister by law are less onerous. In *Tongia v Bolger* [1979] NZ Recent Law 266, Barker J held that the Minister's duty of fairness in relation to s 20A appeals does not include a requirement that he give reasons for his decision. Nevertheless, the delivery of such reasons is still important for judicial

review purposes and, as will be seen shortly, another appeal mechanism provided for by the Immigration Act 1964 for s 22 deportation decisions requires the delivery of reasons by the appeal body.

As we have already seen, the Minister of Immigration has been granted a discretionary power to order deportation under s 22(1) where, for example, a person is convicted in New Zealand of an offence committed before he has resided in New Zealand for at least two years for which the Court has power to impose imprisonment. As in the cases of overstayers and prohibited immigrants, the offender may seek to remove the basis for a possible deportation order by appealing against the conviction pursuant to the appeal mechanisms contained in the Summary Proceedings Act 1957 outlined above. In the event that a deportation order is made and no such appeal, or successful appeal, has been prosecuted, provision is made in s 22C of the Immigration Act 1964 for an offender ordered to be deported under s 22(1) to pursue an administrative appeal before the Deportation Review Tribunal (hereinafter referred to as the DRT) set up under s 22B. The DRT consists of three members (the Chairman must be a lawyer) and its constitution and appeal proceedings are set out in the Fourth and Fifth Schedules to the 1964 Act. Briefly, the DRT is authorised by the Fourth Schedule to set its own procedure (subject to the Act and any regulations promulgated thereunder) and for the purposes of a s 22C appeal the DRT shall not be bound by any rules of evidence but may inform itself in such manner as it thinks fit. The Fifth Schedule provides for a public hearing in relation to a s 22C appeal at which the appellant and the Minister of Immigration may call evidence and have a right to be heard either in person or through counsel or agent. It also requires the DRT to give its decision and reasons therefore in writing and to furnish a copy thereof to both parties.

### Unduly harsh or unjust

On a s 22C appeal, the DRT is empowered by s 22D to quash the deportation order if it is satisfied that it would be unduly harsh or unjust to deport the appellant from New Zealand and, secondly, that it would not be contrary to the public interest to allow the appellant to remain in New Zealand. The DRT must be satisfied of both elements and the onus of proof rests with the appellant. (*Tanu v Minister of Immigration* [1981] BCL 1022). In deciding whether or not it would be unduly harsh or unjust to deport the appellant from New Zealand, the DRT is required by s 22D(2) to have regard to the following matters concerning the appellant:

(a) age;
(b) the length of the period of New Zealand residence;
(c) personal and domestic circumstances;
(d) employment record;
(e) the nature of the offence of which he has been convicted;
(f) the nature of any other offences of which he has previously been convicted;
(g) the interests of his family; and
(h) such other matters as the DRT considers relevant.

In the course of a s 22C appeal, the DRT may at any time, on the application of the appellant or the Minister of Immigration or of its own motion, state a case for the opinion of the High Court on any question of law arising in respect of such appeal (s 22E). Either party is permitted by s 22F to appeal to the High Court by way of case stated on a question of law only in respect of any DRT determination alleged to be erroneous in point of law.

Concerning the fourth category of persons liable to deportation from New Zealand, there would appear to be no appeal available, administrative or judicial, in respect of a Government-directed deportation under s 22(2) of a person whose continued presence in New Zealand is certified by the Minister of Immigration to constitute a threat to national security. Finally, in relation to the Minister's discretionary power to deport suspected terrorists pursuant to s 22(3), s 22G provides that any such person who is ordered to leave New Zealand may appeal to the Administrative Division of the High Court against the making of the order. Section 22G(3) requires the High Court to hear and determine the appeal as if the deportation order had been made in the exercise of a discretion. Concerning the principles applicable to an appeal against the exercise of a discretion, New Zealand Courts in the cases of *Secretary for Justice v Taylor* [1978] 1 NZLR 252, 255 and *Waverley Publishing Co Ltd v Comptroller of Customs* [1980] 1 NZLR 631 relied on the following passage from the speech of Viscount Simon LC in *Charles Osenton & Co v Johnston* [1942] AC 130, 138;

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established . . . The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified.

The decision of the High Court to confirm or quash the deportation order on such an appeal is "final and conclusive" (s 22G(6)), subject to the possibility of judicial review which will next be considered.

### Conviction and appeals

In summary, then, with the exception of those persons liable to deportation on the grounds of national security or suspected terrorist activity, the power to deport under the Immigration Act 1964 only arises after the proposed deportee has been convicted of a specified offence in a Court at first instance after she or he has been accorded all of the procedural safeguards associated with a judicial hearing. In terms of appeal mechanisms, prohibited immigrants, overstayers and persons convicted of serious

criminal offences within specified periods may either pursue administrative appeals before the Minister of Immigration or DRT based largely on equitable grounds or judicial appeals designed to remove the basis for the exercise of the deportation power by attacking the conviction on questions of law and/or fact. It is only in the cases of suspected terrorists and persons deemed to be national security threats that administrative appeal (and, indeed, judicial appeals in the latter case) are unavailable. In cases where both administrative and judicial appeals are available, the Courts will be confined to a consideration of the merits of the conviction underlying the deportation order rather than the merits of the proposed deportation itself which is the proper province of the DRT or the Minister of Immigration.

### 3. The Extent of Judicial Control in Expulsion

Apart from hearing appeals from immigration offence convictions (which provide the occasion for the exercise by the Minister of Immigration of the statutory deportation power), New Zealand Courts control the exercise of the executive discretion to deport in two ways — appeal and judicial review. As we have already seen, an appeal to the High Court from the Deportation Review Tribunal lies on a question of law where the deportation is based on a s 22(1) conviction, while an appeal to the High Court on a question of fact and/or law is available to a person who has been ordered to be deported by the Minister on the ground of alleged involvement with terrorist activities. In both cases, the existence of such a statutory right of appeal has largely obviated the need for recourse to judicial review mechanisms by the deportee. Concerning prohibited immigrants and overstayers, however, judicial review has been much more frequently invoked as the means of control following an unsuccessful s 20A appeal to the Minister against deportation on humanitarian grounds.

It is proposed to deal with the judicial review method of control first. As Lord Brightman aptly stated in *Chief Constable of North Wales Police v Evans* (1982) 1 WLR 1155 at 1173:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

Judicial review in the New Zealand immigration context is founded upon the provisions of the Judicature Amendment Act 1972. Briefly, s 4(1) thereof provides that on an application for review, the High Court may grant any relief that the applicant would be entitled to in any proceedings for the common law prerogative remedies of mandamus, prohibition or certiorari or for the equitable remedies of a declaration or injunction in relation to the exercise of a statutory power. Such relief is available notwithstanding any right of appeal possessed by the applicant in relation to the same subject matter. "Statutory power of decision" is defined by s 3 to include a power or right conferred by any Act to make a decision deciding "the eligibility of any person to . . . continue to receive, a benefit or licence, whether he is legally entitled to it or not". Section 4(5) empowers the High Court to direct the decision-maker to reconsider the matter to which the application for review relates pursuant to such directions as the Court thinks just. Finally, s 13 recites that the relevant part of the Act for present purposes shall bind the Crown, thereby facilitating the bringing of applications for review by deportees against the Minister of Immigration.

#### Humanitarian consideration

The landmark decision concerning judicial review of the Minister's decision under a s 20A appeal declining to order that the appellant not be deported is that of the Court of Appeal in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130. The appellant, a Fijian citizen, was convicted of a charge of remaining in New Zealand after her temporary entry permit had expired contrary to s 14(5) of the Immigration Act 1964. Pursuant to s 20 of the same Act, the automatic consequence of such an overstaying conviction was a Court order that she be deported. The appellant appealed to the Minister against deportation under s 20A on the ground that it would be "unduly harsh or unjust". She relied on the humanitarian consideration that one of her New Zealand-born children had a rare metabolic disease and therefore had of necessity to remain in New Zealand to receive proper medical treatment. A physician was appointed by the Immigration Division as a medical referee and asked by the Minister to comment on the child's current medical situation. The medical referee eventually submitted his report, the tenor of which highlighted improvement in the child's condition and discounted the risk involved in the child accompanying his mother to Fiji in the event of the execution of the deportation order. The general impression conveyed by the referee's report was that the physician in charge of the clinic treating the child had been fully consulted and was in general agreement with the substance of the report. The Minister accordingly refused the appellant's s 20A appeal. In fact, the clinic had not been fully consulted and it appeared that the clinic's advice would have been different from that contained in the referee's report. The High Court dismissed the appellant's application for review pursuant to s 4 of the Judicature Amendment Act 1972 on the ground that fairness did not require disclosure to the appellant of the referee's report. The appellant appealed to the Court of Appeal pursuant to s 11 of the 1972 Act which unanimously allowed the appeal and issued a declaration that the Minister had not validly dealt with the s 20A appeal. The unanimous ratio of the decision was that the administrative law principles of fairness did require that the referee's report, or at least its substance, should have been disclosed to the appellant before the Minister made his decision in order to allow her a reasonable opportunity of correcting or contradicting any prejudicial material. The Court of Appeal indeed acknowledged that Parliament had confided the decision whether, because of

circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport, to the Minister rather than the Courts. Nevertheless, the decision-making process adopted by the Minister must be fair. Although s 20A is largely silent as to the procedure to be followed by the Minister on the appeal, Cooke J (at 143) considered it reasonable to "imply" that at least the substance of any prejudicial material contained in the referee's report should be disclosed to the appellant prior to an adverse decision being made. Concerning the procedure required to be adopted by the Minister on a s 20A appeal, an oral hearing was not considered necessary by the Court of Appeal and, in that respect,the procedure is less demanding than that required by the judicial process. Nevertheless, the Minister is under a legal obligation to ensure through the receipt and qualified disclosure of written submissions that the issues are fully and fairly presented.

**Duty to act fairly**

Prior to the *Daganayasi* decision, New Zealand Courts had recognised that the Minister was under a legal duty to exercise his powers under the Immigration Act 1964 fairly. In the Court of Appeal decision in *Movick v Attorney-General* [1978] 2 NZLR 545, the Minister contended that his discretionary powers under the Act were completely unfettered and, as such, their exercise was not open to review by the Courts. In rejecting this contention, Woodhouse J commented obiter dicta that "it would be an unusual situation to say the least if a statutory power conferred upon a Minister could be exercised by him unfairly and yet leave the Courts persuaded that the decision was incapable of review" (at 549-550). In a similar vein, Richardson J expressed the view that "the Minister must act according to law" (at 551-552). Further, in *Tongia v Minister of Immigration* [1979] BCL 445, BCL Digest 532, a case involving an application for judicial review of the Minister's refusal of a s 20A appeal, Barker J, followed his earlier decision in *Chandra v Minister of Immigration* [1978] 2 NZLR 559 in considering that the Minister was under a duty to act fairly. However, in view of the subjective nature of the considerations "exceptional circumstances", "undue harshness" and "of a humanitarian nature", Barker J was of the opinion that the Court could only interfere if the decision taken was one which no responsible Minister could possibly take or where the Minister had failed to take account of relevant circumstances or had taken into account irrelevant considerations. It would appear, therefore, that the judicial recognition in these decisions of the Minister's duty to act fairly casts doubt on the earlier authority of *Tobias v May* [1976] 1 NZLR 509 which held that the Minister's decision to revoke a temporary entry permit pursuant to s 14(6) of the Immigration Act 1964 is not qualified by a duty to observe the *audi alteram partem* principle beforehand in view of the perceived legislative intention to preserve the Minister's "freedom of action". Indeed, Cooke J maintained in *Daganayasi* that a judicial imposition of a duty to act fairly upon the Minister "should not cause any concern that administrative efficiency will be unduly shackled" (at 145). Nevertheless, as Jeffries J cautioned in *Manhaas v Bolger* [1979] BCL 597, BCL Digest 020, it is not the function of the Court in judicial review proceedings to go so far as to examine the merits or otherwise of New Zealand immigration policy.

Another decision of interest in the context of judicial review proceedings is that of *Weight v Malcolm* [1983] BCL 104 in which the applicant (a convicted overstayer) applied under the Judicature Amendment Act 1972 for an order for review of the Minister's decision under s 20A declining to direct that she not be deported. During these proceedings, the applicant made further application for an order for production for inspection of certain documents in the possession of the Minister on the ground that the latter may have been wrongly influenced, in arriving at his adverse decision, by allegedly false and malicious information contained in these documents supplied gratuitously by someone who wished to secure her deportation. Disclosure of the contents of the documents was sought in order to enable the applicant to answer whatever prejudicial material they might contain. The Minister objected to the production of the documents on the ground that they comprised confidential information in respect of which Crown privilege attached (that is to say, the rule of law which authorises the withholding of a document on the ground that its disclosure would be injurious to the public interest). Quilliam J applied the *Daganayasi* decision in holding that the Minister is under an obligation to act fairly in considering a s 20A appeal against deportation. While Quilliam J sympathised with the Minister's desire to preserve the confidentiality of information supplied to his Department, nevertheless fairness required that the deportee ought to be permitted to know the nature of any adverse information in the possession of the Department (if not its source) so as to be in a position to answer it. Accordingly, production for inspection of the relevant documents was ordered.

**Threat to national security**

Until now, we have dealt with cases in which overstayers and prohibited immigrants sought judicial review in order to quash a Minister's refusal of a s 20A appeal against deportation. The applicants were successful because the Courts were willing to imply a duty to act fairly. It may be, however, that where a person is ordered deported as a threat to national security, the Minister may be subject to a less demanding procedural standard. No statutory appeal is provided in such case and Cooke J has commented in *Daganayasi* (at 145) obiter dicta that where national security considerations are involved, the requirements of fairness in the context of judicial review may well be modified. His Honour cites as authority for this proposition the English Court of Appeal decision in *R v Secretary of State for the Home Department; ex parte Hosenball* [1977] 3 All ER 452; [1977] 1 WLR 766, which suggests that where deportation is sought for reasons of national security, the ordinary rules of natural justice must give way to the interests of national security — the Government Minister being answerable to Parliament and not to the Courts. Accordingly, the

deportee is not entitled to the disclosure of sensitive prejudicial material in such a case.

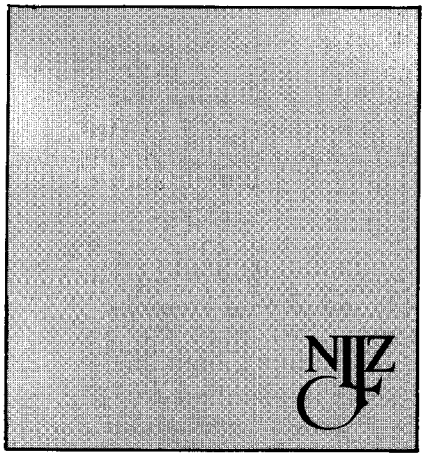
Judicial control over the exercise of executive discretion in deportation is carried out through statutory appeal rights as well as by judicial review pursuant to the Judicature Amendment Act 1972 as in cases concerning the deportation of suspected terrorists and persons convicted of certain comparatively serious criminal offences under s 22 of the Immigration Act 1964. The principles upon which the High Court will interfere on appeal with the exercise of the Deportation Review Tribunal's s 22D discretionary power to affirm or quash a deportation order were canvassed in *Tanu v Minister of Immigration* [1981] BCL 1022. The appellant, a New Zealand permanent resident, was convicted of attempted rape and sentenced to two years and nine months' imprisonment. As the offence had been committed before he had resided in New Zealand for a period of five years, the Minister of Immigration, in the exercise of his discretionary power under s 22(1)(b) of the Immigration Act 1964, ordered the appellant's deportation. After having appealed unsuccessfully to the DRT against the deportation order pursuant to s 22C, the appellant appealed by way of case stated to the High Court pursuant to s 22F on the question of law whether the DRT erred in law in its approach to the criteria set out in s 22D(2) which it is required to have regard to in deciding whether deportation would be "unduly harsh or unjust".

In rejecting the appellant's contention that the DRT attributed undue weight to one of the criteria, Davison CJ stated (at 9) that the manner in which a discretionary power is exercised is a matter of law, and followed the English decisions of *Ward v James* [1965] 1 All ER 563, 570 and *Charles Osenton &Co v Johnston* [1941] 2 All ER 245, 257 concerning the principles on which an appellate Court will interfere with the exercise of such discretionary power. The appellate Court will only interfere if it is satisfied that the decision-maker has given no, or insufficient, weight to those considerations which ought to have been taken into account or, conversely, that the decision-maker has been influenced by considerations which ought not to have weighed, or weighed so much, with her or him. The "merits" or policy of the decision appealed from, however, will not concern the appellate Court. Such an approach on appeal is not far removed from that taken by a Court in judicial review proceedings.

There have been occasions, however, when humanitarian considerations have actuated New Zealand appellate Courts in interfering with the exercise of judicial (as opposed to executive) discretion in relation to the Minister's statutory deportation powers. In the Court of Appeal decisions in *R v Mahmod* [1979] 1 NZLR 62 and *R v Mamud* (1978) unreported, Court of Appeal, CA 9/78, the appellants, Singaporean citizens, applied to have cancelled a judicial recommendation issued pursuant to s 22(1)(c) of the Immigration Act 1964 that they be deported at the expiry of their ten-year imprisonment sentences for convictions of importing heroin into New Zealand. The appellants submitted that the judicial recommendation for deportation ought not to have been made at the time of sentencing since they would be forced during a ten-year period to live under the cloud of imminent deportation to Singapore where they were liable to face capital charges in respect of the same offences. In both cases, the Court of Appeal held that such future consequences were a relevant consideration for the sentencing Judge and accordingly ordered the cancellation of the deportation recommendation, thereby removing one of the grounds upon which the Minister's power to deport may be exercised. The Court held the view that it would not be right on "humanitarian grounds" that the appellants should be left throughout their long period of imprisonment facing a formal judicial recommendation for deportation with the possible consequences of a capital charge at the end of it.

**4. Conclusions Concerning the Effectiveness of Judicial Control**

The control exercised by New Zealand Courts over the exercise of Ministerial discretion in deportation matters, whether such control is exerted through statutory appeal or statutory judicial review mechanisms, is aimed primarily at the manner in which the discretion was exercised as opposed to the actual result of its exercise. The Courts will not be concerned to substitute their own opinion as to whether or not the discretionary power to deport should have been exercised since the New Zealand Parliament has squarely committed that function exclusively to the Minister of Immigration in some cases and to the Deportation Review Tribunal on appeal in certain limited circumstances. Rather will the Courts be concerned to ensure that the Minister has dealt fairly with the deportee in relation to the decision-making process. Failure by the Minister to take into account relevant considerations or to receive and consider the deportee's representations, or the refusal in some situations to provide the deportee with an opportunity to answer prejudicial material or allegations, may constitute error of law amenable to judicial relief. Likewise in the cases of bad faith or improper purpose on the part of the Minister. Nevertheless, New Zealand Courts, rightly so, have exhibited a marked reluctance to interpret such phrases as "national security" and "public interest" — a task which is more appropriately reserved to the New Zealand Executive. So far as the writer's researches have taken him, it would appear that in holding the Minister of Immigration to certain minimum procedural standards, the Courts have been reasonably successful in maintaining an even hand in balancing the interest of ensuring justice to the deportee on the one hand with the interest of the wider community in security on the other. □



# The charismatic renewal of law in Aotearoa

*By N J Jamieson, Senior Lecturer in Law, Otago University*

*The place of James Busby in New Zealand history is now thought of largely in terms of his ownership of what is today known as the Treaty House at Waitangi. It is the argument of Mr Jamieson in this article that historically Busby had much greater legal significance than is usually acknowledged. He sees Busby as being a personification of one of the jurisprudential concepts of Max Weber, who was a founder of sociology. Mr Jamieson makes the point that whereas law for us now is territorial and not personal, national and not tribal, it does not follow that the same was true in 1840. It is, he suggests, the role and personality of James Busby that allows us to investigate and analyse the roots of our law, and to understand better the true legal identity by which we can integrate* turanga waewae, *or a place to call home, with our* whakapapa, *or the continuity of our human heritage. The article is an essay in jurisprudence and an interesting historical piece about the person and the constitutional role of James Busby himself. Mr Jamieson suggests it is historically and legally a mistake to see Busby as a legal figure of fun as summed up in the traditional phrase that he was a man-of-war without guns.*

The citizens of every country eagerly seek to reinvigorate their culture by returning to their original source of law. This first cause of law serves as their civic fountain of youth. Constitutional lawyers regard the search as one to establish the autochthony or grass roots of the legal system. This is their need to find an axiomatic system from which to derive theorems of law that will integrate individual with collective consciousness.

This paper tries to discern some of these roots of legal history on which to found our constitutional law. It assumes, as we all do at different levels of discourse, that the law is some sort of gift. It does not so readily assume, as a purely pakeha culture is prone to do, that our law was given by a superior to an inferior people. On the contrary, the true nature of the law is such that it is simply handed on by way of being God's gift.

Many may consider our concept of law as God's gift to Aotearoa to be some sort of psychological regression. They will say that here is surely a medieval view of law. It is not just medieval, however, but early christian, and not just early christian but anciently hebraic, and not just anciently hebraic, but positively antediluvian.

The reason for this regression of legal values is that we can never appreciate our heritage by being merely modern. If we are going to discover the roots of our legal system we must recall the values with which they were first laid down. Otherwise we make modern mistakes which, in contradicting long established values, impart confusion to the law. And so, even were it only for the sake of maintaining consistent argument, we would unashamedly revert to respectful recognition of the law's divinity.

This is the basis on which we reiterate our original postulate that God's gift is the original source of the law we all still share in Aotearoa. Our sharing is not merely an instance of mundane communication. It is an act of religious communion.

We are all one people under the rule of law in Aotearoa because we began by considering ourselves as being all God's people. We can hardly regard ourselves otherwise and still rightfully live and work in God's own country. Our sense of justice on which we erect a legal system depends on the success with which we can integrate *turanga waewae* or a place to call home with our *whakapapa* — the continuity of our human heritage. The essence of this integrity is our respect for law. In so far as our legal system is concrete then we have a *mauri* or material emblem of the life principle in Aotearoa, and in so far as the jurisprudence underlying our legal system is abstract we have a *taumata atua* or the resting place of a god. Perhaps for only as long as we can remember how our law began on this broad basis in Aotearoa, can we continue to enforce it, for its forcefulness continues to be charismatic. Here lies our need to recognise the root of law in Aotearoa by way of glorifying God as the divine donor.

Why talk about Aotearoa? This is New Zealand. Why provoke an identity crisis by using different words? The answer is not obvious but esoteric. Ours is the problem of posing how law began before New Zealand was New Zealand. Law for us is now territorial not personal, and national not tribal. It may have been otherwise in 1840. Lest we predetermine the origin of our law by assuming it to reflect our present notion of New Zealand, we clear our minds of all such preconceptions. We shall consider our quest to relate to Aotearoa as part of the original *Terra Incognita Australis*, and reconceive its full potential as a jurisprudential source of charismatic wonder.

## The charisma of law

Max Weber (1864-1920) was the first legal theorist to lift the veil on the charisma of law.[1] He revealed that under the traditional process of institutionalisation leading to the legal domination of society by the rule of law lies one of society's oldest secrets. This is the mystery of

how law began. It is also the mystery of how the legal system renews itself.

Some say the law begins in conflict. They gleefully point out how we cannot even agree whether man is a solitary or a social animal. All the same there is room enough for consensus even on this point. The lonely life of the prophet and the communal response of society create an essential tension. It is this tension between the solitary search for life's significance and the social response by way of accepting or rejecting any breakthrough of existing conventions that serves to maintain a homeostatic equilibrium in human affairs.

Max Weber relied on two things by which to explain how law began. First there was the individual initiative needed to overcome the inertia of everyday existence. Secondly there was the collective response required by way of recognising the exercise of this individual initiative.

Weber's theory is thus a composite one. It needs both psychology and sociology to account for the origin of law. The autonomy of each discipline is not only acknowledged but secured by the lynchpin of divinity.

Making sense of the law thus requires at least a trivium of understudy. Both the psychology and sociology of law are related through theology. This renders each immune from relativism and puts both beyond reductionism.

In becoming the touchstone for both the psychology and sociology of law, theology thus reasserts itself as the sine qua non of jurisprudence. The psychology and sociology of law may be secular but the only standard by which each can be evaluated is spiritual. It is this spiritual standard that discloses an underlying divinity of law.

Nothing demonstrates Weber's reliance on divinity to explain the law more clearly than his concept of God as a contracting partner. For the purposes of this paper, however, we must be content to consider only his concept of charismatic personality. Law originates in a charismatic force attributable to the personality of those who take the initiative to establish authority. The charisma is personal, unique, dynamic, deeply-felt, transitory, self-determined, messianic, and unstable.

This describes the life of the prophet. It is so bleak and solitudinous that it would be impossible to pursue without relying on God as a contracting partner. And so the charismatic personality of the prophet is explicable only in terms of the prophet's close contractual partnership with God.

The social response reciprocates the life of the prophet. It literally turns his life inside out. Because this response is public it seems more complex, but its various cycles of initial acceptance, intermediate rejection and ultimate acceptance merely mirror-image the prophetic experience of drawing close, backing off, and then drawing closer than ever before to God.

Whereas the prophetic experience is private, the social response is public. The ultimate acceptance of prophetic revelation is commonly held, externally induced, only rudely imitative, and but superficially understood. It is static, not dynamic, and it worships security at the expense of taking the risk of any further revelation. Here is the frail fellowship of the prophet that will cry first hosannah, then crucify him, and finally end by worshipping him as a god. We shall find that life is no different for the first prophet of law in Aotearoa.

**Weber's jurisprudence considered as a theory of action**

In his *Seven Theories of Human Society* (1981) Tom Campbell considers Weber's jurisprudence to constitute a theory of action. Campbell's is a comparative approach. Consequently what he means by categorising Weber's jurisprudence as a theory of action can only be understood in the context of what Aristotle, Hobbes, Adam Smith, Marx, Durkheim, and Schutz have said about the origins of law in society.

This comparative approach would be more than enough to divert us from the task in hand of ascertaining the origins of law in Aotearoa. In any case today's debate over how law began in Aotearoa is not that wide. We have not yet reached the point of comparing the instrumental individualism of Hobbes with the phenomenological approach of Schutz for the purposes of enquiring into our own legal development. We are thus still innocent enough to accept the notion of a theory of action on trust.

A narrow debate nevertheless proves more intense. Understanding the way in which individual action constitutes social action is as essential for Weber's explanation of the charismatic origins of law as explaining the role of conflict is essential for understanding Marx's denigration of law.

"In a sense", wrote Lloyd of Weber's work, "personal charisma is really the key to understanding the conception of legitimacy". It does so "because it emphasises in an extreme form the psychological forces which underlie this conception". This is the sense, as conveyed by Lloyd's *Idea of Law* (1961), in which Weber's account is made acceptable to contemporary jurisprudence. Its force is psychoanalytic. Yet in so far as we allow psychology to reveal the sociology of law, what is thereby revealed must surely be secular, for ours, so we assume, is a secular society. Who then but a charismatic christian dare doubt the prevailing secularity of our society to reinvest Weber's account with its original significance?

**The earliest origins of European law in Aotearoa**

We can all recognise the charismatic aura of Hammurabi, Justinian and Napoleon, but it takes a wise man to recognise his own father. Who was the founding father of New Zealand? Was it Kupe, Tasman, Cook, or Hobson? Some still insist instead that we were born parthenogenically of Queen Victoria in 1840, but as our true roots sprout twigs, this becomes less and less credible.

Alexander the Great claimed to have been similarly sired by the Gods. This left him without an obvious father, although he was happy enough to rely on his legitimacy to accede to Macedonia. To repudiate one's paternity always produces a paradox of human status. At the level of what it takes to rule a nation this risks, whether for Macedonia or New Zealand, a discontinuity of law.

Instead we propose a rather humble man for our founding father. The fact that he was born a mere Glaswegian will not cause the stiff upper lip of British colonial history to express disdain, but it will

take most historians some time to recover from the anticlimax.

To one, James Busby, we give our toast as the originator of law in Aotearoa. It is to this much misunderstood man we owe almost all our underlying jurisprudence. Here he still stands as a figure of fun throughout our legal history – the embodiment of loneliness, unrevered, laughed at, reviled and ill-thought of by all who enjoy his works.

**Climbing down from the concept of this being "God's Own Country"**

Why pick on Busby for the founding father of New Zealand? Like most men's fathers we might choose to revere him for the wrong reasons as being awesomely wise. We might also, as most men are doomed to misunderstand their own fathers, also find it very easy to misrepresent him as being a complete clown. Accordingly the very fact that we propose him as our founding father bids our caution.

James Busby's frail humanity is a great comedown from the mythology of Maui and the mystical explorations of Kupe and Toi in their discovery of Aotearoa. It might be thought that this comedown becomes more acceptable by reason of our recognising that pakeha culture has lost touch with the spirit world. We even shrug off our own indigenous roots. Thus when Abel Tasman reported of New Zealand that he sighted giants striding across the hilltops, we dismiss not only his writings but his illustrations of them as evidencing an illusion, rather than consider it as confirming our own prehistory of Genesis 6, 4 that "there were giants in the earth in those days".

Captain Cook is a good compromise. He satisfies our sense of the heroic without sacrificing common sense. As a navigator he provides a common bond for maori and pakeha. His figure is the epitomy of Durkheim's consensus theory. But he can hardly satisfy the lawyer as a choice for a founding father of our legal system. His instructions, both public and secret, to explore the antipodes, and his declaration of sovereignty, doubtless have legal significance. Nevertheless they do not even begin to suggest, in Foden's words "a field for an Austin or a Maine".

Busby was different. Unlike Cook, who seems to have had no authority, secret or otherwise, for claiming sovereignty, Busby does not impress the layman as being a man of action. For this he has been roundly criticised by most of his contemporaries. Edward Markham (1801-1865) was one of his critics. This was the Georgian rake who wrote *New Zealand or Recollections of It*. But by no stretch of imagination could Markham be credited with having much respect for the law.

Busby was not just New Zealand's first public servant. That claim, made by the writers of *New Zealand's Heritage*, is even inconsistent with Busby's diplomatic status as British Resident. Before all else, Busby was New Zealand's first jurist.

Busby's was truly a jurisprudence put into action. It has rarely been equalled in visionary zeal or practical success by any monarch far less anyone in Busby's power-hungry position. Having more than a century of substantiated success, it confirms Campbell's concept of Weberian jurisprudence as a theory of action. This success was the result of Busby's forceful personality. Because the concept of personality provides a vital link between law and divinity, theology and jurisprudence, the successful exercise of Busby's personality in turn substantiates Weber's work. It does so by revealing where the real power lies in establishing the authority of law. Because this view runs counter to almost all contemporary and historical evaluations of Busby's work we are now obliged to prove it.

**Busby becomes British Resident of Aotearoa**

In 1831 some thirteen Maori Chiefs petitioned King William IV of Great Britain to extend his rule and administer European law and order in New Zealand. Instead of satisfying, but still responding to this request, the British Colonial Office sent James Busby. He was appointed as British Resident to deliver his sovereign's reply to the Maori Chiefs, and to commence upon "an interesting but fatuous experiment", as Foden in his *Legal History* calls it, of recognising a distinct national entity in an uncivilised native race. Mercifully for Aotearoa, Busby had more faith in his own foresight, than had Foden with hindsight of this experiment, the terms of which were made to work, ready or not, for almost seven years.

"It seems", wrote the Regency Buck Markham in his *New Zealand or Recollections of It* "that Lord Gooderich appointed Busby, and sent him to General Bourke at Sydney for instructions, and he has given none; he will not take on himself to administer an oath to Mr Busby as he is not Consul but Resident."

It is said that Busby had been appointed from a succession of minor posts in the colonial service of New South Wales by Lord Gooderich direct from London. In 1831 Busby had visited London and is rumoured to have expressed dissatisfaction with the way he had been treated as a settlor in the Colony. His appointment as British Resident to New Zealand appears to have been without consultation with New South Wales; but over and above difficulties of communication between England and Australia was also the fact that about the same time Bourke replaced Darling as the Governor of that Colony. McCormick notes that Darling had already picked "the far abler Sturt" for the position. Bourke, always more sympathetic to the rehabilitation of convicts in a penal settlement than the requirements of settlors, might have preferred to appoint an ex-convict to teach the natives how to administer justice in New Zealand.

The present writer does not dispute these facts of Busby's appointment any more than those relating to the remainder of his residency. He does, however, utterly repudiate the values contemporaneously, and so far also historically ascribed to them. It is not just that Busby is made a scapegoat for governmental inconsistencies but that New Zealand's first attempts at jurisprudence are reduced to a kind of clowning. The result is to reverse the roles of law and justice, exaggerate events and belittle ideas, and provoke an intense but illusive conflict between the protagonists of good and evil throughout the remainder of New Zealand's legal history.

Bourke did eventually issue instructions to Busby. The British Resident was to announce his

intention of remaining among the natives where he would claim the protection and privileges accorded in Europe and America to British subjects holding similar positions in foreign states. It was clear that the Colonial Office chose to regard Aotearoa then as an independent sovereign state. Whether this is an instance of legal fiction or not depends as much on anthropological jurisprudence as on international law. It is only the extension of New South Wales government to New Zealand, if that is what really happened in 1839, but not the Treaty of Waitangi in 1840, that is inconsistent with this recognition.

That New Zealand's early exploration was speluncian has already been written about in terms of jurisprudence (1984 NZLJ 393). For the rest of his life Busby went on trying to reconcile practical duties with theoretical aspirations. It was thanks to the less than seven lean years of his residency, however, that the import of Fuller's *Morality of Law* would have come to have a firmer hold on New Zealand jurisprudence than the risky response of legal positivism raised by Golding's *Lord of the Flies*,[2] through the lynch law of the Kororareka Association. It is the remaining task of the present paper to prove this point.

The proof of Busby's reinstatement as a leading jurist of Aotearoa takes two forms. In the first place we shall show that Busby's life and works consistently express his principled recognition, practised under the most extenuating of circumstances, of the morality of law. In the second place we shall show that those who denigrate his contribution to New Zealand jurisprudence espouse a very primitive sort of legal positivism at the lowest level of which might is right.

**Busby's recognition of legal morality**

Busby was no great theoretical jurist. We are not searching for some nineteenth century anticipation of twentieth century revelation. If we do so we shall be grossly disappointed. In the same way as New Zealand exploration of jurisprudence was speluncian, however, the first premise of her search for justice was moral. It was also in accordance with the most enlightened tenets of much later anthropological jurisprudence. This is amply demonstrated by what Busby both said and did. Not even Salmond had the opportunity, whether as writer, teacher or judge to put so much jurisprudence into action as had Busby. As British Resident, Busby realised his full potential as the legal leader of a fast emerging nation. Until now it has passed unmentioned.

"Until the native Chiefs have acquired some idea of the existence and limits of legal authority", wrote Busby, after his house had been attacked in 1834, and a close shot had scattered fragments of weatherboard in his face, "their power cannot be employed for the purpose of maintaining order without risking greater evils than it could remedy". Yet he considered the natives "to be on the very threshold of civilisation . . . it is only necessary to acquire their confidence in order to lead them to whatever changes in their social condition may best afford them the blessings of established government and impartial law".

These were the views of an enlightened and liberal thinker far ahead of his times. They were not just the thoughts of a theorist, however, who would use them to pre-empt all need for action. Busby put them into practice.

**The practical measure of Busby's morality of law**

Once again, we do not find fault with the facts as found by the historians of Busby's life and work. What we do take issue with, once again however, is the way in which their value has been belittled. In most cases this is the result of historians evaluating legal data as if it were merely a matter of fact. In other cases, however, it is the failure of legal historians to recognise the extent to which only jurisprudence can explain the law.

Because we do not find fault with the facts, we shall be content to summarise the practical measure of Busby's morality of law. In terms of the two principles quoted in the previous part of this paper it will be seen that Busby was concerned first, neither to expect too much nor secondly to expect too little from his practical application of anthropological jurisprudence to the early days of Aotearoa.

These two principles, neither to expect too much nor too little from those who seek to enforce law and order in their search for justice, appear trite and commonplace. Their apparent obviousness offends the academic jurist whose ears ring with the exhilarating was cries of extremely different schools of jurisprudence. The truth is that Busby's morality of law was one of moderation, and he himself being a moderate-minded man practised what he preached as British Resident.

Busby did not expect too much from either the native inhabitants or the early settlers when he argued the need for a constabulary. He did not expect too much from the existing Maori order when he sought to establish schools for educating the sons of Maori chiefs. He did not expect too much from the colonial authorities when he used more than a quarter of his own salary in providing for the natives. He did not expect too much of himself when he refused to conduct criminal trials because he had not been empowered as he ought to have been as a magistrate. He did not expect too much from his second in command, MacDonnell of Hokianga, who had been appointed as Additional British Resident. Busby did not support MacDonnell's attempt to legislate by way of the Ardent Spirits Prohibition Order 21 December 1835 because that would be inconsistent with the principles of constitutional government he had been appointed to teach the Maoris. Both settlers and missionaries, as well as New South Wales and British authorities viewed Busby's constitutional caution with despairing contempt. With the exception only of the Port Nicholson settlers, they all perhaps were rougher men and therefore wanted rougher justice.

On the other hand, Busby refused to expect too little from those who opposed his ideal of inculcating a concern for British justice in the tribal society of New Zealand. The usual response of unrequited public benefactors is to retire if possible and retrieve their largesse to take with them. Busby stubbornly stayed on. He stuck to his principles and intensified his efforts amid a changing context that made him

appear to contradict himself and act the clown.

Busby refused to expect too little of the Maori nation when he helped them to devise the first flag of Aotearoa. A New Zealand made ship, the Sir George Murray had already been gleefully seized by the New South Wales Government in Sydney because it flew no flag at international law. Busby's flag worked by putting a stop to this sort of seizure — so how can one deny the sovereignty of the Confederation of United Tribes who flew it?

Busby was derided by his contemporaries for his lack of action. Yet he acted decisively enough. Within 36 hours of de Thierry declaring his intention to land in Aotearoa as "the sovereign chief of New Zealand", Busby had obtained a Declaration of Independence from 35 hereditary chiefs and heads of tribes. They represented Maoridom from North Cape to Thames. This Busby achieved, even in those days of primitive communication, and despite all Governor Bourke could do to keep the British Resident of New Zealand in one place at Waitangi and prevent him travelling.

Busby has been long laughed at for calling this document New Zealand's Magna Carta, but like the English original few have read it or studied the context in which it was made, or the personality of its initiators and so are unfit to judge. It is probably the first of New Zealand's own legal documents. Certainly it is the first document of this nation entirely initiated from within that expresses a national identity. Of that there can be no doubt.

Busby refused to expect too little even from those in New South Wales who most obstructed his efforts to bring British justice to New Zealand. He asked the colony at least to provide official stationary. When we remind ourselves that Governor Bourke refused to send help after the attempted assassination of the British Resident, refused to send any militia at all to put down the Waikato War, and sat silent and refused to pass on to Busby the grant of Lord Glenelg for Busby's constabulary and Maori education, we are not surprised that Busby had to pay for his own pen and paper. Lesser men might have stopped writing, but Busby wrote on. His continued criticism of colonial affairs to the Colonial Office in London provides a theoretical reverse-image of the ideals he still tried to put into action in Aotearoa.

**The cynic's response to every charismatic renewal of law**

Busby's principles of neither expecting too much nor too little from those around him delineated his own teaching tightrope. His own ruder contemporaries and just as insympathetic chroniclers have persistently mistaken what was essentially an Aristotelian mean by way of applied anthropological jurisprudence for a self-contradictory character. His was an immense force of character required to walk such a finely delineated tightrope and he did so with a logical consistency that has remained almost entirely misunderstood by those who have no alternative, in their present frames of mind, but to impose their own secular values. Yet this in itself does not go far enough to explain the force with which Busby's contribution to New Zealand's legal history is still reviled.

Indeed, how can the positive force of Busby's personality on the development of jurisprudence in New Zealand remain so long misunderstood? The facts of legal history are firmly enough established. The values we attach to them just don't make sense. It is suggested that the key lies in psychoanalytic rather than historical jurisprudence. The fault is ours not Busby's.

"A small-minded man" wrote Peter Adams of Busby in his account of *British Intervention in New Zealand* (1830-1847). This, too, is but an echo of William Pember Reeves' conclusion in his *Long White Cloud*, that Busby was "a well-meaning small-minded person, anxious to justify his appointment". "A pompous young man" awaiting the attentions of "a Gilbert and Sullivan" decided Keith Sinclair in his *History of New Zealand*. "A shrewd estimate" concludes McCormick of Markham's criticism that Busby "has not Devil enough for the situation . . . but if he had more (Suaviter in Modo) he might do anything". It is even claimed by the writers of *New Zealand's Heritage* that "Busby's career proved that personality without power was insufficient to protect British interests in New Zealand".

Of course all these sayings are mere echoes of contemporary criticism. The real purpose of history, however, is not just to find out, but to go on re-evaluating the facts. In the case of legal history this means the facts in so far as they reveal the law.

Let us remind ourselves then that when Hobson landed in New Zealand he handed Busby not the thanks of Britain and New South Wales for the single mindedness with which Busby had carried out his duties as British Resident, but Busby's own dismissal; that the New Zealand Banking Company seized Busby's property at Waitangi without giving Busby's debtors any opportunity to repay him what they owed; that Governor Grey cancelled all land titles and expropriated Busby's land at Whangarei; that when Busby vindicated himself by Court action the scrip he was awarded could not be realised to buy land and was later devalued from £36,000 to £24,000 which left little over to repay his debtors and meet the costs of litigation.

Accounting for this state of affairs requires not only, as Foden points out, a Maine, a Bentham, or an Austin. It requires a jurist skilled in the old school of theological as well as the new school of psychoanalytic jurisprudence. All we can do in their absence is to study the phenomenology of human values and try to explain in commonsense terms how it is that those who hate, revile, and laugh at Busby thereby only evidence an intense dislike of themselves.

Corresponding to every charismatic renewal of law in society is a cyclic response of human cynicism. There would appear to exist a logic of complementarity explaining the reprisal of cynicism exacted against a caring God by sinful man. Instead of receiving from and rejoicing in, man steals from God. Pride makes man regard the legal system as his own. By doubting God man thus begins to believe himself self-made. The prophets of law, of whom Busby is the foremost in Aotearoa, are reviled. Unless we can understand and forgive ourselves we shall be tempted to refute not just the values but the facts of history and so

commit an even greater miscarriage of justice.

**One generation's conclusions are the next generation's first premises**

The only lines of communication Busby could keep open were Polynesian. He was the only prophet of European jurisprudence to the Polynesian, and when bankrupt, dismissed from office, and broken in health, his sovereign students offered to make him their king. Characteristically, Busby declined the offer, and went back to Britain where he eventually died after an eye operation.

Derided as "the man of war without guns" shows how misunderstood Busby was. He never pretended to be any sort of man of war. Indeed, he was appointed expressly as a civilian. One might as well mistake a militia man for a jurist as to judge the ideals of constitutional government by the practices of a convict colony.

Busby wrote his testament. He called it *The Occupation of New Zealand 1833-43.* It still has to find a publisher. Unlike Markham's risque accounts of whoring with Maoris and gossiping over colonials which our own Government Printer has seen fit to publish, Busby's testament so far remains a private and still prophetic document.

"I hold it to be the highest duty to which a citizen can be called", wrote Busby to "oppose the unlawful and unjust acts of persons in power". What Busby's biography, rather than this short sketch by a charismatic fellow-Scotsman still requires, is a jurist of the highest order, to revitalise the life source of New Zealand's legal history.

To those who still ask, "why pick on Busby for the founding father of our jurisprudence?", these are the short answers. In the first place, as a matter of psychoanalytic jurisprudence in which most sons misunderstand their fathers, he too is grotesquely misunderstood. In the second place, as a matter of sociological jurisprudence, no man apart from Busby has ever attempted to hold and bring New Zealand together as one nation, and done so single-handed and unsupported, in the face of fierce opposition solely by force of his own personality. Thirdly, unlike Tasman, Cook, or Hobson he participated intimately in New Zealand life, and identified his own fortune with that of the emerging nation. Fourthly, as the prophet of a nation's future greatness, he sacrificed himself. Fifthly, his work has the appearance of extreme ambivalence, being seen by some as saintly in its innocence and by others as devilish in its naivity.

In short, Busby provided lawyers with the speculum juris or mirror of law by which they see themselves today. It is impossible to identify the continuing context of concern in which our legal issues are debated and decided without recognising the ongoing Grand Experiment that James Busby initiated for Aotearoa. It is in the strength of this continuing experiment by way of creating a legal system that Busby's personality lives on, and in pursuit of which he himself died, like Christ, a broken man. □

1 The most recent and thus accessible account of Max Weber for lawyers is published in the *Jurists: Profiles in Legal Theory* series edited by William Twining. This is Anthony Kronman's book *Max Weber* (1983), but of course no jurist will ignore the primary sources by way of being Weber's own writings which even in translation make delightful reading. Among these are his *Economy and Society* with its essay on the Sociology of law, and his *Sociology of Religion.*

2 I owe this idea to Professor Nolan of South Carolina who raised it in private correspondence.

**Continued from p 243**

competitive prices without sacrificing quality, typically to the less well-to-do who have seldom before visited a lawyer.

The liberalisation of the touting rule in the Code of Ethics is to be welcomed. The most important value served by lifting restraints is to expand the information available to consumers and increase public access to the legal system. The American experience suggests that there are also pro-competitive benefits. Questions remain for future debate whether the changes to the Code go far enough, in particular whether the "touting" rule should be retained and whether barristers should continue to be excluded from the benefits of advertising their services. In the final analysis the profession's willingness to embrace reforms in this area, together with the abolition of the Scale, can only enhance public confidence in the profession. □

1 For the proposals set out in full, see L Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* (1980) at 97-134.

2 Ibid, at 135-146.

3 98 S Ct 1908 (1978). The greater constitutional protection is based in part on the practical need to encourage the co-operative non-profit activities of attorneys like Primus.

4 This he defined as "solicitation by advice and information that is truthful and that is presented in a non-coercive, non-deceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous". Supra note 3, at 1927 n 3.

5 See T Muris and F McChesney, *Advertising and the Price and Quality of Legal Services: the Case for Legal Clinics* [1979] 1 AB Found Res J 179, 183.

6 M Freedman, *Lawyers' Ethics in an Adversary System,* 116-7 (1975). Freedman argues that lawyers have a "duty to chase ambulances". In contrast to the strictures against advertising and solicitation, "attorneys have a professional duty to stir up litigation when they are acting to advise people, who may be ignorant of their rights, to seek justice in the Courts" (p 118).

7 B Christensen, *Lawyers for People of Moderate Means* (1970) at 128-135.

8 See generally the Monopolies and Mergers Commission, *Barristers Services,* HOC 559 (28 July 1976). The Commission opposed lifting restrictions on the advertising of barristers' services.

9 L Andrews, supra note 1, at 83.

10 B Christensen, supra note 7, at 128-135.

11 Two studies conducted into local needs for legal services in Christchurch and Dunedin prior to the establishment of student-run law centres in those cities revealed that in the absence of precise cost information, misconceptions relating to price occur. In particular, people tend to over-estimate significantly the cost of routine legal services. See Dunedin Community Law Centre, *Reports on Local Legal Needs* (December 1980-February 1981). Both studies are reported in *Public Attitudes to Lawyers,* [1982] NZLJ 269. See also, *Bates v State Bar of Arizona,* 433 US 350, 370 and n 22, 376 and n 33.

12 Supra note 5.

13 L Andrews, supra note 1, at 82.

14 C Anderson, *How Lawyers are playing the Advertising Game,* 1981 Cal Law 34.

15 Supra note 13, at 71.

# Books

## *Goods and Services Tax*

*By Garth Harris LLB, M Jur and Wayne Mapp LLB(Hons), LLM(Tor)*
*Published by Butterworths, xxi and 126pp*

*Reviewed by Annabel Young BA, LLB, Dip Acc, Tax Manager Ernst and Whinney, Wellington*

*Goods and Services Tax; The application of the Act* is striking on first glance because it is the first work that applies case law to the GST Act. This book is not a mere discussion of what the GST Act says, instead it discusses what the GST Act means. In order to do this Mapp and Harris have referred to British decisions on the meanings of words or phrases in their VAT legislation. The authors also source their conclusions in an analysis of the White Paper and the Brash Report.

The book is explicitly aimed at "tax professionals, both in the legal and accounting professions". It assumes a working knowledge of the format and effect of the GST Act and proceeds to analyse the main issues that can be expected to arise. British case law provides an indication of how our GST law will evolve but it also highlights problems which seem to have been overlooked here so far.

- What happens when the sale of an asset is treated by the IRD as the sale of a going concern? It would seem the vendor will lose one eleventh of his sale price and the purchaser will obtain an unexpected input tax deduction of the same amount (p 48).
- Is the sale of a tenanted building the sale of an asset or of a going concern?
- Is an insolvent business a going concern?
- Where services are provided to a bank in respect of its banking operations, are the services provided financial services, eg the transportation of cash between branches of a bank by a security firm? It would seem not (p 34) and is therefore GST liable but the bank cannot claim the cost as an input since it is an input to a financial service.
- Can a person be registered for some purposes but be unregistered for others eg where two activities are carried on and one is below the $24,000 threshold? It appears from the British experience that once you are registered every taxable activity is caught (p 94).

The GST Act is due to be amended in June. This book states the law as at 1 April, 1986. In addition, departmental statements are expected in June eg on apportionment. This book provides insight into the interpretation of and operation of GST which will remain valid even after the anticipated amendment of the Act. □

# Hand-me-downs

The houses, the furniture, the clothing of the rich, in a little time, become useful to the inferior and middling ranks of people. They are able to purchase then when their superiors grow weary of them, and the general accommodation of the whole people is thus gradually improved, when this mode of expense becomes universal among men of fortune. In countries which have long been rich, you will frequently find the inferior ranks of people in possession both of houses and furniture perfectly good and entire, but of which neither the one could have been built, nor the other have been made for their use. What was formerly a seat of the family of Seymour, is now an inn upon the Bath road. The marriage-bed of James the First of Great Britain, which his Queen brought with her from Denmark, as a present fit for a sovereign to make to a sovereign, was, a few years ago, the ornament of an ale-house at Dunfermline.

— **Adam Smith**
*The Wealth of Nations (1776)*

All for ourselves, and nothing for other people, seems, in every age of the world, to have been the vile maxim of the masters of mankind.

— **Adam Smith**
*The Wealth of Nations (1776)*

The man who, by some sudden revolution of fortune, is lifted up all at once into a condition of life greatly above what he had formerly lived in, may be assured that the congratulations of his best friends are not all of them perfectly sincere.

— **Adam Smith**
*Theory of Moral Sentiments (1759)*