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Peter Mahon (1923-1986)

In Memoriam

The death of the Honourable Peter Mahon meant for many people more than the death of a retired Judge. He had become a national personality of note. It is fitting that the occasion of his death be marked among the legal profession. The editorial for this month, accordingly, is the republication of a personal tribute to the late Judge by John Burn, Barrister of Christchurch. The article originally appeared in The Press *of Christchurch on 16 August 1986. The accompanying poem by Thomas Hardy has been selected by the Editor of the* New Zealand Law Journal *as an appropriate* in memoriam *testimonial to the life of a man of laws who was not only advocate and Judge, but was also the author of* Dear Sam.

The death of Peter Mahon this week had a wider effect than merely upon his family and friends, many though they were. Late in his life he became an internationally known figure, a symbol of integrity and duty, when his painstaking report on the Erebus disaster led to his dramatic resignation from the High Court.

To the man in the street, he was at once more than just another Judge, and his writings and the media attention brought him a fame which will not quickly die.

To Christchurch people, he had long been known and respected. He had studied law after service in the Italian campaign, and in a steady career became a most competent Crown Prosecutor. His conduct of cases for the Crown evinced the characteristics which always marked his work — careful preparation, complete grasp of the issues and a feeling for the dynamics, the tactics, of a case which defied definition.

Perhaps his courage was first shown when he forsook a safe practice to become the first barrister practising in this city, but he was an almost immediate success. Colleagues remember the small shopfront-type office in Hereford Street in which he began, and they will recall, too, the deft manner in which he advanced his clients' causes, by direct inquiries of the police, settlement discussions which were gentle but firm, and creative adjustments to the court fixture lists.

His clients gained full measure, and as the years advanced many in other fields were to receive the same unstinting and unselfish attention. Lawyers remember him in an era when the civil jury trial was still pre-eminent in litigation practice. Though there were other skilled counsel in the city, perhaps the feats of the brilliant trio of Mahon, McClelland and Leggat are those which stick in the memory.

In complex commercial cases, too, he made his mark, culminating in the Europa Oil tax appeals to the Privy Council. But he could be found also in the lower courts, giving his powerful talent full rein in every type of factual and legal issue.

He was not a great advocate, but a skilled presenter of any proposition. He had a feeling for the evidence of witnesses, and an ability to divine what their motivation and hidden thoughts were likely to be. His antennae were always out.

This understanding of human nature manifested itself in his conversation and his wry sense of humour. He was always an enthralling companion, and he acquired and kept loyal friends in every walk of life.

His close friends would hear that sombre voice on the telephone, or see those saturnine features intrude in chambers or home, and then for a while all would be delight and fun.

From those years of practice, too, sprang his continual interest in technical matters, in other people's

jobs, in how things worked. There came a time when this gift of analysis attracted the attention of the world. Looking back, it is not difficult to see how the basis for this ability was being laid.

He acquired a lifelong interest in golf and, though none of his friends at Shirley or Middlemore would accept his constant assertion that he had perfected his swing, all who played with him will remember his careful calculation of margins, his gentle gamesmanship and his close assessment of wagering odds.

He was also a private man, rising before dawn each morning to work on cases or to write letters and articles. It was not generally known that he was fluent in Italian, but his close study of the great literary works could be realised from his superb style of prose and his gift for literary allusion.

Soon after taking silk he was appointed to the Bench, and spent most of his subsequent career in Auckland. His friendships with colleagues were not lost, but maintained by frequent and absorbing correspondence.

Readers of his published collection of letters, "Dear Sam," will need no further description of that urbane and humorous style, but those like this contributor who received almost monthly missives for over a decade know that this masterly prose was not achieved for special occasion or special effect — he could write in no other way.

He had the tricks of the sophisticated comic writer — the description of workaday matters in solemn prose, so that the absurdity become hard to bear, and the following of a passage of fine writing by an unexpectedly down-to-earth phrase.

Perhaps his greatest gift was the inspired mot juste. One doubts whether any established man of letters would have wished to change a word, if impelled on a re-editing attempt, of any of his many writings. One phrase was later to ring around the world, and though it may have caused considerable trouble, no author could have improved upon it.

This gift for prose is evident in every judgment he handed down from the High Court Bench. Words are the tools of lawyers, and they must be used precisely and without ambiguity, or judgments and submissions begin to fray at the edges. Peter Mahon was pre-eminently successful in this respect.

His very confidence in each judgment sometimes persuaded him to impart a measure of that gently mocking humour which was never far below the surface. The case had to be suitable for such an exercise, of course, but those who enjoyed such judgments as the mouse in the bottle in the dairy factory, the come-uppance of the rapacious clergyman, or any of the fishing prosecutions in the Taupo area appreciated to the utmost that they were based on a balanced, kindly and amused outlook in which a feeling for humanity was never lost.

As a senior Judge said in his funeral oration this week, he was a superb lawyer who could always be

Afterwards

When the Present has latched its postern behind my tremulous stay,
And the May month flaps its glad green leaves like wings,
Delicate-filmed as new-spun silk, will the neighbours say,
"He was a man who used to notice such things"?

If it be in the dusk when, like an eyelid's soundless blink,
The dewfall-hawk comes crossing the shades to alight
Upon the wind-warped upland thorn, a gazer may think,
"To him this must have been a familiar sight."

If I pass during some nocturnal blackness, mothy and warm
When the hedgehog travels furtively over the lawn,
One may say, "He strove that such innocent creatures should come to no harm
But he could do little for them; and now he is gone."

If, when hearing that I have been stilled at last, they stand at the door,
Watching the full-starred heavens that winter sees,
Will this thought rise on those who will meet my face no more,
"He was one who had an eye for such mysteries"?

And will any say when my bell of quittance is heard in the gloom,
And a crossing breeze cuts a pause in its outrollings,
Till they rise again, as they were a new bell's boom,
"He hears it not now, but used to notice such things"?

— Thomas Hardy

relied on for unhurried and considerate assistance to his brethren.

In court he was reserved, unemphatic, but always in control. He was unfailingly courteous to counsel, witnesses and parties, and his summings-up in criminal trials were a model of fairness. The accused always received the benefit of any doubt, but if convicted could not count on a soft sentence. He was concerned for the victim before it became fashionable to be so.

His friendships were legion, and elevation to the Bench affected none of these. His continued passion with racing saw him at Riccarton or Ellerslie in close consultation with owner, trainer, jockey or stableboy. All recognised his interest and expertise in bloodstock, and perhaps, here again, his ability to comprehend and communicate with the expert could be seen.

He was almost universally admired for his lack of pomposity. While a chance meeting with an old Etonian solicitor in the City of London led to a firm and continued friendship, he also had an arrangement towards the end of his life whereby the girl in the T.A.B at Parnell was required to slip him some forbidden cigarettes. During his enforced stay this year in Mt Sinai Hospital in New York, he gained the friendship of a young American intern who, hearing his masterly accounts of experiences with his elder son, Sam, with rod and gun, resolved there and then to visit New Zealand.

His correspondents up to the time of his death ranged from members of the Court of Appeal to a Christchurch schoolboy who treasures his closely observed descriptions of cats, birds and ants. As a godfather, and indeed in many other respects, he retained a direct and almost boyish attitude of mind. As Sam said at his funeral service, he was a man for all seasons.

It was Erebus which brought him fame and personal loss. His dedication to duty and scientific analysis gave him no option in the report he handed down, but his feeling for the drama and the horror of the accident led him to a passage of dramatic prose which brought the Establishment down on his head.

Some of the stricter members of the legal profession saw his resignation and his entry into the public controversy as unjustified and made no secret of that. The Auckland District Law Society, however, championed him from the start, and conferred what public honour it could upon him.

It is known that he was much moved during his last illness by a message from that society assuring him of the affection in which he was held by every member.

Greater still was the support he received from the public. This contributor was dining with him in a restaurant when the proprietor arrived to say that another diner, who had already left, had arranged to pay for his meal. Others, similarly unknown to him, would stop him in the street to express their good wishes.

It was clear that his vindication of the dead pilots had struck an emotional chord in the public consciousness. However the litigation over his decison fared, it was clear that he had won in a broader and more representative court.

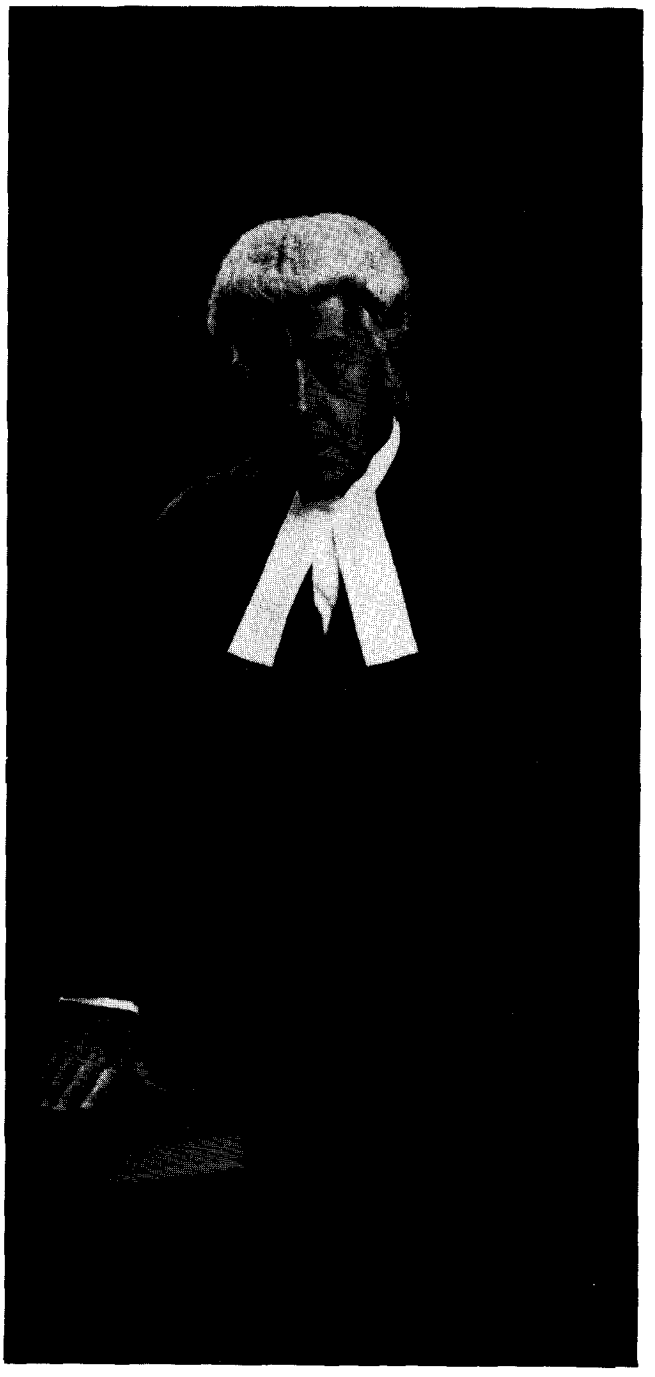
His close friends and family gave him unfailing support and over the last years of his life he had secured a happy and worthwhile lifestyle.

He was charged with several major commissions — the Queen Street riot inquiry, the reorganisation of power boards, the trusteeship of the Agent Orange claimants and many public inquiries and arbitrations.

He was totally a man whom the public knew it could trust (perhaps the highest accolade), and it is sobering to realise how much important public service has been lost by his early death.

But for the many who knew him, directly or through his writings, an irreparable sense of loss remains. For his friends it is hard to accept that one will no longer read those finely turned phrases, no longer hear those gentle witticisms, and no longer have, bent upon one, that cool sardonic gaze.

John Burn



Anthony Henry, Photographic Portraits, Parnell

Hon Peter Mahon
(1923-1986)

Case and Comment

Should a caveat under the Marriage Act 1955 be discharged? — the aim of the Court's inquiry?

In *Dowling v Matthies and Hooper,* (Family Court, Christchurch; judgment 12 May 1986, (No MFP 30/86)) Judge T W Fogarty had to consider s 26 of the Marriage Act 1955.

That section provides that the Judge to whom a caveat under s25 of the 1955 Act has been submitted shall forthwith inquire into the grounds of objection stated in the caveat, and, if he is of the opinion that those grounds should not prevent the solemnisation of the marriage, he shall discharge the caveat. Judge Fogarty stated that the duty so imposed on the Judge was to consider the matter in an inquisitorial manner and not merely to embark on a hearing of an adversary nature. Whilst the scope of the inquiry was limited "to the grounds of the objection stated in the caveat", it was not limited simply to determining whether the conditions precedent to a valid marriage as set out in Parts III and IV of the 1955 Act had been met. An intended marriage which would contravene the restrictions imposed by Part III would, for instance, support a caveat.

As to Part IV, the scheme of the Act was that a Registrar of Marriages should not issue any licence until a caveat is either discharged or is deemed to be discharged within the terms of s 26. Although a caveat could clearly be based on matters contained within the 1955 Act itself, the scope of a caveat was not limited to the provisions and prohibitions in that Act. A caveat could equally be supported on grounds which, if made out, would enable a Family Court to declare a marriage void ab initio pursuant to s 31 of the Family Proceedings Act 1980. It would be contrary to the provisions and intentions of Part IV of the 1980 Act, and of the 1955 Act, if any person who believed that an intended marriage would be void by virtue of s 31 of the 1980 Act were not entitled to lodge a caveat and seek a determination from a Family Court Judge on that matter prior to the intended marriage being solemnised. (Section 31(1)(a) in effect states that, in the case of a marriage governed by New Zealand law, it will be void if: (i) it is bigamous; or *(ii) if, by reason of* duress, mistake, or insanity, or for any other reason, there was at the time of the marriage an absence of consent by either party to marriage to the other party; or (iii) if the parties to it are within the prohibited degrees of relationship set out in the Second Schedule to the Marriage Act 1955 and no order is in force under s 15(2) of that Act dispensing with the prohibition).

Judge Fogarty emphasised that the opinion to be formed by a Judge under s 26 was not to be an opinion by way of a value judgment on the *quality of the intended marriage or* the likelihood of its permanence. It was limited to an opinion as to whether, in law, there were any grounds existing which should prevent the solemnisation of the marriage.

Facts of the case

The learned Judge thought it clear that s 26 authorised the Court to obtain reports. The facts of the case before him were these: the respondent, Mrs Matthies, had given notice to the Registrar of Marriages at Christchurch of her intended marriage to the other respondent, Mr Hooper. The applicant, Mrs Matthies' father, had previously lodged a caveat against this intended marriage. The grounds given in the caveat were that Mrs Matthies, (who was born in 1933), had suffered from epilepsy and other mental disorders from the age of seven and had, for many years, been a voluntary patient at Sunnyside Hospital. The caveat went on to state that Mr Hooper was a committed patient in the same hospital. It further stated that Mrs Matthies had been married in 1959 and that her marriage had ended in divorce in 1973. From his observations of that marriage, her father stated, he considered that his daughter did not have the emotional stability to make a judgment as to who would be a suitable husband for her. (In broad terms, therefore, *the caveat had as its basis matters* covered by s 31(1)(a)(ii) of the Family Proceedings Act 1980, which is, as we have seen, concerned with marriages void for lack of consent).

When the matter originally came before Judge Fogarty, counsel for the applicant appeared, but the applicant himself was not present. The respondents appeared in person. The Judge considered the file and the provisions of s 26 and, having regard to the general background of the respondents as disclosed in the caveat, directed that reports be obtained from the Social Worker for Mrs Matthies, the Superintendent of Sunnyside Hospital, where Mr Hooper was a patient, and from the minister of religion who was the chaplain of that hospital and the intended marriage celebrant. The reports were initially directed, by Minute, to be made available to the Judge only — and not to the father, his counsel or either of the respondents. That limitation was imposed having regard to the mental health of the respondents as disclosed in the papers then before the Court. The Minute also requested the authors of the reports to advise the Court whether it was considered that disclosure of the contents of any of the reports to the respondents would have a detrimental effect upon them. The Minute also recorded that the Court had advised counsel for the father that the Court considered it necessary for the father himself to be present at the resumed hearing to enable the Court to make proper inquiry.

In due course the reports came to hand and the matter was further set down. The Court considered the reports and heard evidence from both respondents, who were now represented by counsel. The father was not present and called no evidence. His counsel, however, held a watching brief for him.

Committed mental patient

The report on Mr Hooper, (who was born in 1937), essentially revealed that he had been committed to a mental hospital in 1967 having been acquitted on a charge of murdering his wife on the grounds of insanity. He was still a committed patient. He had a long-standing history of epilepsy and, following an attack on a relative, he had spent almost three years in Seacliffe Hospital from 1956. The indications were that he would require institutional supervision for the forseeable future. He lacked insight into his illness. He was, on occasions, entitled to leave, but only with specific permission. The hospital did not feel that the proposed marriage was suitable, and thought that it would be able to be one in name only.

The report on Mrs Matthies showed, basically, that she she very recently obtained a placement in the Laura Fergusson Home, that her epilepsy seemed to be under reasonable control, that she could conduct her own affairs and handle her own finances and medication, but was clearly in need of regular support. She was now in the initial stages of attempting a transition from hospital life at Sunnyside to some life in the community. The indications were that, in the foreseeable future, she would continue to reside at the Home, where she received the care and support she still needed.

The respondents said in evidence they had known each other for eight years, having met while both were in Sunnyside. They still saw one another frequently and worked together daily. Mr Hooper said he realised he would be in hospital "for years to come — until I get my discharge". Mrs Matthies said she did not intend to leave the Laura Fergusson Home.

The Court thought that there was no element of duress and no question of mistake. In the sense that each appeared to understand the nature, concept and obligations of marriage, there was considered to be no element of insanity present, notwithstanding that Mr Hooper in particular was a committed patient.

The report of the hospital chaplain questioned whether the respondents' marriage could ever be complete in the normal sense; he considered, however, that they had the "right to let this relationship be a legal marriage despite the restrictive circumstances, if they so choose". He added that many marriages were restricted or limited for a variety of reasons.

Limited marriage

Judge Fogarty said it was clear that the respondents' opportunities to live together in a common household were extremely limited and might never come to fruition. When they gave evidence before him, he continued, all that they could contemplate in regard to that aspect of their marriage was that, on weekends when Mr Hooper was permitted leave, they might cohabit in a motel in or about the Christchurch area. It was also clear to the Court that the intended marriage would "not be without difficulty and may have its dangers". These were heightened by the fragile state of both respondents.

It was considered that, in essence, the grounds for objection raised in the caveat had been made out, but that they did not, as the law now stood, justify the Court's allowing the caveat to remain in force. The learned Judge was very careful to emphasise that, in making a determination on this matter,

> the Court is not required to pronounce its approval of the intended marriage. If that were the test to be applied, I would not be prepared to grant my approval.

The caveat was accordingly discharged.

Examination on respondents

Judge Fogarty added that he had received a (very recent) supplementary report from Sunnyside Hospital indicating that the hospital authorities might, if the intended marriage was to proceed, carry out an examination on Mr Hooper, and perhaps Mrs Matthies, immediately prior to, or on the date of, the intended marriage with a view to determining whether, at that point in time, either or both of them were so mentally incapacitated as to bring them, at that point in time, within the provisions of s 31(1)(a)(ii) of the Family Proceedings Act 1980. It was further indicated that the Court's determination of the matter of the caveat "should not in any way be construed as rendering any such examination or examinations unnecessary or undesirable". Indeed, the Court considered that, in the respondents' own interests and in the public interest, such examination should be carried out.

Although the Court had decided that there were no legal grounds to prevent the solemnisation of the marriage, it made the point that it was not unmindful of the consequences both to the parties and to society at large if a marriage of the nature envisaged by the information before the Court were to proceed. Bearing in mind the respondents' ages, the possibility of their having children seemed to be unlikely. Had they been of less mature years and had the likelihood existed of their having children, the Judge said he would not, given the present law, have found that to be a ground for upholding the caveat. That:

> might mean that children could be born of a union when neither parent would be capable of caring for those children and there would be a distinct possibility of the children suffering from a disability which would require them to be in constant care and enjoy little by way of the physical and emotional benefits of life.

It was, in the Judge's view, clearly a matter for the legislature and not the Court to extend the grounds on which a caveat might be upheld, "if the legislature so considers it necessary in the public interest".

Judge Fogarty directed that a copy of his judgment be made available to the Superintendent of Sunnyside Hospital, to the Matron of the Laura Fergusson Trust for Disabled Persons and to the hospital chaplain at Sunnyside Hospital.

P R H Webb
University of Auckland

Misrepresentation and the Contractual Remedies Act 1979

Since the coming into force of the Contractual Remedies Act 1979 there have been a large number of cases, most of them unfortunately unreported, on misrepresentation. This is not altogether surprising. On the one hand, prospective sellers and their agents often misstate the attractions of their property to prospective buyers, either through inadvertence or an over-eagerness to effect a sale. On the other, purchasers who wish to escape from a bargain which they regret having made often seize upon inaccuracies in the statements made to them during the pre-contact negotiations to justify their cancelling the contract. There were fears in some quarters when the Contractual Remedies Act was passed that its simple and all-encompassing provisions about misrepresentation (ss 6 and 7) would lead to the opening of the litigation floodgates. While it is going far too far to say that that has happened — there were plenty of cases under the old common law too — misrepresentation, real and alleged, has certainly been keeping bench and bar busy.

Two recent High Court cases are worth noting. In *Pearson* v *Wynn* [1986] BCL 916, the prospective purchasers of a farm were told by the vendor's agent, by his wife, and by advertisements, that the farm was "fully irrigated", and that the irrigation system was working. This was in fact not true, the water table having fallen to such an extent that the irrigation system, although working to an extent, was totally inadequate. It would cost some $10,000 to upgrade it. Williamson J, in an oral Judgment, held that this was a misrepresentation, that the purchasers had been induced by it to enter the contract, and that it was sufficiently substantial in effect to justify their cancelling the contract under s 7 of the Contractual Remedies Act 1979.

In the other case, *McAlpine Snowline Ltd* v *Wethey* [1986] BCL 918, the prospective purchaser of a commmercial property was told by the vendor's agent (i) that although finance was quite tight just then it would free up after Christmas and enable settlement in February, and (ii) that there should be no difficulty in finding a tenant for the property. The parties entered a contract of sale and purchase, but the purchaser failed to settle, relying on these two alleged misrepresentations as justifying cancellation. Henry J held against the purchaser on four alternative grounds: first that the agent's statements were statements of opinion rather than misrepresentations; secondly that it had not been agreed that the truth of the statements was essential to the purchaser so as to justify cancellation; thirdly that the statements were not within the agent's ostensible authority; and fourthly that it had not been demonstrated that the purchaser had been induced by either statement to enter the contract.

The cases illustrate several significant points about misrepresentation under the Act.

1 *What is a misrepresentation?* A misrepresentation is a false statement as to a question of fact. In *Pearson* that test was clearly enough satisfied, Williamson J affirming that the date at which the falsity of the statement must be judged is the date of entry into the contract. In the *McAlpine* case, however, the statements were not really statements about facts at all — they were simply statements of opinion (and, incidentally, opinion about the future rather than present or past matters). Henry J found that the opinions were honestly held by the agent — if they had not been they might possibly have been misrepresentations, for the agent would then have been mis-stating his state of mind. The opinion/fact distinction is always a difficult one. There are several cases where what was ostensibly a statement of opinion has been held to imply a false statement of fact, on the grounds that the maker of the statement was more knowledgeable than the representee and was deemed to be indicating that he knew facts justifying his opinion: eg *New Zealand Motor Bodies Ltd* v *Emslie* [1984] BCL 694, (a budget forecast for a company). Indeed, the whole distinction between fact/opinion and present/future is perhaps more blurred than commonly thought. It may well be that a crucial underlying factor in determining whether a statement is a "misrepresentation" is the extent to which the representee was justified in relying on it. But in the *McAlpine* case there could be little ground for saying that the statements were other than opinions: no reasonable buyer could really regard them as assertions, or rely on them. Everyone knows that the money market is not readily predictable, and everyone knows that the finding of a suitable tenant, however likely, is not something that anyone can guarantee in advance, however knowledgeable they might be.

2 *Misrepresentation by an agent.* A misrepresentation by an agent will bind his principal, provided it is within his authority, actual or ostensible. This is effectively provided for in ss 6 and 7 of the Contractual Remedies Act ("made by or *on behalf of* another party"). In *Pearson,* the misrepresentation was made, inter alia, by the land agent and the vendor's wife, who, it appeared, had registered a notice of claim under the Matrimonial Property Act 1976 against the title to the farm. (An interesting question might have arisen, if the sole misrepresentation had come from the wife: was she an "agent", or a co-vendor, for this purpose?) In *McAlpine,* a more important question arose as to the ostensible authority of a land agent to make representations. Henry J, following a passage in the Judgment of Bacon VC in *Mullens v Miller* (1882) 22 Ch D 194, 199 held that the agent's ostensible authority is "to describe . . . the property which is to be the subject disposed of . . . [and] to state any fact or circumstance which may relate to the value of the property". Henry J found here that neither of the agent's statements (about finance and a tenant) really related to the property in this sense, and that they were therefore not within his ostensible authority so as to bind the vendor. This is no doubt a strict view of the test of ostensible authority, and a somewhat strict application of that test to the facts of the case. (Could it not be said, for instance, that the availability of tenants is a matter relating, albeit loosely, to the value of the property?) Nevertheless there clearly must be limits on the extent of a principal's liability for the things his agent may happen to say,

and it must be remembered that in cases where fraudulent or negligent misstatement can be established an injured party will have an action in tort against the agent.

3 *Inducement.* A party claiming on the basis of a misrepresentation must show that he was induced by it to enter the contract. The misrepresentation need not be the only inducement (indeed it seldom will be), provided it is *an* inducement. In the *Pearson* case it was argued by the vendor that the purchasers were not induced by the statement about irrigation: that they had "fallen in love with a property" irrespective of the qualities of its irrigation system and were determined to purchase regardless. Williamson J found that this was not the case. The male purchaser had specifically discussed the irrigation with the agent and the wife, and before he signed a new unconditional contract (there had been an earlier conditional one) he took the trouble to check the advertisements which claimed that the property was fully irrigated; his Honour accepted his evidence that this factor "meant a lot to him." There is no separate requirement in the Contractual Remedies Act as there was at common law, that the misrepresentation be "material", but so closely related is materiality to inducement that its omission from the Act will almost never make a difference. In *Pearson,* Williamson J used words suggesting that something like materiality will still be relevant in determining whether there has been inducement. He said: "A misrepresentation of the sort which I have found may be *significant* or not. In this case the defendants say it was *important.* That it induced them to enter the contract." And later, that the irrigation system "meant a lot" to the purchasers.

On the other hand in the *McAlpine* case inducement was not made out, even it it could have been held that the statements were misrepresentations. The purchaser had expressly waived a condition in the contract about finance; he was aware of likely sources of finance and asked no follow-up questions of the agent; he believed he would lose the purchase if he did not move quickly; and he had advice from elsewhere (a valuer) that leasing should not pose a problem. Henry J said:

> My assessment of the evidence overall is that the alleged statements played no material part in Mr Wethey's final decision to proceed, which was based rather on a belief that the opportunity to buy was too good to miss and warranted taking a risk of being able to arrange satisfactory finance by settlement date.

No doubt the question of inducement, based as it is on subjective factors, is sometimes difficult to determine. In this case, given the Judge's alternative ground that the agent's statements were only statements of opinion anyway, his finding of no inducement is scarcely surprising.

4 *Cancellation.* As yet another ground for holding the purchaser's cancellation unjustified in *McAlpine,* Henry J held that the truth of the misstatements had not been impliedly or expressly agreed to be essential to the purchaser under s 7(4)(a) of the Contractual Remedies Act 1979. In the cases so far decided under the Act the ground of cancellation in s 7(4)(a) has been argued less, and has been overall less successful, than the "substantially reduced benefit or increased burden" test under s 7(4)(b). The conceptual and practical difficulties of the essentiality test in relation to misrepresentation are well discussed in Dawson and McLauchlan, *The Contractual Remedies Act 1979,* pp 48-53. In the *Pearson* case, Williamson J applied the test in s 7(4)(b), and found that the ineffectual irrigation did substantially reduce the benefit of the contract to the purchasers, and also substantially increase their burden under the contract. The statutory test in s 7(4)(b) involves the Court in a question of degree.

Williamson J here, while declining like other Judges to define "substantial" found the facts lay on the "substantial" side of the line. The irrigation system would cost about $10,000 to fix, a large enough sum in a purchase of $159,000. But his Honour made it clear that other factors than money may be relevant to this kind of determination: in this case, there was "the inconvenience of bringing in water or other steps necessary during the course of having such work done." There can never be rules about questions of degree like this, and no doubt the Courts will continue to be influenced, as they were at common law, by a variety of factors: the best one can do is to hope that some kind of helpful pattern will eventually emerge from the growing number of decisions. It is, however, deserving of comment that his Honour may have taken a rather less strict view of the expression "burden under the contract" than did Hardie Boys J in *Jolly v Palmer* [1985] 1 NZLR 658, 662. In the latter case Hardie Boys J emphasised that the relevant burden of which the section speaks is the burden *under the contract:* he concluded that the raising of mortgage finance, to which the contract did not in terms commit the purchaser, was not a burden under the contract. One may take leave to wonder whether fixing an irrigation system in *Pearson* was any more a burden *under the contract* in that sense.

J F Burrows
University of Canterbury

Payment on demand

All the authorities are agreed that an undertaking by a debtor to pay his creditor "on demand" is not to be construed literally. The debtor, it is said, must have a reasonable opportunity to pay once the demand is made; but as to what is reasonable, and more particularly what factors may be taken into account in deciding what is reasonable, there is some difference of opinion.

A conservative line is followed in the Judgments of the Court of Appeal in *Gibson and others v ANZ Banking Group (New Zealand) Ltd* [1986] BCL 505 Richardson, Somers and Casey JJ, on appeal from the Judgment of Holland J reported at [1981] 2 NZLR 513. The ANZ held debentures given by two associated companies, and these were guaranteed by the directors of each company, the appellants. The debentures provided inter alia that:

(1) the companies would on demand repay to the ANZ the moneys secured by the debentures; and

(2) notice was deemed to be given if left at the companies' registered offices.

The liability of the guarantors depended upon the fact of the moneys having become due and payable, and this formed the essential issue between the parties.

The companies had a dismal trading record and had been insolvent for some two years. Characteristically the directors' optimism appeared hardly dented, and under pressure from the ANZ to reduce the companies' indebtedness, they proposed in the course of protracted negotiations a series of measures to stem the tide, including the injection of fresh capital by interested outsiders. None of these schemes bore fruit and eventually the ANZ considered it expedient to call in the loans. This was achieved by notices served at 10 am at the companies' registered offices, which happened also to be the office of a firm of chartered accountants. There had been an informal indication on the previous day to Gibson the chairman of the two companies that the loans were to be called in. The demand for payment not having been met, notice of appointment of receivers was served at 12.15 pm at the companies' registered offices and upon the guarantors personally at their business premises at 12.45 pm. The guarantors argued that their liability under their guarantees had not crystallized because:

(1) there was no effective demand until actually brought to the attention of a director or other company officer who could respond to the demand, or until a reasonable time had elapsed for the demand to have been brought to such a person's attention; and
(2) even if service of the demand was held to be good, the appointment of the receivers two hours after the demand was first made did not allow the companies a reasonable opportunity to comply.

Effective demand

In *Moore v Shelley* (1883) 8 App Cas 285 (PC) a mortgage deed provided that the demand "shall be . . . delivered either personally to the said mortgagors or either of them, or left at their or his usual or last known place of abode". Where notice was served by leaving it at the mortgagor's residence at a time when he was not there, and where the mortgagee immediately entered into possession upon failure to pay, the Privy Council held that there was no default entitling the mortgagee to act. In *Gibson* Holland J at first instance distinguished *Moore's* case on the basis that the debtors in the instant case were companies to which s 460 of the Companies Act 1955 applies. Section 460 states that "(a) document may be served on a company by leaving it at the company's registered office, or by sending it through the post in a registered letter addressed to the company at that office". Holland J considered that service of the demand was validly made by service at the companies' registered offices; the reasoning appears to be that it is the responsibility of the company to ensure that contents of a demand notice are immediately communicated to the officers of the company. His Honour considered that:

> service of a demand on the registered office of a company and not an officer of the company may be one of the circumstances in considering whether reasonable time to meet the demand was given but the absence of proof that the demand was referred to an officer of the company is not a bar in itself to a creditor exercising its rights on default (at 527).

But in an interesting aside Holland J said that had there been no one present at the registered offices then the principles in *Moore's* case might apply (ibid).

The Court of Appeal wasted little breath in holding that the demand was effective upon service at the companies' registered office and that there was no necessity to show that the demand had come or could reasonably have come to the attention of a company officer. Somers J based his argument upon much the same ground as that employed by Holland J in the Court below, viz the companies in question had agreed that notice be served at their registered offices and consequently "(e)ach company must be understood by that arrangement to have accepted that a demand so served would promptly reach those called upon to make decisions". On a slightly different tack Richardson J, invoking the provisions of s 460, considered that service at the companies' registered offices was effective because a company must be taken to be present at its registered office, which is not a proposition for which authority abounds and none was cited. Certainly this latter approach would seem to exclude the possibility suggested by Holland J that service at the registered office at a time when nobody was present would not per se constitute an effective demand.

Some support for the view that a demand is effectively made by mere service at a company's registered office may be gleaned from the decision of Devlin J in *T O Supplies (London) Ltd v Jerry Creighton Ltd* [1952] 1 KB 42. Here a writ was sent by registered post to the registered office of the defendant company; as in *Gibson* the registered office was the office of a firm of accountants and although the letter was redirected to the company's usual place of business a saleswoman who happened to be in charge at the time (the company offices were closed for staff holidays) refused to accept the letter because she thought the contents of a registered letter must be so important that she would not be able to deal with it. The letter was in fact never delivered with the result that the defendant company failed to enter an appearance and default Judgment was given; the defendant then sought to have the Judgment set aside. The case proceeded on the question of whether there had been service within the terms of s 437 (1) of the Companies Act 1948 (now s 725(1) of the Companies Act 1985) which stated that "(a) document may be served on a company by leaving it at or sending it by post to the registered office of the company". In the event Devlin J held that the service was not bad for having been made by way of registered as opposed to ordinary post; but there was no suggestion that service was invalid for not having come to the attention of the company's officers.

Reasonable opportunity

The approach of the English Courts has been to allow a debtor sufficient time physically to get in the money which is owed; this presupposes that the money is available but not immediately to hand. So in *Cripps (Pharmaceuticals) Ltd v Wickenden*

[1973] 1 WLR 944 allowance of an hour following notice of demand before appointment of a receiver was made was held to be not unreasonable. The reality of course is that companies borrowing large sums of money do not retain adequate reserves conveniently ready should demand be made, notwithstanding that they have expressly agreed that the money is to be payable "on demand". There would otherwise be no necessity to borrow. In the Court of Appeal in *Gibson* Casey J expressed some dissatisfaction with the English decisions:

> (T)hose English cases limiting the time for compliance to that necessary for the physical transfer of funds to the creditor can be regarded as too restrictive in modern commercial conditions.

On the other hand all three members of the Court of Appeal considered unsatisfactory the liberal approach exemplified by the Judgment in *Mister Broadloom Corp (1968) Ltd v Bank of Montreal* (1979) 101 DLR (3d) 713 where Linden J said:

> Thus a reasonable time must always be allowed, but, in assessing what length of time is reasonable in a particular fact situation various factors must be analysed: (1) the amount of the loan; (2) the risk to the creditor of losing his money or the security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability to raise the money required in a short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factors (at 723).

As is rightly pointed out in *Gibson,* this means in effect that the debtor must be given reasonable notice, which is quite inconsistent with the debtor's undertaking to pay on demand. Rather the Judgments in *Gibson* affirm that "pay on demand" does not mean payment on reasonable notice nor even payment within a reasonable time of demand; it means payment within so much time as is reasonable given that the creditor demands, and is entitled to demand, that payment be made forthwith.

At first instance Holland J indicated that the factors which pointed to the reasonableness of the time allowed in the instant case were –

> that there was no indication at any stage ever given to the bank that the demand would or could be met; that this was a commercial transaction between two trading corporations; that the companies had the advantage of skilled and competent advice; that the demand for payment was not made precipitately without prior negotiations or threats but following several months of expressed statements of concern as to the position (at 530).

In the Court of Appeal particular emphasis was placed on the need to treat each case on its particular facts. The Judgment of Richardson J is of most assistance in providing some guidelines as to how the question of reasonableness should be approached. First, it was accepted that the parties would not expect that the debtor would have the money immediately to hand since this would "frustrate the obvious object of overdrafts in providing credit for the operation of the business". However the debtor "is expected to pay from resources which are presently accessible to him but have to be converted into immediate cash or utilised within the same time to obtain financial cover". This follows from the proposition that the strict undertaking to pay on demand must be relaxed to avoid the absurdity of the debtor at all times keeping at hand sufficient cash to discharge the debt, but relaxed only to this extent.

Secondly, Richardson J said that "(t)he language of "demand" envisages a peremptory notice unaffected by any questions as to matters personal to the debtor or creditor". A particular application, and in the instant case this appeared also from the construction of the debenture as a whole, is that the parties would not have contemplated that the insolvency of the debtor would entitle him to more time to find the money than would be the case in respect of a solvent debtor.

With these constraints in mind, could it be said in the instant case that the debtors had been given a reasonable time to comply with the creditor's demand? All three members of the Court of Appeal considered that they had. Some weight was accorded the fact that on the day prior to the demand being formally made the ANZ had given an informal warning that the demand was about to be made. But far greater reliance was placed on the consideration that the companies were insolvent and had no realistic chance of raising the money needed. Richardson J said:

> (T)wo hours might on its face be an unreasonably short time in some circumstances for funds of that order [$128,000] to be obtained and paid over. But in this case it is abundantly clear that the companies did not have resources of that order. They could not pay from their own funds. They did not reasonably require even two hours for they lacked any present ability to meet the demand when it was made.

On this reasoning, why should the debtor have been allowed any time at all? Why should the appointment of the receivers not have been made immediately upon notice to pay being given? And if an insolvent debtor is not entitled to more time than a solvent debtor, surely he is entitled to not less? Is not insolvency a consideration personal to the debtor, and so a consideration which should not be taken into account? It is submitted that the insolvency of the debtor should not be a factor decisive in determining the reasonableness or otherwise of the opportunity allowed for payment. Admittedly, in the great majority of cases involving an insolvent debtor it will be no more than a charade to allow the debtor to come up with the money since from the outset there will not be the slightest chance that he will succeed. It is likely that in *Gibson* the Court of Appeal was reluctant to find that the appointment of the receivers had been precipitately made when the outcome would not differ whether the debtor was allowed two hours or two months. But once the concession is made that "payment on demand" does not mean what it literally says, then for the sake of consistency the charade of allowing the insolvent debtor time to mobilise "accessible resources" must be acted out – for otherwise why allow him any time at all?

Andrew Borrowdale
University of Canterbury

Books

Hear The Other Side

By Dame Elizabeth Lane
Published by Butterworths (London) 1985. Price NZ$60.00

Reviewed by Patricia Mills, an Auckland practitioner

Despite this reviewer's reservations, this book had to be written, and it deserves to be read as a piece of modern history.

The tale of Dame Elizabeth Lane's early years, and her life at the Bar and on the Bench holds a certain sort of interest and is written with a liveliness of style. However, as the book goes on there is a sameness in the use of phrases that becomes tedious. The publisher is presumably to blame for the unfortunately large number of misspellings. By the end of the book it is hard to avoid the feeling that Dame Elizabeth Lane's autobiography does not do her full justice.

As an achiever, Dame Elizabeth must be admired. She, as the frontispiece chronicles her, was England's first woman Judge of the High Court. And this was only 40 years after Miss Ivy Williams was the first woman called to the Bar by the Inner Temple on 10 May 1922.

Dame Elizabeth overcame many prejudices in her professional life, perhaps by the useful expedient of not admitting their existence. As a member of the Junior Bar she rose to prominence quite early. Her initial reluctance to practise during World War II (as she did not wish to gain an unfair advantage over the young men at war) was overcome by persuasive advice from Paul Sandlands. Quite sensibly he showed her that the work that had been done by male junior barristers still existed and had to be done.

Once started she showed ability in many spheres. It was this ability, her secure personal background and the independence of the Bar in England and Wales which led her inexorably towards success. She did not let others' opinions of her sex deter her progress in the profession. This could be a lesson for women practitioners of today. Her determination led her down coalmines, to visit mental institutions and as far as possible to keep in touch with the realities of society. Such efforts are seldom made by any practitioner let alone a lady.

One gains the impression that Dame Elizabeth was singleminded in her devotion to the law. Her comparatively late start at 35 years old obviously gave her a depth of maturity not normally found in junior practitioners. She alludes little to her personal life after she was admitted, but the apparent happiness and longevity of her marriage to Randall Lane (five months off fifty years) must mean there is more to Dame Elizabeth's life than she has disclosed in her autobiography. She emerges as a private woman. One can only wonder about her personality from what she has not written. One thing is certain though; her personal circumstances were comfortable, and she achieved what she did with the support of her husband and domestic help.

Edwardian morals form an integral part of Dame Elizabeth's approach to the law. She, both as a County Court Judge and High Court Judge, puts civil matters before criminal. While one can see the logic as to why law-abiding citizens should have their legal difficulties dealt with first, it is so only if one accepts that the personal liberty of defendants is secondary. It appears that Dame Elizabeth may have believed that defendants are probably guilty in any event. Perhaps an unfair comment!

Dame Elizabeth showed a mind that was not to be trammelled by the shibboleths of male routine in the manner in which she dealt with the inordinate delays encountered in civil litigation prior to 1971. She showed she was advanced for her time in her manner of dealing with judgment summons and organisation of time while sitting.

To a New Zealander of the 1980s, many of Dame Elizabeth's attitudes to life appear antiquarian. One wonders how she can seriously believe that a woman's role is first as a wife and mother and second, if possible, as professional when one examines the path that her life took. There is no doubt that the loss of her son John was tragic and may have affected her determination to become a barrister. Her devotion to work, however, does not sit well with her expressed belief. She may have initially found solace in work, but thenceforth she attacked her career with a vengeance. Would it have been possible to have done all she did if her energies were divided? To her and others perhaps, modern women owe the expectation of superwoman — able and expected to achieve in all spheres. An unrealistic and unfair expectation. Dame Elizabeth at least had servants to assist with household chores.

The Abortion Act Report section was approached with trepidation — what sort of things would be unearthed there. From the tenor of the rest of the book it was clear that Dame Elizabeth would be firmly opposed to abortion. It was with surprise and admiration that we read of her conversion to support the Abortion Act. When her beliefs are challenged with logic and reason Dame Elizabeth reacts, not as a turtle, but with the open mind one should be able to expect from a High Court Judge. While not altering her personal position, she was able to perceive the humanity

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The unsettled state of the law of negligence

By District Court Judge Cadenhead of Otahuhu

In this article Judge Cadenhead looks at developments in the law in relation to negligence. This is a chronological development of his survey published under the title Negligence in Pursuit of Fairness *published at [1984] NZLJ 262. In this present article, which was originally a paper read to the Conference of District Judges earlier this year, Judge Cadenhead analyses a number of recent overseas decisions. He considers that the law in this area is again unsettled, and that it is a matter of speculation whether the past New Zealand approach in favour of a simple uncomplicated test for recovery of all damages incurred through negligence will be further developed.*

In 1983 the writer gave a paper entitled "Recent Trends in Negligence" to South Island law practitioners. At the end of that paper certain conclusions were reached and the apposite conclusions that now require drastic reappraisal and modification are set out hereunder:

(1) It has been seen that from a historical viewpoint the trend with regard to negligence has been the withering away of a particularised relational concept to a generalised duty of care. It is forecast that this trend will continue in regard to the *"Hedley Byrne"* type factual situation which will ultimately be determined by the application of Lord Wilberforce's two-stage test in *Anns*. The relational factors listed in *Hedley Byrne* and *Evatt* will be evidential only as to going to establish proximity and the seriousness of the occasion and the assumption of risk by the maker of the statement.

(2) Negligence actions will be determined by principle and reasoning by analogy from previous situations. The limits of the duty of care are not to be determined by precedent. As under the *Anns* test, policy and public opinion may restrict the duty of care and as policy or public opinion are not immutable, it follows that it can be dangerous to seek guidance from cases that may be behind the times.

(3) [This paragraph appears not to require reconsideration but is set out here for completeness.] The question of remoteness of damages still presents a semantic sea of semi-conflicting principle. In addressing the damages question the injunct of Lord Pearson to consider "the tort of negligence as a whole" is thrown into relief. Damages should flow in a natural and common sense way from the factual situation making up all the components of the tort.

(4) History again points the way to the fact that the tort/contract tension is artificial and should be done away with. The trends in

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embodied in the statute, and carried this through into her conduct of the Committee and the writing of the Report.

A champion of the independence of the Bar, Dame Elizabeth is a product of it. Her success must be in some way attributed to the system which allows ability to shine and to be the sole arbitrator of success. A barrister gains his or her briefs from that sexless organ the tongue. A woman is not handicapped because it is what she does and how, which counts. Initial reluctance to brief must always be overcome by success. One begins to doubt whether Dame Elizabeth's success can be emulated in a common law system with a fused profession. Certainly it has not been here in New Zealand to date. In her own words:

> Barristers are experts in the law and advocacy and it would be a great pity on the one hand to deprive them of their indpendence and turn them into partners responsible to one another and on the other hand to confine them to a particular firm instead of them being available to all solicitors and lay clients. It would be no more sensible to abolish the distinction between barristers and solicitors than it would be in the case of medical consultants and general practitioners.

Reading this book serves as a reminder that New Zealand's first woman barrister, Miss Ethel Rebecca Benjamin, was admitted to the bar in 1897 by Mr Justice Williams. She required the Female Law Practitioners Act 1896 to do so. Her admission was 25 years earlier than Miss Ivy Williams in England. Sixty eight years on from 1896 England already had its first woman High Court Judge. How much longer must we wait? □

> New Zealand appear to be moving to a view of concurrent liability. (5) The determination of liability including damage will be essentially left as a particular assessment of fact for the individual judge. ... It is "the breach" stage that will assume importance in marking off the liability between the parties.

In 1984 the writer delivered a paper to the Wellington District Law Society namely "Negligence in pursuit of fairness". This was subsequently published as an article in the *New Zealand Law Journal* at [1984] NZLJ 262. The conclusion reached in that article was as follows:

> It should not be thought that because the Courts have laid down a wider approach to the general duty of care "the floodgates" of negligence liability will become an instrument of oppression rather than fairness. Rather the emphasis as to controlling responsibility will arise out of the factual situation pertaining from the particular case. ... It is the opinion of the writer that the Courts have acted responsibly in developing "negligence" as an effective method of enabling fairness to be attained on a more particularised factual basis case by case. The role of modern "negligence" in pursuit of fairness meets the requirements of Cooke J where he said in *Hayward v Giordani* at p 148:
>
> > But a function of the Courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, not to frustrate them.

That article in the *New Zealand Law Journal* considered, inter alia: *Allied Finance and Investments Limited v Haddow & Co* [1983] 1 NZLR 22, *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, *Gartside v Sheffield, Young & Ellis* [1983] 1 NZLR 37, *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] 1 Ch 384, *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938 and *Meates v AG* [1983] 1 NZLR 308.

The law of negligence in New Zealand appeared settled. It is of interest to note that in *Kendall Wilson Securities Ltd v Barraclough & Anor* [1986] BCL 107 Cooke J in dealing with a valuation case observed on appeal that there was no issue as to the finding of the Judge that the valuer was negligent in the valuation "and has at all times accepted that the valuer was under a duty of care to prospective lenders to whom Mercantile or its solicitors might show the report". There was no attack on the duty of care. In *NZ Forest Products Ltd v AG* [1985] BCL 555 Barker J applied the two-stage test from *Anns* in an action for recovery of pure economic loss.

Loss as reasonably foreseeable

The thrust of the authorities reviewed in the 1984 article was to importing a liability for economic loss by applying the *Anns* test and ascertaining whether the ensuing loss was reasonably foreseeable. In *Gartside* the absence of reliance was not deemed a constraining factor in claiming pure economic loss. In *Meates* Cooke J at p 379 said that recovery for the economic loss could be, but on a broader basis than on a *Hedley Byrne* basis. He also thought it was artificial to distinguish between statements and other actions.

In *Haddow* Cooke J observed that it made no practical difference whether there was or not a concurrent duty in contract. In both *Haddow* and *Gartside* Richardson J expressed the view that an action in negligence is a loss allocation mechanism and that professional advisors were in a position to insure and in that way to spread the risk.

The scope of the present article is to show that recent pronouncements falling from the Privy Council, the House of Lords, the English Court of Appeal and the High Court of Australia have somewhat resiled from the New Zealand approach.

Recent overseas cases

The scope of this article is an examination of recent overseas cases. These cases:

(i) place a gloss on the *Anns* duty of care test
(ii) place limits on recovery of economic loss
(iii) place a limitation on recovery for an allegation of negligence through a failure to act
(iv) emphasise the supremacy of contract and a move away from a concurrent liability stance.
(v) a return to precedent in restricting a prima facie duty of care as evidencing policy at the second stage of the *Anns* test.

The particular circumstances

Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529 was a case where the plaintiffs built houses on a hillside site. The plaintiffs' architect designed a suitable drainage system, but then put in a different system that was defective. The original system was known to the defendant and passed as likewise was the substituted system. The drainage system failed. It was contended that the council owed a duty of care to the plaintiffs to require the plaintiffs to comply with the statutory requirement and also was in breach in failing to supervise the same.

It was held in all the circumstances it was not just nor reasonable to impose a duty of care.

Lord Keith drew the distinction following *Dennis v Charnwood BC* [1982] 3 All ER 486, between a negligent building owner, to whom no duty was owed and the intended occupiers of the house who had purchased the same who were within the ambit of the duty of care.

The duty of care arose from the particular circumstances and on the facts it was not fair and reasonable to impose a duty of care. As Lord Keith said at p 534.

> So in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

It was not enough to show proximity and reasonable foresight to establish a duty of care.

Economic Loss of non-owners

In *Candlewood Navigation Corporation Limited v Mitsui OSK Lines Ltd* [1985] 2 All ER 935 (PC) a vessel which was time-chartered to the plaintiff was involved in a collision with another vessel which was totally at fault. The chartered vessel was damaged and put out of operations while repairs were carried out. The charterers brought an action claiming damages for economic loss made up of hire they had to pay while the vessel was repaired and loss of profits for the same period.

The Privy Council (Lord Fraser) applied the principle that a person who was not the owner of a chattel

was not entitled to sue a person who damaged the chattel to recover economic loss which resulted from not being able to use the chattel. The charterers were therefore not entitled to recover damages for economic loss. *Cattle v Stockton Waterworks* [1874-80] All ER 220, *Simpson & Co v Thomson* (1877) 3 App Cas 279.

It had been argued that the recovery of economic loss suffered as a result of damage caused to a chattel by a wrongdoer should not be tied to the ownership of the chattel but whether it was a direct result of the negligence and was foreseeable. As can be seen this submission was rejected. Lord Fraser said at p 941:

> And, if claims for economic loss by sub-charterers are to be admitted, why not also claims by any person with a contractual interest in any goods being carried in the damaged vessel, and by any passenger in her, who suffers economic loss by reason of the delay attributable to the collision? An exceedingly wide new range of liability would be opened up. Their Lordships accordingly reject this submission.

Lord Fraser traced historically the policy of the common law to impose strict rules limiting the right to recover compensation from a wrongdoer for loss caused by his fault. In particular liability was limited by the rule that a plaintiff was not entitled to recover for economic or financial loss which was not consequential on damage to his person or property. That limit was breached by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529 and *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 20.

These latter cases were used to support the argument that it was enough now to recover economic loss if the same was a direct result of a wrongful act and that it was foreseeable. The rationale of this argument was based on the famous two-tiered approach articulated by Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at pp 498, 499.

Lord Fraser was mindful of the warning given by Lord Keith in *Peabody Donation Funds (Governors) v Sir Lindsay Parkinson* [1984] 3 All ER 529 at p 534 that one should resist the temptation to treat these passages from Lord Wilberforce's speech as being of a definitive character. Lord Fraser made the point that Lord Wilberforce was not dealing with the situation where the only relation to the victim was merely contractual. However, the speech was important as a reminder of the importance of the part played by policy in decisions as to how far the liability of a wrongdoer should extend. *McLoughlin v O'Brian* [1982] 2 All ER 298. After considering in depth *Caltex* and *Junior Books* (supra) His Lordship concluded:

> Their Lordships consider that some limit or control mechanism has to be imposed on the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence....
>
> The common law limitation which has been generally accepted is that stated by Scrutton LJ in *Elliott Steam Tug Co v Shipping Controller* [1922] 1 KB 127 at pp 139-140 which has already been mentioned. ... These considerations operate to limit the scope of the duty owed by a wrongdoer, and they do so at the second stage mentioned by Lord Wilberforce in the passage cited above from his speech in *Anns v Merton London Borough* [1977] 2 All ER 492 at pp 498-499.

The limitation referred to as framed by Scrutton LJ is as follows:

> At common law there is no doubt about the position. In the case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use of services of the chattel for purposes of making profits or gains without possession of a property in the chattel.

The Privy Council has therefore considered that the approach to economic loss flowing from an act of negligence must as a matter of policy be confined by an appropriate control mechanism, which is applied at the second stage of Lord Wilberforce's test. Proximity and a reasonable foresight not to cause loss, in themselves are not sufficient.

Australian authority

The tort of negligence in Australia has recently been extensively canvassed in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HC). The brief facts of that case were that in 1968 an application to erect a dwelling house was made to the appellant council on behalf of the then owners of the land. A building permit was issued which notified that the approval was given to the erection of the building as described in the attached plans. It was a condition that the council be given notice of the various building stages and there was a prohibition of occupation without the completed building having been inspected and passed.

The plan did not show footings but they "had to be to a depth necessary to record solid bottom and even bearing throughout". The only record shown by the council which referred to the construction or any inspection of the building had one endorsement "Frame OK — 3.12.69", followed by initials.

In January 1975 the respondents bought the house and went into occupation. During 1976 they first became aware of the damage to the house caused by the inadequacy of the footings. They incurred expense to remedy the damage and to strengthen the foundations.

It was submitted that the council was negligent either:

(1) in carrying out such inspections of the building as were made by its officers while the building was in the course of construction, or
(2) in failing to make the inspections that ought to have been made.

The first ground of negligence was not made out as it was not established that an inspector had inspected the foundations or had done so negligently.

The second ground required a careful examination of the scope of the duty of care.

Gibbs CJ and Wilson J were of the view that foreseeability alone is not sufficient to establish proximity or neighbourhood and thus the existence of a duty of care, subject to any considerations which might negate, reduce or limit the duty at the second stage of the inquiry. The scope of the duty must depend on all the circumstances of the case. Gibbs CJ said at p 13 in regard to the duty of care:

> The general statement by Lord

> Wilberforce as to the circumstances which a duty of care arises has been frequently cited with approval in the United Kingdom, New Zealand, Canada and Australia. However, there is some difference of opinion as to what Lord Wilberforce intended when he said that one first has to ask "whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter". One view is that this damage means that "the relationship of proximity or neighbourhood" exists if the alleged wrongdoer ought reasonably to have foreseen that carelessness on his part might be likely to cause damage to the other. In other words, if it is reasonably foreseeable that carelessness on the defendant's part will cause damage to the plaintiff the defendant is the plaintiff's neighbour and prima facie owes the "plaintiff a duty of care, which may, however, be negatived on grounds of policy at the second stage of the exercise".

This view, that Lord Wilberforce meant to "test" sufficienty of proximity simply by the reasonable contemplation of likely harm has been accepted by Woodhouse J in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 at p 574 by Sir Robert Megarry VC in *Ross v Caunters* [1980] 1 All ER 310 and by McGarvie J in his dissenting judgment in *Seale v Perry* [1982] VR 193 at p 227 and acceptance of it may have been implicit in other judgments. However, it was rejected by Lush J in a clear and persuasive judgment in *Seale v Perry* at pp 193-198 and Gibbs CJ rejected it in *Jaensch v Coffey* (1984) 58 ALJR 426, at pp 427-428. It is quite clear that foreseeability does not of itself, and automatically, lead to a duty of care. . . .

However, in my respectful opinion the principle was correctly stated by the House of Lords in *Peabody Donation Funds v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at p 534, as follows:

> The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise but the scope of the duty must depend on all the circumstances in the case. In deciding whether the necessary relationship exists, and the scope of the duty it is necessary for the Court to examine closely all the circumstances that throw light on the nature of the relationship between the parties.

Deane J in the *Sutherland Shire* case at p 54 stressed that the "proximity" and "neighbourhood" requirements were distinct from the related test of "reasonable foreseeability". Both elements are required to be proved. One test related to the closeness of the relationship while the other was directed at a judgment of the legal consequences of the relationship. The issue of proximity cannot be divorced from what is "fair and reasonable" in all the circumstances. Applying such test at p 59 Deane J held that a failure to act normally fell outside the scope of the duty of care.

> That being so, reasonable foreseeability of the likelihood that such loss or injury will be sustained in the absence of my positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of care in which such proximity of relationship will be found to exist are properly to be seen as special or "exceptional".

Deane J also thought that in regard to "economic loss":

> The field of liability for pure economic loss is a comparatively new and developing area of the law of negligence. Again the reasonable foreseeability of a real risk of such loss does not of itself suffice to give rise to a prima facie duty to take reasonable care to avoid it. That being so, the circumstances in which the relationship between the parties will be such as to impose a duty to take care to avoid pure economic loss are also properly to be seen as special.

There is no novelty in holding that public authorities are liable to the ordinary principles of negligence. A distinction is drawn between the area of policy and the operational area. There is no doubt that a public authority may be liable for the negligent acts of its servants or agents in carrying out their duties, or exercising their powers within the operational area, although, if the performance of their duties or the exercise of their powers involves the exercise of a discretion, an act will not be negligent if it was done in good faith in the exercise of, and within the limits of, the discretion.

In accordance with the principles stated in *Anns v Merton London Borough*, a local authority has been held liable for damage resulting from negligence in passing building plans submitted for approval (*Dennis v Charnwood Borough Council* [1983] QB 409), from the negligent inspection of the foundations of a building while the work of construction was in progress (*Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, see also *Dutton v Bognor Regis UDC* [1972] 1 QB 373). Similarly a council has been held liable for negligently granting a planning permission that was defective (*Underwood Forests Ltd v Marlborough County Council* [1982] 1 NZLR 343), and the Housing Corporation has been held liable for negligence in approving a house built by a novel method of construction as against which a loan could be raised (*Bruce v Housing Corporation* [1982] 2 NZLR 28).

However, as a general rule, a failure to act is not negligent unless there is a duty to act. The duty may arise because of the conduct of the defendant or it may be created by statute. (See *Sheppard v Glossop Corporation* [1921] 3 KB 132.)

The High Court held in all the circumstances the plaintiff did not come within the scope of the defendant's duty of care towards him. There was no statutory duty making the defendant liable for a mere failure to act. In cases involving

mere omission or mere economic loss apart from proximity inter alia, the plaintiff would have to show reliance in circumstances where the defendant had induced or encouraged such reliance or was or should have been aware of it. This was not present in the instant case.

Proximity and the manufacturer

The principles articulated in *Candlewood Navigation* have been followed by the English Court of Appeal in *Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705. In that case the plaintiff purchased pumps from a pump supplier who in turn had purchased the same from a manufacturer. The pumps failed. The plaintiff's lobsters died. The plaintiff was not aware of the name of the manufacturer. The plaintiff brought a claim based in negligence against the manufacturer for the loss of the lobsters and economic loss based on loss of sales. The Judge held that although the actual physical damage to the lobsters could not have been foreseen by the manufacturer, however, the economic loss was foreseeable and consequently there was liability for the same.

The trial Judge had applied the rule of *Donoghue v Stevenson* [1932] AC 562 to cover pure economic loss. He relied on *Junior Books* and *Anns*.

Robert Goff LJ thought that the only principle that could be extracted from *Junior Books* was that in the case that:

> (1) There was a very close proximity between the parties.
> (2) There was specific reliance by the plaintiff on the defendant.
> (3) The defendant may be able to rely on contracted terms with a third person to defeat the claim of the plaintiff.

He considered that *Junior Books* should be regarded as confined to its own facts. Indeed Lord Fraser in that case regarded it as so, as did the Privy Council in *Candlewood*. Real reliance on the immedidate vendor and not the manufacturer was the basis of the *Muirhead* decision. Sir Robert Goff held that there could be no close proximity to the manufacturer nor any real reliance upon the same. As the law stood in regard to recovery for pure economic loss the purchaser should look to his immediate vendor not the manufacturer. There would therefore be no liability for economic loss. Sir Robert was also of the view that the manufacturers could rely on exemption clauses that could have been invoked by the immediate vendor.

On the other hand Sir Robert thought that the loss of the lobsters was of the type of damage that could be foreseen, even if the same was not precisely foreseeable. As this was physical damage to the fish damages under that head was recoverable.

Similarly in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1985] 2 All ER 44 the English Court of Appeal held that in regard to goods, the property in which has not passed to the purchaser, that the purchaser could not sue the shipowners in negligence because the claim was for pure economic loss and the plaintiffs title to the goods based solely in contract. It had no immediate proprietary interest.

Recovery of economic loss in UK and Australia

The position in regard to the recovery of economic loss in the United Kingdom and Australia may therefore be stated as follows:

> (1) There is the simple case of economic loss consequential on physical damage to the plaintiff's person or property. Such loss is and always has been recoverable.
> (2) There are the cases of economic loss caused to the plaintiff by acting in reliance on some advice or representation given or made to him by the defendant or on the performance by the defendant of some statutory duty cast on him. The liability here arises as a direct relationship of proximity established by the knowledge of or attributed to the defendant that the plaintiff or a person in the position of the plaintiff is going to rely on his skill or accuracy in the performance of his duty and a direct relationship exists between the expense to which the plaintiff has been put and the erroneous advice or representation or the failure to carry out the duty. It is inherent in these cases that the damage suffered is "economic" in the sense that it is not, or is certainly not necessarily, associated with damage to the plaintiff's person or property.
> (3) There are cases in which damage is caused by the defendant to the property or person of a third party and where the loss alleged by the plaintiff results from that third party having thereby been prevented from carrying out a contractual or statutory duty owed by him to the plaintiff or from supplying to the plaintiff goods or services which he might otherwise be expected to supply.
> (4) There are the cases where the loss alleged arises from a wrong done to a third party resulting in some contractual duty previously assumed by the plaintiff becoming more expensive for or less advantageous to him. In such a case recovery of the economic loss is precluded.

Again it is clear from *Candlewood's* and *Leigh's* cases, precedent was heavily relied upon by the Court in determining whether at the second stage of *Anns* policy considerations should preclude or restrict the duty of care.

Heyman and *Peabody* have placed a gloss on the duty of care, as understood, on one viewpoint of the first stage of the test propounded in *Anns*.

Heyman shows the difficulties facing a plaintiff where the allegation is based on a failure to act.

Estoppel by representation

Finally the recent case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 (PC) is referred to. In that case a textile manufacturer carrying on business in Hong Kong was a customer of the respondent bank. They operated a current account. The banks had had specified instructions as to the signing of cheques. The bank agreed to send periodic statements which were deemed to be confirmed unless the customer notified the bank of any error therein by a specified time. No cleared cheques were ever returned to the company. Between 1972 and 1978 an accounts clerk employed by the company who was not a signing officer forged signatures on 300 cheques appropriating $HK5.5 million. The bank paid and debited the account.

The fraud was uncovered in 1978 when a newly appointed accountant commenced reconciling bank statements. The company issued a writ claiming a declaration that the bank had wrongly debited its

account. The trial Judge held that the company was estopped by a representation implied from its conduct from asserting the bank statements were wrong. He further held that the bank had acted in reliance on those representations to its prejudice. Accordingly the claim failed.

Lord Scarman following *London Joint Stock Bank Ltd v Macmillan* [1918-19] All ER 30 and *Greenwood v Martins Bank Ltd* [1932] All ER 318 held that in the absence of an express agreement to the contrary the duty of care owed by a customer to his bank in the operation of his current account was limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorised cheques on the account as soon as he, the customer, became aware of it. The customer was not under a duty of care to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment nor was he under a duty to check periodic bank statements so as to enable him to notify the bank of any false debits. Furthermore, the obligations owed by the banker and customer to one another in tort does not provide the respondent bank with any greater protection than that which it had contracted for, since the parties' mutual obligations in tort could not be any greater than those to be found expressly or by necessary implication in their contract.

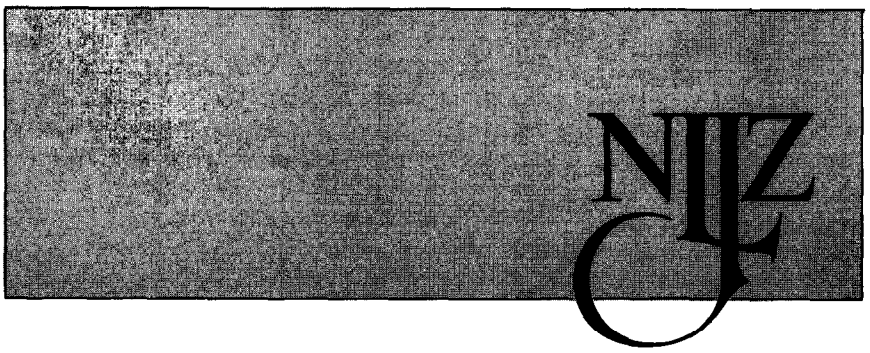
Lord Scarman at p 957 (d) to (j) said:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied, or, as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125 at p 139, [1957] AC 555 at p 587. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said:
>
> > Since in any event the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly I think, as much contractual as tortious. Since in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.
>
> Their Lordships do not, therefore, embark on an investigation whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in *Macmillan* and *Greenwood* can be implied into the banking contract in the absence of express terms to that effect, the respondent banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.

This passage does not lie easily with the judgments of Hardie Boys J in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 at pp 587, 588, 589; Prichard J in *Ware v Johnson* [1985] 2 NZLR 518 at pp 540, 541 and Moller J in *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163 at p 189 where each of these Judges thought that there was an independent concurrent duty in both negligence and contract, but that the preferred obligation was a finding in tort.

Conclusion

After *Donoghue v Stevenson* the law declined to impose a general test of foreseeability to recovery of pure economic loss. (cf *Candler v Crane Christmas & Co* [1951] 1 All ER 426) *Hedley Byrne* saw the law move forward to allow for such recovery, but this advance in turn was hedged by the restrictions imposed by *MLC v Evatt* [1971] AC 793. The law advances and then retreats. The *Junior Books* and New Zealand approach is in favour of a simple uncomplicated test for recovery of all damages incurred through negligence. Will the cases and principles cited in this article arrest this process? It is a matter of speculation and the law in this area is once again unsettled. □



Cross-examination on documents

By M H McHugh QC of New South Wales

This article is reprinted with permission from the first issue of the new periodical The Australian Bar Review. *The author is now Mr Justice McHugh of the New South Wales Court of Appeal. In addition to the commentary by R V Gyles QC of New South Wales an additional commentary on the New Zealand situation by D L Mathieson QC of Wellington is also published.*

Legal aspects of cross-examination on documents

As you will see from the notes of the article, I have outlined a series of seventeen propositions. I had intended to deal mainly with the legal aspects of cross-examination on documents but have included something about technique in cross-examination.

Document must be put in evidence

The first proposition is that the basic rule of the common law is that a witness cannot be asked any questions about the contents of a document unless it is first shown to the witness and put in evidence by the cross-examiner as part of his case. That rule is alleged to be an application of the "best evidence" rule, and it is found in *The Queen's Case* (1820) Brod & Bing 284; 129 ER 976, which was concerned with the trial of Queen Caroline for adultery, heard in the House of Lords. She was defended by Brougham and during the course of the examination of a witness called Louisa Dumont, Brougham sought to cross-examine her about a letter. Some argument took place. Reynolds QC some years ago when he gave a paper on this topic, which is reported in *Glass, Seminars on Evidence*,[1] p 126, stated that it would appear the decision was formulated without argument by counsel. But it appears from a speech of Brougham in the House of Commons some eight years later that there was a detailed argument before the Judges and the Lords, and the Judges formulated a rule which is set out in the second proposition; it totally destroyed effective cross-examination.

Now the rules in *The Queen's Case* are accurately set out in a number of propositions in the above report which are contained in various headnotes. I do not think I need read the first and second propositions. But the headnote concerning my first proposition is in this form.

> If on cross-examination, a witness admits a letter to be of his handwriting he cannot be questioned by counsel whether statements, such as counsel may suggest, are contained in it, but the whole letter must be read in evidence.
>
> In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The Court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof.

Now it will be seen that the common law rule led to extraordinary consequences. The first was that it effectively destroyed cross-examination, and the second was that it put counsel into evidence. So if you are for the defendant and you wish to cross-examine the plaintiff on a document, you will have to undertake to tender the document in your case and you are immediately in evidence. So there is no question of getting the last address in such a situation.

It would appear that over the next 30 or 40 years the English Bar sought by various devices to circumvent the operation of *The Queen's Case*. One of the standard devices was to put the document in the hands of the witness and say, "Having read that, do you adhere to your statement?" Even that device was overrruled by the Judges in a series of cases which are reported in the Law Reports in the 30 years following *The Queen's Case*. But at last the legislature intervened. The predecessor of our present s 55 of the Evidence Act was enacted in England and three years later in Australia. Section 55 of the Evidence Act, you will no doubt recall, provides that:

> 1. A witness may be cross-examined as to—
> (a) previous statement made or supposed to have been made by him in writing or reduced into writing, or
> (b) evidence given or supposed to have been given by him before any Justice without such writing or the deposition of such witness being shown to him.

That was a legislative overruling of the fundamental proposition of *The Queen's Case*, but note, that it applies only to the witness's own document or when his evidence had been reduced into writing in front of a justice.

The section goes on to say that if it is intended to contradict him by such writing or deposition his attention must, before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of so contradicting him. And then there is an important proviso; provided always that the Court may at any time during the trial require the production of the writing of deposition for inspection

by the Court and may thereupon make such use of it for the purposes of the trial as the Court thinks fit.

So the Court is given a power to require the production of the writing or deposition and, if necessary, the Court could require it to be tendered by cross-examining counsel. I must say that in over 20 years of practice I have never seen any Judge take advantage of that proviso. However, the existence of that proviso has given rise to another rule which I refer to later in my notes, namely:

> That you are not entitled to cross-examine on a document unless you have it in Court or it can be readily produced and that it is admissible in evidence.

Cross-examination on a previous statement

My third proposition is that a witness may be cross-examined as to a previous statement made by him in writing or reduced to writing or as to evidence given by him before a justice without the writing or deposition being shown to the witness. Further, there is no obligation on counsel to tender that writing or deposition: cf Evidence Act 1898 s 55(1) and also Sir Frederick Jordan's judgment in *Alchin v Commissioner of Railways* 35 SR 498 at 508.

Document must be in Court

Proposition four is that to take advantage of s 55, the document must be in Court or at least capable of being readily produced: *R v Anderson* (1929) 21 CAR 178. This was an interesting criminal case where counsel cross-examined the accused upon a statement which he was alleged to have made at the time of dissolving his partnership and in which he admitted dishonesty. It turned out that counsel did not have the original document in Court, but apparently had a copy of it. The Court of Criminal Appeal, which consisted of Heweitt LCJ and Avery and Talbot JJ, set aside the conviction on the grounds that counsel had acted irregularly. At p 181 in the report it said:

> Those questions were put again and again, nevertheless no such statement was in Court and whatever copies of documents there may have been the original of that alleged dock statement was never produced, still it appears that at some point of the cross-examination a document was made visible to the jury and questions were put which might have easily conveyed to their minds that whatever the witness might say or deny there was import in the original document to that effect alleged bearing his signature, it is admitted there was no such original or could have any document have been produced in Court.

Judge's discretion

Proposition five is that the trial Judge retains a general discretion to require the production of the document and its tender. Not only does the proviso itself give rise to that conclusion, but there is a reference to two dicta in the cases cited there: *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 509, and *Wood v Desmond* (1958) 78 WN 65 at 67.

Adhering to testimony

In proposition six, reference is made to the case of *R v Jack* (1894) 15 LR (NSW) 196 which has troubled the New South Wales Bar for almost 90 years, and if it represents the law, which I would suggest is very doubtful, even a party to a cause cannot have an identified document put in his hand and then be asked whether he adheres to his testimony, unless the cross-examiner undertakes to put the document in evidence. There have been many attempts to explain *Jack's* case. There was a very narrow ground on which I think it could have been decided, but unfortunately the Judges decided it on a wider ground. What happened was that counsel for the accused was in the act of placing in a Crown witness's hand his deposition, and he said to him, "Look at your own deposition", or he wanted to say "Look at your own deposition and say whether you adhere to what you have said; is not the word 'stab' in your deposition?" Unfortunately the Judges clearly decided the case on a much wider ground, and that wider ground was that it was improper for counsel to seek to use the deposition in that way without undertaking to tender it. Windeyer J (at 200) said:

> When counsel did this he was clearly making use of the depositions in a way which was calculated to create the impression in the minds of the jury that the witness, in giving his evidence at the Police Court, had made use of the word "stab". His Honour was therefore, entirely correct in the course he took, and acted on the law laid down in *R v Ridout* SMH 3 May 1854, and in cases in England decided before that case. The law laid down and established in that case was, that if cross-examining Counsel makes use of a deposition in this way by putting it into the witness's hands, he must put it in evidence, even though he ostensibly makes use of the deposition for the purpose of refreshing the witness's memory. The reason of the rule is that if the putting in of the deposition were not insisted upon, a false impression might be conveyed to the jury that the witness had sworn something different at the Police Court from the evidence that he was then giving in Court, whereas the deposition and evidence might be exactly the same.

Now with great respect to the Judges it seems to me they completely denied the effect of s 55; their thinking was predicated on the law which had been laid down in *The Queen's Case* and in a series of cases which were decided in England between 1820 and 1852. My view is that the decision is clearly wrong and yet it has never been overruled, although in *Maddison v Goldrick* [1976] 1 NSWLR 651 at 660 Samuels J expressed the view that it was an authority which may well be doubted.

Any witness may be shown a document

Proposition seven is that any witness may be shown a document even though he is not the author and whether or not it is admissible and asked, if having read the document, he still adheres to his testimony. Now the difference between proposition six and proposition seven in those notes I would submit is that in *Jack's* case the document was identified. It was put on the basis that it was a deposition. Counsel said "Look at your own deposition" and he also referred to the contents of the deposition. But there are a series of cases where it has been held that counsel may act in accordance with the terms of proposition seven, and I refer to *R v Orton* [1922] VLR 469, which was a conspiracy trial before a great Victorian Judge, Mr Justice Cussen. There is an important ruling in that case which supports the

proposition in proposition seven. Counsel showed the witness a letter upon which was written a handwritten memorandum. The witness was on trial on a charge of conspiracy to defraud by false pretences. One of the false pretences alleged was that the witness stated that he had been told by a man named Shaw that he, Scarborough, wanted the accused to get certain privileges and concessions, and Shaw had written on a letter, "I told Mr Scarborough specifically he could get no privilege or concessions". Objection was taken and Cussen J ruled that question was inadmissible. His Honour ruled that the question should not have been asked in that way; the witness should have been asked to look at the document and then asked to the effect "Having looked at the document do you still adhere to your previous statement?" And that in my submission is the way in which the matter should be approached; you don't identify the document, you don't identify its contents, you put the paper in front of the witness and then say to him "Having looked at the document, do you still adhere to your previous statement?"

There is an interesting illustration of that in a Queensland Criminal Appeal, *R v Bedington* [1970] Qd R 353 at 359-60, where the accused was charged with armed robbery. He was alleged to have admitted to a detective that he had thrown certain car number plates into a river after he saw in a newspaper that the car was wanted and the paper had reported certain numbers in the number plate. When the accused gave evidence, counsel for the Crown cross-examined him about what had appeared in two newspapers for the purposes of establishing that these facts had been in the newspaper, and to give support to the truth of what the detective said the accused had told him. At p 359 of the report the Court sets out what the Crown Prosecutor had done. The Crown Prosecutor put in the witness's hands the *Courier Mail* and asked him a series of questions finishing with, "I am not asking you to say anything. I am putting it to you that having read the article in *The Courier Mail* on the Saturday morning you had not only found the type of car the police were looking for but you would have found the figures of the registered number? — Yes". "Of that car? — Yes". And it was held that that was improper cross-examination by the Crown. The statement of principle appears a little earlier on p 359 where their Honours say:

> Nevertheless it must be said that the use made of the newspapers by the experienced prosecutor who conducted the case for the Crown was quite wrong. The limited use which can be made in cross-examination of documents of this kind is or should be well known. A document made by a person other than the witness and not being a document which can be used to refresh memory, may, even if inadmissible in evidence, be put into a witness's hands and that witness may be asked whether having looked at the document he adheres to his previous testimony, but this is the extent to which the cross-examiner may go; he may not suggest anything which might indicate the nature of the contents of the document.

Birchnall v Bullough [1896] 1 QB 325 at 326 is an interesting example. In that case the document cross-examined on was inadmissible in evidence because it was an unstamped promissory note and could have not been tendered. As Bruce J said:

> Although the document may be inadmissible in evidence, a witness may be called upon to look at it, and having looked at it, to say whether he did not in fact borrow a certain sum of money.

Document must not be identified

The second part of proposition seven is that the document must not be identified and, if the witness is not the author, no question can be put which suggests the nature of the document or its contents. *R v Sehan* (*Yousry's* case) (1914) 11 CAR 13 at 18 is an interesting illustration of that proposition because again counsel for the Crown had indicated by the nature of his question that the document he had in his hand was a report from the Cairo Police concerning the antecedants of the accused. Counsel, after describing the document, said, "Look at it; do you adhere to your answer?" and it was said by the Court of Criminal Appeal, "Now that was inadmissible in evidence and in our judgment was a wholly wrong method to adopt. Counsel for the prosecution holding documents in his hands which he cannot put in has no right to suggest to the jury in any way what they are."

Also relevant to the second part of the proposition seven is *R v Gillespie* (1967) 51 CAR 172 where a conviction for embezzlement was quashed because the accused was asked questions about sales dockets made out by various sales girls when all the sales girls were not called to identify the dockets. In fact some five sales girls were called but the documents were the product of some 12 sales girls. It was held that for counsel to cross-examine on the contents of dockets which had not been proven in evidence was improper, and the conviction was quashed.

Party asked to make admissions

Proposition eight, which may be very debatable, is that a party to an action may be *asked* to make admissions as to the contents of a document whether or not made by him if the contents are within his personal knowledge. I cite as authority for that a passage in the judgment of Sir Frederick Jordan in *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 508-9. However, there is an express authority to the contrary effect, *Darby v Ousley* (1856) 1 Hurl & Nor 1; 156 ER at 1093. I might say that proposition eight accords with my experience at the New South Wales Bar over the last 20 years. Without objection parties are frequently asked to make admissions concerning the contents of documents whether or not they are made by that person.

However, *Darby v Ousley* says the contrary. It was an action for libel and the plaintiff sued on a newspaper story which alleged that he was a Papal rebel, a traitor, and an idolator and that he was a member of an association for the conversion of England to the Roman Catholic faith. The defendant pleaded not guilty and justified so much of the libel as imputed that he was a member of the association. The action was tried before one of the greatest English common lawyers, Mr Justice Willes. In the course of cross-examination the witness denied that he was a member of the association or that he had done any act to become a member of it. The defendant's counsel in cross-examination proposed to ask him

whether his name was not written in a certain book of that association as a member, and Willes J refused to allow the question to be put. There was a motion for a new trial before quite a strong Court of Exchequer Chamber. Mr Chief Baron Pollock, giving the judgment of the Court, said:

> We are all of opinion that there ought to be no rule. The first ground is the improper objection of evidence. . . . The learned Judge ruled that the question could not be put, and that the book itself ought to be produced. We are all of opinion that the Judge was right in point of law. . . . The entry of the plaintiff's name in the book had no reference to any former statement made by him, so that the case is not within 17 & 18 Vic s 24.

(That is the predecessor of our present s 55 of the Evidence Act.) His Lordship goes on:

> The object of the question probably was to show, by the plaintiff's name being in the book, that he was a member of an association, the character and objects of which would justly subject him to the charges and imputations contained in the libel. But whatever was the object, that question could not be put, no notice having been given to produce the book.

His Lordship must have felt very strongly about the legal merits of it because he was not too enamoured of the plaintiff. In the report he says:

> I as little desire to see the opinions of that class [meaning Roman Catholics] extended as any one in this land, but while they are tolerated, and entertained by those of rank, station, and property in the country, it is scarcely to be borne that, because a person is a Roman Catholic, he is to be asked whether he is bound by the notes and comments in a certain Testament, and then the Jury are to be told that these notes and comments lay down that no faith is to be kept with heretics, and justify the burning them.

Questions about another person's document

Proposition nine is that a party probably cannot be required to *answer* questions about the contents of another person's document unless it is produced. The first case cited in support of that proposition is *R v Banks* (1916) 12 CAR 74 at 75-6. It was a criminal case. The accused was charged with carnal knowledge and he had written a letter to a woman asking her to take care of the girl involved. He was also cross-examined on her reply. The Court of Criminal Appeal did not distinguish between his letter and her reply. It held that the cross-examination was improper, but upheld the conviction under the proviso on the basis that there was no miscarriage of justice. At p 75 Avery J, giving the judgment of the Court, says:

> There is another objection of a more formidable character, namely, that the contents of the correspondence between the appellant and the woman Smith, were elicited from him. It undoubtedly is open to considerable question whether that cross-examination was strictly regular. The Court thinks that it was not regular to insist that the appellant should give an answer concerning the contents of a letter which was not produced.

The next case in the notes to proposition nine, *Henman v Lester* (1862) 12 CB (NS) 776; 142 ER 1347 at 1352, is a very strong case in favour of proposition nine. The defendant was sued for fraudulent misrepresentation concerning certain products. He was asked in cross-examination whether or not he had been sued in respect of a similar claim in the County Court; that he had resisted it, had given evidence and that the jury had found a verdict for the plaintiff notwithstanding. It was said in the Court's judgment, "It was hardly disputed that the inquiry was admissible as going to the credit of the witness, and it is not denied in point of fact that such proceedings did take place in the County Court". In fact the witness answered the question, and in the judgment of the Court their Lordships say:

> The learned counsel were not agreed as to the precise point ruled by the Lord Chief Baron at the trial. I have, therefore, thought it necessary to speak to the learned Judge, who informs me that he only allowed the question to be put, because, the defendant being a party to the cause, his answer, if he thought proper to give one, would be evidence, whether it related to a writing or not, and that the learned Judge did not compel the defendant to give an answer to the question, and indeed gave him the option of answering or not.

Willes J goes on to say in his judgment that apparently counsel misunderstood the ruling. He says "This was not ruled by the learned Judge, nor argued by counsel for the plaintiff; nor is it sanctioned by any member of the Court". And their Lordships go on to say:

> We cannot say that the learned Judge was wrong in going the length he did, viz allowing the question to be put, even supposing that it could have not been put to a witness who was a third person, without proving the record.

It certainly seems to be an authority for the proposition that the question can be put to the witness, but the Court also seemed to be of the view that he cannot be required to answer it.

Testing present evidence only

Proposition ten is that unless the witness is a party, the document can only be used for the purpose of testing the witness's present evidence. That is an important point. If the witness says "X" and he is not a party to the proceedings and you either get him to admit that he has made a prior inconsistent statement, or if he refuses to admit that he has made a prior inconsistent statement, and you tender that prior inconsistent statement, the inconsistent statement does not become evidence in the cause. It can only be used to discredit his evidence. It is a different thing altogether if the witness is a party; then you can use his statement out of Court as an admission.

Hammer v Hoffnung & Co (1928) 28 SR (NSW) 280, is a very good illustration of proposition ten. The defendant called two witnesses both of whom denied on oath that they were employees of the defendant and in fact asserted they were the

employees of somebody else. Whether or not they were employees was of great relevance because the plaintiffs sought to make the defendant vicariously liable for their actions. Both witnesses were then cross-examined about previous statements they had made in which they had said they were employees of the defendant. The trial Judge told the jury that they could take account of those prior inconsistent statements on the issue as to whether or not they were employees. The verdict having gone to the plaintiff, the defendant appealed. The Full Court of this State set the verdict aside on the ground that the trial Judge had improperly directed the jury as to the use they could make of the prior statements. It was important in that case, of course, that the witnesses were not parties; if they had been parties then the statements out of Court could have been tendered as admissions against them.

Document tendered in contradiction

Proposition eleven is that once the witness's attention is drawn to the inconsistent part, the document can be tendered to contradict him if he refuses to admit his previous inconsistent statement. I should say that a question sometimes arises as to whether or not what has been said is inconsistent with the witness's testimony. It has been held in this State in *Carbery v Measures* (1904) 4 SR (NSW) 569, that the test is: Is it clearly inconsistent? It is not sufficient that conflicting inferences may be drawn from the two. You must have, in effect, a collision between the two pieces of material. It has also been held in this State that an opinion may be a statement for the purposes of s 55. This was decided by the Full Court in *Cotton v Commissioner for Road Transport* (1943) 43 SR (NSW) 66. If the witness says "In my opinion this", and at some earlier stage he has expressed another opinion to the contrary effect, that counts as an inconsistent statement for the purposes of s 55.

Admission of inconsistency

Proposition twelve is that once the witness admits the inconsistency, the document is not admissible unless he is a party. So once you cross-examine him and he says, "Yes, I admit I made that statement", that is the end of it. You have got what you can out of it. You cannot then tender the document. Two authorities for this proposition are *Nth Aust Territory Co v Goldsborough Mort* [1893] 2 Ch 381 at 385-6 and *Alchin v Commissioner of Railways* (1935) 35 SR (NSW) 498 at 509.

Required to tender document

Proposition thirteen is that if the cross-examiner shows the document to the tribunal of fact or directly or indirectly gets any of its contents before the tribunal of fact, he can be required to tender the document. An unreported judgment of Walsh J in the Supreme Court, *Oakes v Gaudron* (23/5/63) is an authority for this proposition. You will find very little authority and, in fact, I know of no reported authority, on this point. But in that particular case, counsel, Mr Reimer, who was appearing for the defendant in a highway case, asked a doctor some questions about an X-ray and he did not tender the X-rays. In fact he refused to call evidence. And Walsh J held that he was in evidence.

Such rulings in my experience have been made fairly frequently at *nisi prius*. Sometimes a witness will be shown a plan and asked some questions about it. The rule of thumb test I have always used is: If the transcript is understandable without the tender of the document, then you are not required to tender it, but if the transcript is incomprehensible without the plan or the document or whatever it was, then you are obliged to tender it if your opponent requires you to do so. That may be open to some debate or some refinement, but broadly speaking you put yourself in evidence if you indirectly get the contents before the tribunal.

Document used to refresh memory

Proposition fourteen is that if a witness refreshes his memory from any part of a document and counsel cross-examines on that part, he is not required to tender the document. But, if he cross-examines on parts not used to refresh the memory of the witness, counsel can be required to put the document in evidence: cf *Senat v Senat* [1965] P 172, 177.[2]

Tendering of document by opposing counsel

Proposition fifteen is that opposing counsel can only require the tender of the document during cross-examination. A very important decision by Harris J in the Victorian Supreme Court, which is contrary to the practice which has existed in my time at the New South Wales Bar, is authority for this proposition: *Hatziparadissis v GFC Manufacturing Co* [1978] VR 181 at 183.[3]

Very frequently in New South Wales counsel will say of his opponent "He examined on that document; he has got to tender it". It might be two days later or a month later, or it might be in re-examination of the witness. But Harris J deals with the matter in some detail and he decides as a matter of precise decision that if you do not require the tender of the document during cross-examination you lose your right to insist on the tender.

Re-examination by opposition

Proposition sixteen is that if a witness is cross-examined as to part of a document his opponent may prove that part of the document in re-examination together with such other parts of the document as are necessary to explain or modify it: *Meredith v Innes* (1931) 31 SR (NSW) 104, 112.

Waive privilege

Proposition seventeen arises from *Burnell v British Transport Commission* [1956] 1 QB 187 at 190, which decides that: If counsel cross-examines on certain parts of a privileged document in his possession, he waives privilege not only to those parts but to the whole document itself. That is a decision of the English Court of Appeal.

Technique in Cross-examination on documents

I think it is important when you want to use a document that you close all the gates — that you eliminate all possible explanations that a witness may have to avoid the effect of the document. Also on the question of a witness's signature, it is always necessary to tie a witness down. It is remarkable how often that, despite your instructions that it is the witness's signature, or your opponent's instructions about some witness of yours, that it is his signature, the witness will deny it. So you have to obtain an admission that it is his signature. If you are super cautious you may even ask him to write his signature, go about the matter very carefully, come back to it, show him the actual signature on the document without showing him the contents, and get an admission as

to the signature.

A favourite device of witnesses to get out of admitting the effect of documents — particularly when it contains their signature but they have not prepared the body of the document — is to say that they were not aware of the contents. This is a frequent device used when investigators have taken their statements. It is very important in cross-examination to get admissions from the witness that he was aware of the contents of the document. The standard approach is on the line, "You are a careful person?", "Yes"; "And you wouldn't sign a document without reading it?", and so on. It is also extremely important to eliminate explanations of the contents of documents. Every document creates its own problems; it is up to you to think how can this witness explain this away; and long before you obtain the admission, cut off those gateways and explanations.

In practice you will find a witness will say that he has changed his view since the time that letter was written, he did not have all the information in his possession at that time, he relied on other persons, and so on. They are common explanations, and you have to frame your questions so that you cut off those explanations, until finally when you put that particular part of the document to him there is no way out.

Another way a witness will sometimes seek to avoid the effect of documents is to say, "Oh, somebody told me to write it", or "I really didn't know what was in it", or "I was seeking to get some advantage" or something of that nature. You need to get his admission that when he wrote the document he was not setting out to deceive anybody.

If you are going to use a document to cut down a witness's credit or to secure admissions, it is very important to put carefully each part of the document to the witness. Cross-examine him on each part; draw out all the implications. Get everything you want out of it and, after showing him the part that you want to cross-examine him about, keep the document in your hand. Do not give the witness the whole of the document or let him read the whole of the document or give him an opportunity to see what is coming later.

In para three of the outline I make three points on documents to be used on credit. I think I left out the most important point and that is: if you are to use the document on credit, the first thing is to get the witness hopelessly committed to his sworn evidence. That is the first thing; do not let him explain away his sworn evidence, so that he gets himself in a hopeless situation.

I once saw Mr Justice Larkins in a defamation action do that with the greatest skill and most destructive force. Evatt QC and I were appearing for a party who was suing for defamation. There was an article which said that he had been put up for a council election by the Labor Party, and the plaintiff claimed that he was an independent candidate. Now Larkins had in his possession the application form or entry form which had been signed by the President and Secretary of the local Labor Party branch. And having got the witness committed to his story that he now had nothing to do with the Labor Party, he then led him along, the witness not knowng where he was going, seeking his explanation as to how he came to nominate and who signed his nomination, and the witness was led to make the most extraordinary statements since he had not the faintest idea who signed his nomination form. The plaintiff said in the witness box, "Oh, I had the application form in my hand and I was walking through the streets of some suburb in northern Sydney and I saw this gathering outside the hall and I went up to them and asked people if they would nominate me. Somebody came out and said he would, and I don't know who they all were". Of course Larkins had already got admissions that he knew the people involved and cut off every possible explanation. Ultimately when the document was produced, there was an absolutely devastating cross-examination. In fact in all my time at the Bar I have never gone out of Court so completely destroyed as I did at the conclusion of that cross-examination on that day.

Then so far as possible, get the witness to admit that each portion is contrary to his sworn evidence. Get him to admit, "You swore this ten minutes ago, and you swore that", then get him to admit to the contrary. If it suits your case, and it usually does, don't ask him which statement is true. J W Smyth QC, who is probably the greatest cross-examiner that the New South Wales Bar ever produced, always had the technique of saying "Which is false?" and it sounds a lot better than saying "Which is true?"

Some Judges, I think, quite rightly object to that technique and will make you say "Which is untrue?", but if you can say "Which is false?" and the witness says "What I said five minutes ago is false" it has quite a devastating effect. Of course once you obtain an admission that he has sworn false evidence or he has made a false statement you can pursue him up hill and down dale.

On the other hand you may want to use a document to secure admissions against a party, and you must again make sure that all the gates are closed. And then you must seek admissions as to the facts that you want without using the document. If you get the admissions well and good, particularly if you are thinking of not going into evidence. Then you don't want to have to use the document. In any event if using that technique the witness will not make admissions as to facts, you usually get a double bonus because when you produce his prior inconsistent statement you will usually get him to admit that his evidence was untrue. So you get the admission anyway and you get the bonus of him having given untrue or false evidence on his oath. It is far better getting it that way than the method I have often seen used; the other party is in the box and counsel has a document in his hand and he takes the document over to the witness and says "You said this, and you said that", and the witness says "Yes", "Yes", "Yes". It is true that you get the effect but you may be in danger of going into evidence and you lose the opportunity to get the witness to make contradictions. Again you should put the document to the witness piece by piece.

In some cases, particularly commercial cases, you may want to contradict the very statements in a document. There may be some representation, for example, made in the document. Here of course the ordinary techniques of cross-examination apply. You seek to obtain admissions as to facts and other documents which can ultimately be used to force admissions out of the witness that the statement in the document is untrue.

Also remember, as *Alchin's* case shows, that any document can be

used, no matter who produced it, to obtain an admission. I once saw J W Smyth absolutely destroy a witness when he had nothing to cross-examine the witness on but a *Law Almanac*. A police sergeant had sworn that it was a bright moonlit night at the time an accident happened. Our client was charged with culpable driving and Smyth had said to me a couple of days before, "Go and find out whether it was a bright moonlit night", and I am afraid I was a bit negligent; I had not done it. So as the witness was in the witness box, Smyth turned to me and said "Have you found out if it was a bright moonlit night?" and I said "I'm sorry Jack, I haven't". He seemed somewhat annoyed and said "Well go and get a *Law Almanac*". In those days the *Law Almanac* used to have the moon phases in it and the solicitor went out and got one. Sure enough the moon rose about 11 o'clock in the morning and set about four o'clock in the afternoon, so it couldn't have been a bright moonlit night. That was all Smyth had. So having got the policeman hopelessly committed to swearing it was a bright moonlit night he then took the almanac up to him and in that deadly voice of his he said "Have a look at that, having seen that do you still swear that it was a bright moonlit night?", and the witness, the police sergeant, said "No". Then Smyth said to him "Five minutes ago you swore to me that it was a bright moonlit night, and now you have just sworn that it wasn't a bright moonlit night haven't you?". "Yes", said the witness. "And one is contrary to the other?", "Yes". "Which is false?" and the witness said, "It was false when I swore it was a bright moonlit night." Of course the cross-examination just went on and on. The policeman went red, and finally he was reduced to total speechlessness. It is an interesting illustration of how you can use any document.

The other thing I would suggest is sometimes you may have a document and you may want to use some contradiction in it. But it may be so far on the periphery of the case that the jury and also the Judge will get very annoyed with you attempting to use it. Always try and make it relevant in some way; try and frame your question so it seeks to have some relevance. For example, if you are resisting an action for goods sold and delivered, and you know the plaintiff has some conviction for a minor offence (it may be something like breaking and entering or something like that), you get Judges and juries offside if you start cross-examining about the previous convictions. People will say "What has that got to do with the goods sold and delivered?" But if you can suggest to the witness that he appreciates that the defence in this claim is that it is a dishonest claim and get him to understand that, and then introduce the conviction in that way, it appears to have relevance. The same with other statements.

Commentary

R V Gyles QC

Can I just say a few words about some practical aspects first, and then return to some of the propositions which you have seen put forward. It may just be helpful, although very basic, to consider the circumstances under which we come to cross-examine on documents.

The first and most obvious time is when we wish to prove a document so as to be able to tender it in evidence. You may have to prove signatures, or in these days of statutory admissibility you may need to prove the pre-conditions after the business records provisions of the Evidence Act to enable the document to be tendered. That is not what we primarily think of when we talk about cross-examination on documents, but it probably still remains the single most important time when we have to do so. The second main purpose is to prove a fact referred to in the document, and often we wish to do that without tendering the document or without being bound to tender it, and without going into evidence for tactical reasons. So we may wish to cross-examine on the document without going into evidence, and of course that has been dealt with in the propositions we have seen. The third main use of cross-examination on documents is of course credit, and we have heard already a number of illustrations of that. Fourthly, in addition to circumstances under which we are forced to tender documents we must always bear in mind the circumstances under which, by cross-examining on a document or using a document, we become bound to produce it to the other side.

Having just reminded you of those perhaps two very trite points, I return to some of the propositions which have been discussed.

I have always thought that the use of a document other than the document of the witness is always unfair unless the witness has seen the document before. Now I have put that argument to various tribunals with remarkable lack of success over a number of years, although it is fair to say I think that a number of Judges share that view, and some of them act upon it.

Undoubtedly, the authorities to which you have been referred (*Orton* and the Queensland case of *Bedington*) are reasonably contemporaneous authority for the proposition that you may take the document of somebody else, no matter how irrelevant, and put it to a witness and say, "Now, having read that do you still adhere to the evidence you have given?" The illustration of the *Law Almanac* is a classic example of this technique. One may be pardoned for doubting whether the *Law Almanac* would necessarily be the best source of that information. Often a document which really has no credence at all can be put to the witness.

Now as to the witness in a witness box confronted with that situation, what must go through his mind? He knows the barrister on the other side is permitted by the Judge to give him that peice of paper, he waits for and sees that his own counsel does not object or if he objects he is overruled. One presumes that the witness would think that the other barrister is able to put that into evidence later and its purpose was for him to deny it. The statement or proof of another witness may be put to him, because bear in mind that under this theory, neither your opponent nor the Judge ever see the document. You may put to the witness the proof of evidence of another witness and say, "So having read that do you still adhere to your version?" I would venture to suggest that the average witness in those circumstances would assume that the other barrister would need to call that witness, whereas of course we know if this theory be correct he is not only not bound to call the witness he is not bound to show that statement to anybody else. I should have thought that this technique places great pressure on a witness to make an admission which he really is not bound to make and which is unconnected in any probative sense

to the document he is shown.

I was delighted therefore to hear reference to the decision of *Darby v Ousley* because that seems to be clear authority for the proposition that I have always thought correct. The other way of looking at it of course, is this: If *The Queen's Case* represents the basic law which says you cannot confront somebody with a document unless it is or it becomes part of the evidence in the case, we then have a statutory exception to that rule laid down in s 55 of the Evidence Act which applies only to statements made by the witness. Now one could think that would leave the position in relation to other documents precisely as it was in relation to *The Queen's Case* and I would suspect — and I have not read *Darby v Ousley* — that they would say that they would simply apply *The Queen's Case* rules to the documents created by a third party.

When you examine some of the authorities which are in support of the proposition that you may put an unacknowledged document to a witness, they really do not have the force that we might otherwise think. The relevant part of *Orton's* case has been read to you and it is really just a short statement without any examination of the problem, as is *Bedington*. In *Birchall's* case the document was the document of the witness, it was inadmissible because of the lack of a stamp, so that doesn't really touch this proposition. The *Nth Aust Territory Co* case is not a very clear authority because there, although the Court was dealing with a situation in which both the depositions of the witness and the depositions of another party were being referred to, it is unclear to me on which basis the Court made that decision. So without entering into a debate about it I wonder if the last word has been written on this subject. Certainly it is true that the practice in this State for very many years, certainly for the whole of my time at the Bar, has been in accordance with the propositions that McHugh has outlined and would be in accordance with the statements in *Orton*. However, as a matter of law I wonder whether it is correct.

Of course what I have just said does not mean that you cannot make use of a third party's documents. Let's take the illustration of the newspaper in *Bedington's* case. In my view it is consistent with principle that a cross-examiner can take a newspaper to a witness and say to him, "Have you seen that document before?" Once he assents to that, then you may ask other questions because the contents of that document become part of the witness's knowledge about which you can ask him further questions, assuming that his answers are either relevant, or relevant either to a fact in issue or as to credit. Once the person admits to knowing the facts or to having read the newspaper article, then you can ask him if he understood it was being said that such and such was the fact, and did he accept that, or not?" Now that, in my view, is not cross-examining on the document as such; it is cross-examining on the witness's knowledge of it.

Similarly in the case about the statement on the Rolls concerning the Catholic. If that witness had seen the Roll would it not have been legitimate to say "Have you seen the Roll kept by such and such?" "Yes"; and "Have you seen your name on it?" "Yes"; "Did you not appreciate that that was alleging that you were a Roman Catholic?" "Yes"; "Did you take any steps to correct it?" "No". Now I would suggest that is admissible cross-examination on credit, and would not be caught by the rule in *The Queen's Case* because the person has made the relevant admission as to his own state of knowledge about the document. And as I understand *The Queen's Case* principle, it is that you cannot get in a document or its contents by the back door, or make use of it by the back door unless you are in a position to prove it.

I would also suggest that when one examines the propositions eight, nine and ten, it is not altogether easy to understand quite how these propositions, which are all supported by authorities, fit into each other. It would be beyond the scope of a lecture like this to examine that thoroughly, but I have some hesitation how, for example, propositions eight and nine really work out in practice if both are correct.

One other point I wish to raise, in proposition thirteen McHugh says that counsel can be required to tender the document and in other propositions we also have an obligation to tender the document. Now as I understand it, if you cross-examine on part of a document — a discrete part of a document — you cannot be forced to tender the whole document or at least you cannot be forced to tender those parts of it which are clearly separated from any relevance to the part which was cross-examined upon. I do not think the propositions here are intended to cut across that, but that is my understanding of the relevant principle.

May I also have leave to question proposition fifteen. I haven't read that Victorian case, and it certainly is opposed to all practice in our Courts over very many years, and I think we must all consider our position about that. Can I just put a caveat on proposition seventeen. The reasoning which led the Court of Appeal to that decision seems to me to be quite inconsistent with the general principles which have been enunciated and certainly applied here over many years. In that case the witness assented to the cross-examiner's propositions about the contents of a small part of a document. Now as I understand it in those circumstances the cross-examiner is not bound to do anything with the document; he has not put it to him, he has had the assent of the witness to the proposition and that is all there is to it. Now Lord Justice Denning (as he then was) said that "In these the privilege was waived because otherwise neither the other party nor the Judge would have access to the document". Now as I understand the principles they would not have had access to the document anyway except under the little-used, if ever used, proviso to s 55. So that in my view the reasoning behind that decision is wrong. Whether or not as a matter of principle the use of part of a document should waive privilege is quite another question; the decision may be right in principle but it is not supported by the reasoning.

Reply

M H McHugh QC

I absolutely agree with R Gyles' criticism of the rule of people being shown somebody else's document and then being asked if they adhere to their evidence. I think it is very unfair because I think it has a psychological advantage over the witness for the reasons that Gyles outlined. Secondly, it cannot be justified on the basis of *The Queen's Case*, and although *The Queen's*

Case has been subjected to some devastating criticism, noteably by Wigmore, and anyone interested can see the criticisms in para 1259 of the Third Edition, those criticisms do not affect this particular situation. I agree with Gyles that, although four cases are cited for proposition seven, the first case, *Orton*, is founded on *Birchnall v Bullough* which really deals with the document being inadmissible, it was the witness's own document. It is far from clear to me, as it was to Gyles, as to whether the *Nth Aust Territory Co* case is authority for that proposition. I really do not think it is myself. So I would venture to think myself that *Orton*, although decided over 60 years ago by one of the greatest Victorian Judges, is a decision of very doubtful authority. Then *Bedington* in turn was based principally on *Orton*. However, for over 20 years to my knowledge of the New South Wales Bar, witnesses have been shown documents of which they are not the author and whether or not they are admissible, and then asked whether they adhere to their testimony. The matter has never been considered by an appellate Court and my view is that if it was, it could not be defended as a matter of principle. I am sorry, I should not say that; *Bedington* of course was the decision of the Court of Criminal Appeal, but it doesn't seem to have been debated in terms of principle; they looked at it in point of authority and I think that the practice is very suspect.

The second point Gyles made was in respect of propositions eight and nine. I should not say the second point he made, but the second point he made about my document. He says that there is some difficulty reconciling them. I must say I entirely agree with that criticism. It seems to really amount to this, that the party may be asked to make admissions (I am leaving aside *Darby and Ousley*) and counsel cannot object to the question being asked, but the witness has a right to refuse to answer, and that is perhaps the reconciliation of the two propositions.

The third matter to which Gyles drew attention is proposition thirteen, and he said if you cross-examine on a document it could only make that part of the document admissible and I accept that.

And finally he referred to proposition fifteen concerning Harris J's decision in *Hatziparadissis v GFC Manufacturing Co*, and again I agree that that is quite contrary to the practice which has long existed in the New South Wales sphere. I don't know whether as a result of that decision there has been any change of practice — I cannot recollect any in the last three years — I suspect there has not been. As for *Burnell's* case, in proposition seventeen I think it can only be justified on the basis of the proviso to the English equivalent to s 55, namely that the Judge has the right to demand the production of the document and that is the only basis on which it can be justified. □

1 Equivalent provisions to those in s 55 of the Evidence Act 1898 (NSW) are contained in s 36 Evidence Act 1958 (Vic); s 19 Evidence Act 1977 (Qld); s 29 Evidence Act 1929-1976 (SA); s 22 Evidence Act 1906-1976 (WA); s 99 Evidence Act 1910-1977 (Tas).

2 *Senat v Senat* (1965) P 172 has recently been followed by the full Court of the Supreme Court of Queensland in *R v McGregor* (1984) Qd R 256. McPherson J emphasizes in *R v McGregor* that the effect of the rule in *Senat v Senat* is that if cross-examination of parts of the document not used to refresh memory takes place, then the *whole document* becomes evidence and not merely those parts that have been cross-examined upon.

3 The principle expressed in *Hatziparadissis v GFC Manufacturing Pty Ltd* [1978] VR 181 that opposition counsel can only require during cross-examination the tender of a document cross-examined upon, has been doubted as being inconsistent with *Holland v Reeves* (1835) 7 CAR and P 36; 173 ER 16, 18; cf *R v McGregor*.

Cross-examination on documents — The New Zealand context.

The above article and commentary were referred to D L Mathieson QC who was asked to provide a New Zealand comment to establish the relevance of the article for the New Zealand situation. D L Mathieson QC is the Editor of the New Zealand edition of Cross on Evidence. *A new edition of this work is at present in preparation.*

Mr Justice McHugh has performed a valuable service by setting out the rules relating to cross-examination on inconsistent written statements in his series of propositions. Broadly speaking, the law in New South Wales is the same as the law of New Zealand. Section 11 of our Evidence Act 1908 which seems to have attracted not a single reported decision, is in much the same terms as s 55 of the Evidence Act 1898 (NSW) which Mr Justice McHugh takes as his foundation. Both these sections derive from s 5 of the Criminal Procedure Act 1865 (UK), a misleadingly named statute because it applied, as s 11 does still, both to civil and criminal proceedings. Section 5 repeated a section in the Common Law Procedure Act 1854 (UK) which was designed to abrogate the chief practical consequence of the rulings in *The Queen's* case (1820) 2 Brod & Bing 286; 129 ER 976 which were heartily condemned by leading English counsel of the time as IV *Wigmore on Evidence* (Chadbourn revision) 1259 et seq shows.

To follow McHugh's propositions we need to have s 11 before us. It provides: —

> (1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding without such writing being shown to him; but if it is intended to contradict such witness by the writing his attention must, before such contradictory

proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him.

(2) The Judge may at any time during the trial request the writing to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.

The New South Wales provision speaks of a previous statement made "or supposed to have been made by him". But, since the cross-examiner's first task in this context will always be to identify the document by obtaining an acknowledgment that the document was indeed made by the witness, those added words are unimportant. Section 55(1)(b) expressly applies the same rule – that it is not necessary to show the writing to the witness first – to a deposition before a Justice, but our s 11 is sufficiently general to apply to depositions at preliminary hearings. This is worth emphasising because some trial Judges have occasionally insisted that there is only one way for defence counsel to cross-examine on depositions, namely, by showing the deposition with the inconsistent statement in it to the prosecution witness, securing his acknowledgment of his signature, and then directing the witness's attention to the statement(s) in his deposition inconsistent with his present testimony at the trial. So to insist is to hark back to *The Queen's* case and to ignore s 11.

The proviso to our s 11(2) is not invoked in New Zealand practice either, so far as my experience goes. It is accordingly unnecessary to labour over the question whether a document which was so required to be produced for "inspection" would necessarily become evidence in the case, or the associated issue whether McHugh is correct when he states that the Judge could "require it to be tendered by cross-examining counsel" – which would of course make it evidence. Section 11(2) is regrettably obscure on those points.

Proposition 6

R v Jack (1894) 15 L R (NSW) 196, which is the basis of McHugh's proposition 6, almost certainly does not represent the law of New Zealand. Although Sir Frederick Jordan CJ cited it approvingly in *Alchin v Commissioner for Railways* (1935) SR (NSW) 498, at 509, it was doubted, as McHugh mentions, in *Maddison v Goldrick* [1976] 1 NSWLR 651, at 660. It is submitted that a judicial power to require cross-examining counsel to give an undertaking to put the document in evidence would offend against the *spirit* of s 11 by depriving counsel of the often valuable option of simply asking the witness whether he still adheres to his testimony in the light of his previous inconsistent statement, without putting in the document itself (which may reinforce the witness's testimony on many other matters of detail). But such a power, if recognised, would admittedly not offend against the *letter* of s 11.

Proposition 7

The first part of McHugh's proposition 7 is solidly supported by the cases cited, but I respectfully differ from the second part. It would be absurd if no question could be put which identifies a document of which the witness is not the author, or which suggests the nature of the document or its contents. I suggest that in this country it is a matter of everyday practice to ask questions, such as: "Here is a copy of the Company's Articles. Do you still say, looking at Art 15, that there was no right of pre-emption of your shares?" *R v Sehan (Yousry's Case)* (1914) 11 CA R 13 supports a narrower and very sensible rule, that the document must not offend against the hearsay rule, so that it could not be admitted as part of the cross-examiner's own case. A report from the Cairo Police is obviously mere documentary hearsay and must be excluded unless it is admissible under the Evidence Amendment Act (No 2) 1980.

The dockets in *R v Gillespie* (1967) 51 CAR 172 were, similarly, "nothing but hearsay" in the absence of an acceptance of their truth by the accused, and this is why, when the accused was forced to read them aloud, the Court quashed the convictions. For it is, or should be, trite law that a hearsay document cannot be introduced by the subterfuge of getting a witness to read it aloud, so that an inadmissible document appears in the record not *qua* document but indirectly in the form of oral testimony as to what the unproduced document says.

Proposition 8

McHugh's eighth proposition is sound in New Zealand. Such questions are asked all the time, just as they are in New South Wales. What has been called the "calculated obstructionism" of the law of evidence cannot be so obstructive as to prevent it. *Darby v Ousley* (1856) 1 Hurl and Nov 1 and the remaining part of the *Queen's* case on which the Court of Exchequer Chamber apparently relied, should be regarded as mere antiquated error and consigned to oblivion.

Proposition 9

As to proposition 9, it would be an affront to justice if, for instance, an electoral roll could not be shown to a witness in an attempt to get him to admit that he was registered as an elector in a certain electorate in 1984, without necessarily having to produce a hundred pages of roll in evidence. I shall assume for the purposes of argument that the entire roll would be admissible, if only under the public records exception to the rule against hearsay.

I do not think, incidentally, that Mr Gyles' ingenious suggestion that cross-examination is legitimate only if it is confined to the witness's knowledge of someone else's document is sound, for such cross-examination cannot meaningfully be distinguished from "cross-examining on the document as such"; the law is not so technical that it permits one line of questioning and forbids another aimed at making the same point, simply because of minute differences in the way the question was phrased. The authorities quoted in support of proposition 9 are frail, although *Phipson on Evidence* (13th ed) at 33-73 continues to cite them for the proposition that a party witness cannot be compelled to answer a question as to the content of unproduced documents. The laconic Judgment of Avery J in *R v Banks* (1916) 12 CAR 74 states that it "was not *regular* to insist that the appellant should give an answer" (emphasis added). This might be interpreted to mean that the Court should have exercised its residual discretion to ensure fairness at a criminal trial by disallowing prejudicial questioning. After all, the letters to the woman could have been produced and, if they had been, it would be possible to check whether their contents were being fairly represented to the witness

by counsel.

Henman v Lester (1862) 12 CB (NS) 776, is obscurely reasoned and is far from being a very strong authority for the ninth proposition. If, as Willes J held, the question was a proper one, why would it have been improper to insist on an answer? It is unclear whether the majority of the Court in *Henman v Lister* held that a party witness *must* "answer as to the contents of any written document as to which he may be asked" or whether they regarded it as unnecessary to decide that issue.

Propositions 10 and 11

McHugh's proposition 10 is plainly sound. It is well settled that the inconsistent statement goes to credibility only, and is not evidence of the facts that it states: see *R v Birch* (1924) CAR 26 and *R v Carrington* [1969] NZLR 790. Proposition 11 is also sound.

Proposition 12

Proposition 12 needs rephrasing, it is submitted as follows: –

> But once the witness admits an inconsistency between his present testimony and an earlier statement made *by him* the purpose of discrediting him by the inconsistency has been achieved, and the statement cannot be further proved in evidence unless it is otherwise admissible.

It is immaterial that the witness is a party if the document is inadmissible. On the other hand it may be admissible as relevant to a fact in issue as opposed to credibility and not excluded by any exclusionary rule such as the hearsay rule, and in deciding whether the admissions exception to that rule applies, it must of course be remembered that only a party can make admissions.

Proposition 13

I believe that proposition 13 is correct. It rests on the principles:

(1) that the contents of a document may be proved either by the usual method of producing it or by the less usual method of putting questions that result in its contents appearing in the transcript; and

(2) that if you put in part of a document you should (in the absence of any complicating issue of privilege) put in the whole: "if part of the document is put in, the whole is put in" Lord Esher MR said in *North Australian Territory Co v Goldsborough Mort & Co* [1893] 2 Ch 381, 385.

The context *may* throw a powerful light on the meaning of, or the weight to be attached to, the part.

When Australian lawyers refer to "putting yourself in evidence" they mean that you have adduced evidence, which it is perfectly possible to do without calling a witness. This will affect your right to apply for a non-suit. It will also affect the order in which final addresses are given: *Boracure (NZ) Ltd v Meads* [1946] NZLR 192.

Propositions 14 and 15

Proposition 14, resting on *Senat v Senat* [1965] P 172, is undoubtedly correct. Proposition 15 is more controversial, but it is submitted that New Zealand Judges should follow the lead given by Harris J in the *Hatziparadissis* case. This avoids the necessity of considering the possible recall of the witness later in the trial, after the document has been produced, as Harris J pointed out. The rule is obviously a convenience to the Judge who will hear cross-examination and re-examination on the document in reasonable proximity to each other.

Propositions 16 and 17

Proposition 16 is technically accurate although in practice the rule is either ignored or objections are not taken. Further, examining counsel will probably contend that the entire document is necessary to explain or modify the part cross-examined upon. And while it is possible to seal up part of a document, the exercise is usually not worth the fuss. So in practice for a variety of reasons the whole document tends to go in. Proposition 17 is an important rule, justified by policy considerations.

Conclusion

Mr Justice Hugh's propositions, as I have ventured to explain and sometimes modify them, are difficult to retain in one's mind. The effort should be made, against the day when one's opponent in these days of evidential laxity stands pat on the strict law of evidence in a case where the result may be affected. But I do not predict a wild upsurge of technicality in the District Court. □

Circumstantial evidence

Judges have not at all times extolled the value of circumstantial evidence. For example, there was the case where Lord Mansfield, as Chief Justice, presided over the trial of a Catholic priest who was charged, under an Act of William III, with the crime, then current, of saying Mass. If proved, the offence was punishable with imprisonment for life. Determined to secure an acquittal, his Lordship explained to the jury that they must not infer either that the prisoner was a priest because he appeared to be saying Mass, or that he was really saying Mass because he appeared to be a priest. The jury took the hint and returned a speedy verdict of "not guilty."

Lord Campbell criticised Lord Mansfield for that performance, and likened it to that of a certain Judge of long ago who disapproved strongly of the game laws. It was proved before him that the defendant, being in a field with two dogs and armed with a gun, had fired at a covey of partridges and that two of the said covey had fallen immediately after the discharge of the shot aforesaid. The Judge directed the jury that, in the absence of definite and direct evidence as to the cause of death, it was their duty to assume that the birds had died of fright.

– Reprinted from (1930) 6 NZLJ 191

Accounting records required to be kept by companies

M J Ross, Department of Accountancy, University of Auckland

Changes in the law relating to company accounting are still not fully recognised by some. In this article the provisions of the 1980 Amendment to the Companies Act 1955 are considered in the light of subsequent Court decisions. The effect of the amendments the author points out are mainly a matter of giving statutory force to recognised accounting practice, so that there will be adequate disclosure of financial information.

The 1980 Amendment to the Companies Act requiring companies to maintain proper accounting records is beginning to take effect. Criminal convictions have been entered against company directors where their company failed to maintain sufficient accounting records. Civil actions are in prospect against other directors.

The Court of Appeal has considered applications by two company directors seeking leave to appeal against their convictions under s 151(7) of the Companies Act 1955 for failing to maintain sufficient accounting records. *R v Bennett, R v Keane* [1985] BCL, 419. Leave to appeal was refused. In addition, there are a number of civil cases on the ready list awaiting a High Court hearing in which company directors are being pursued under s 319 of the Act. Under s 319, officers of a company can be held personally liable for the debts of the company if it is proved that a failure to keep sufficient accounting records contributed to the company's insolvency.

Section 151 of the Companies Act 1955 was amended in 1980, with the avowed aim of strengthening the obligations on companies to maintain accounting records. The policy behind the Amendment was outlined by the then Minister of Justice, Hon J K McLay, on its introduction to the House. He said:

> Personal liability for failure to keep proper accounting records that contribute to insolvency is an instance of reckless mismanagement, but has been specifically singled out because of the not infrequent correlation in liquidations between insolvency and the inadequacy or absence of proper accounting records ((1979) 427 NZPD 4518).

North American studies

This view has been supported by North American studies:

> The average life of a small business is less than five years. The obituaries of small business failures help bear testimony to this sad phenomenon. Post-mortem research discloses many reasons for these unsuccessful ventures, including an ineptitude and/or reluctance to maintain adequate accounting records and, very important, a failure to analyse the accounting data beyond that required to satisfy the Internal Revenue Service. (R L Patrone and D du Bois, "Financial Ratio Analysis for the Small Business", (1981) 19 *Journal of Small Business Management 35).*

Section 151 now deals with accounting records in two subsections. Section 151(1) sets out the end use of accounting records. Section 151(2) specifies the content of accounting records to be kept. The section is substantially the same as s 12 of the Companies Amendment Act 1976 (UK), now ss 221 and 222 of the Companies Act 1985 (UK).

The accounting professions in both New Zealand and the United Kingdom have sought legal opinion on the interpretation to be given the respective amendments. Legal opinion on s 151 of the Companies Act 1955 appears in (1980) 59 *The Accountants Journal* 110. Legal opinion on s 12 of the Companies Act 1976 (UK) has been published in *Palmers Company Law,* vol iii (1976), 6619 and repeated in (1978) 89 *Accountancy* 74. In addition, the New Zealand Society of Accountants has published a Guidance Note to members. (GU-6, printed in (1982) 61 *The Accountants' Journal* 293.) The Society publishes Guidance Notes, with the approval of its Council, to provide a lead to members on contentious matters.

1 The obligation to keep accounting records

Section 151(1) requires that every company shall cause accounting records "to be kept". In *R v Bennett* [1985] BCL 419 it was argued that this requires a company to merely retain or store such records as happen to come into its possession. In the Court of Appeal, Somers J stated that s 151 requires a company to create those accounting records required by the section which are not already in existence and retained.

This raises the question of what accounting records are required to be kept. Somers J said s 151(1) does not stipulate the accounting records to be kept save by the purposes they are to serve and the information they are to provide. What is necessary will vary with the nature of the business and the urgency and state of its affairs.

Section 151 requires a company to keep *accounting records that:*

(a) *correctly record and explain the transactions of the company — s 151(1)(a).*

A parallel can be drawn with the provisions in bankruptcy law that require unincorporated traders to

keep proper books of account, s 127 Insolvency Act 1967. The bankruptcy provision has been interpreted as requiring accounting records to be accurate and arithmetically correct with assets and liabilities, along with items of revenue and expense, correctly recorded. Minor arithmetical errors can be excused, but gross book-keeping errors and persistent arithmetical errors would mean that the company's transactions were not accurately recorded (*R v Darby* (1911) 30 NZLR 908).

(b) *will at any time enable the financial position of the company to be determined with reasonable accuracy — s 151(1)(b).*

This provision is designed to ensure that the management of the company is in touch with the profitability and solvency of the company. For the financial position of the company to be determined *at any time* the accounting records must be in such a form to enable information to be extracted in the form of regular management reports or management accounts.

Useful dicta arose in the West Australian case of *Manning v Cory* [1974] WAR 60. The director and secretary of a company were prosecuted following the company's failure to keep proper books of account. (The prosecution related to s 347B of the Companies Act 1961 (Aus), now s 267 of the Companies Act 1981 (Aus).) Burt J drew an analogy between the officer of a company and the pilot of an aircraft, to illustrate the manner in which accounting records should be used:

> The whole policy of the section is to prevent [insolvency] from happening . . . to prevent its officer flying the company blind and upon its crash, and without having any information capable of sustaining the opinion, from saying that he thought he had more altitude (supra p 62).

Implicit in this analogy is the idea that current accounting information must be stored in such a manner as to give management immediate information about the solvency of the company.

Accounting records, traditionally required only to produce a profit and loss account plus a balance sheet some time after balance date, must now be in such a form as to enable rudimentary management accounts to be prepared. The primary accounting records must be maintained in such a fashion that information can be extracted and assembled in a meaningful way to provide cashflow information to management.

For a small business, primary accounting records and source documents may by themselves be sufficient. In *re Crimmins (No 1)* [1957] QLR 4 Mansfield CJ said:

> . . . a mass of documents may disclose business transactions and may disclose the financial position if they are put in proper order and collated and totals made and so on.

So long as source documents are filed in a logical order, and are capable of being analysed to construct a reasonably accurate cashflow forecast, then s 151(1)(b) of the Act has been satisfied. For a larger business, the source documents will need to be summarised either in handwritten journals or a computerised accounting system to enable totals to be extracted to determine the company's short term solvency.

This was the failing of the respective defendants in *Manning v Cory* [1974] WAR 60. Source documents that were kept were not ordered in a meaningful manner and were not capable of being used as a management tool to establish the solvency of the company until long after it had "crashed". Similarly, in *Gill v R* [1960] WAR 91 it was described as being "idle" for the defendant to reconstruct his accounts after the event to establish when he became insolvent. The accounting information should have instead been recorded at the time and used to warn of impending insolvency.

In an appendix to its Guidance Notes, the New Zealand Society of Accountants recommends the completion by small businesses of a monthly cashflow forecast. This reinforces the view that s 151(1)(b) requires companies to be in a position to prepare meaningful cashflow budgets from accounting data that is being accumulated to complete end of year accounts and accounts for tax purposes. The management reports thus produced do not have to be of the standard required of final accounts. This requirement is covered in the next subsection, s 151(1)(c).

(c) *will enable the directors to ensure that any balance sheet, profit and loss account, or income and expenditure account of the company complies with section 153—s 151(1)(c).*

Section 153 requires each company to produce a balance sheet and profit and loss account, at the end of its financial year, which give a true and fair view of the company's affairs. Section 151(1)(c) requires a company's accounting records to be available for use in the preparation of these annual accounts. Annual accounts are an historical record of the company's performance over the previous accounting period. The subsection does not require a company to be able to produce annual accounts at any time. A company has the luxury of some weeks or months after balance date to prepare the detailed annual accounts. There is clear distinction between s 151(1)(b) and s 151(1)(c). The former requires accounting records which can be used on a regular basis to prepare management accounts. The latter requires accounting records which can be used after balance date to prepare financial accounts. Both use the same raw accounting data. The data must be recorded in such a way that it can be used to produce management reports during the course of the financial year and financial accounts at the end of the financial year.

The obligation in s 153 is to prepare annual accounts which show a "true and fair view". The accounting records are the parts which when taken together and summarised form the annual accounts. Particular accounting records are not required to show a "true and fair view". The accounting records must however be accurate and correct. This is covered by s 151(1)(a). Individual transactions are recorded in the primary accounting records. The various transactions need to be identified as being capital (asset or liability) or trading (revenue or expense), in accordance with accounting principles; and each transaction must be recorded correctly and

accurately. The end of year financial statements are a summary of the accounting records, and thus a summary of individual transactions. The overall summary must represent a "true and fair view" of the company's position.

(d) *will enable the accounts of the company to be readily and properly audited — s 151(1)(d).*
Preparation of the end of year accounts is the statutory responsibility of the directors, (s 152). Section 166 of the Companies Act 1955 requires an independent audit of the accounts before they are presented to shareholders although s 354(3) permits private companies to dispense with an audit. The auditor undertakes this task by checking a selected number of transactions. To check the final accounts, the accounting records from which the final accounts were prepared must be available. The auditor will reconcile the accounting records to the totals in the final accounts; will further check the physical existence and valuation of selected assets which are recorded in the company's accounts; and check that all the liabilties of the company have been recorded.

Section 151(3) requires that the accounting records be self-contained. They must be kept in one place; either at the registered office of the company, or at such other place as the directors decide. There should be no need to consult third parties, such as debtors, the bank and solicitors, to assemble the necessary information. It should be available in the company's own records.

The auditor's report must specifically state whether proper accounting records have been kept by the company (s 166(1)(b)). To date, one listed company, Sovereign Gold Mines Ltd, has been subject of an unfavourable report.

2 Specific accounting records required
Section 151(2) sets out the minmum information which must be contained in the accounting records. The subsection is concerned with the substance of the accounting data stored within the accounting system, not the form in which it is stored. Properly ordered and filed source documents may well satisfy the requirements of s 151(2) for many small businesses.

(a) The accounting records must contain *entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place — s 151(2)(a).*
It is clear from bankruptcy law, (*re A N Warburton* (1869) 20 LT 235), that the phrase *day to day* does not mean that accounting records need to be literally written up daily. Rather, they must be written up on a regular basis and must be stored and presented in date order. How frequently the records are written up must depend on the circumstances of each company's trading operations. *Day to day* refers to a calendar method of record keeping. It does not create a legal obligation to write up accounting records daily, though for many companies that will be the only practical method of recording transactions in date order. For most companies, compliance with s 151(2)(a) will be satisfied by the retention, and where necessary writing up, of cash books, day books, adding tapes, cheque butts and deposit slips which are able to be reconciled to the bank statements.

(b) The accounting records must contain *a record of the assets and liabilities of the company — s 151(2)(b).*
In general, s 151(2)(b) requires a company to be able to indentify its debtors, creditors, fixed assets and plant. Stock records are dealt with separately in s 151(2)(c).

Total debtors outstanding must be available. This figure will appear in the balance sheet. Individual debtors must be separately identified to enable debtors to be aged, and the information presented in a form to be used when a cashflow budget is required.

Totals for creditors must be available. Total liabilities will appear in the balance sheet. Individual creditors must be identified, along with amount due and payment date, to enable cashflow budgets to be prepared at times during the financial year.

Fixed assets and plant will be recorded in the general ledger. For a small business, a general ledger with cross-references to vouchers and supporting documents held on file may, by itself, be sufficient. For a larger business, detailed information regarding assets will need to be extracted from the accounting records and summarised in an asset register. A summary, in the form of an asset register, is necessary in a larger business to enable annual accounts to be prepared which satisfy the requirements of s 153 and the Eighth Schedule to the Companies Act 1955, enable the annual accounts to be properly audited, and to identify assets which may be sold or mortgaged to meet a short-term liquidity crisis. An asset register will be necessary if a perusal of the general ledger along with supporting vouchers and receipts is not able to readily provide a summary of the current position of the company.
(c) For manufacturers and retailers of goods the accounting records must contain *a record of all goods purchased, and of all goods sold (except those sold for cash by way of ordinary retail trade), showing the goods and the sellers and buyers in sufficient detail to enable the goods and the sellers and buyers to be identified; and all invoices relating thereto — s 151(2)(c)(i).* And *where the company's business involves the provision of services, records of the services provided and all invoices relating thereto — s 151(2)(d).*
For other than cash retail sales, a company is required to keep records of goods and services sold and purchased, together with enough detail to identify the respective purchasers and sellers. Invoices must be retained. Files of invoices, properly ordered and referenced can be sufficient for a small business. They are in a form whereby detail can be extracted to produce cashflow budgets so as to establish the solvency of the company. For a larger volume of business, the source documents will need to be written up into sales journals and purchases journals. Cashflow budgets, establishing future cash receipts and payments, can be constructed on a regular basis from an analysis of this information. After balance date, the accounting records can be finalised in order to produce annual accounts.

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Mental health law reform

By John Dawson, Legal Officer, Mental Health Foundation

This article is based on an address to the Auckland branch of the New Zealand Society for Legal Philosophy in September 1985. The author considers what he describes as the principal effects of a mental health statute as being the provision of legal authority to detain someone, and to administer medical treatment to them without their consent. This power he describes as a compulsory clinical relationship, and one therefore that raises some basic problems. The main question for any review of the Mental Health Act he sees as being whether the law will provide legal remedies for possible human rights violations to detained patients.

I wish to address the topic "Key Issues for the New Mental Health Act", by focusing on the legal provisions governing the compulsory treatment of detained patients.

Other issues such as arrest, committal and discharge, compulsory treatment in the community – all tie in to the core issue: the power of mental health professionals to require some patients to accept treatment without their consent. This, after all, is the main function of the Mental Health *Act* – to provide legal authority to detain and treat without consent. Without that authority such treatment is an unlawful assault on the patient who receives it. The law makes this compulsory clinical relationship possible.

The key issue in the review of any Mental Health Act is this: having decided to create this relationship, what is the role of the law in regulating it, and in making mental health professionals accountable to the public for the exercise of this formidable power of compulsory treatment.

For the relationship is characterised by an enormous imbalance of power. On one side is the hospital staff, backed by the law; by their training; their professional associations and trade unions; by the hospital administration; and by the Police on whom they can call – in fact by the entire apparatus of the *hospital* and *the State*. All this is stacked on one side. On the other side is the patient – detained, often forcibly medicated, perhaps acutely distured, rejected by family, destitute, without access to legal advice, even in solitary confinement – in a position of utter powerlessness, confronting the forces of the hospital and the State.

This powerlessness is actively maintained by the provisions of the present law, which I wish to describe to you, so we know what it is we are trying to reform.

There are six key features of the law in this context:

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(d) The accounting records must contain *statements of stock held by the company at the end of each financial year thereof, and all records of stocktakings from which any such statement of stock has been, or is to be, prepared — s 151(2)(c)(ii).*

The subsection does not require that perpetual stock records be kept. A company is required to retain summary stock sheets as at the end of each financial year plus stocktake records which were used to prepare the stock sheets. This is the information used to establish the stock figures in the balance sheet and in the profit and loss account, and from which the auditors can undertake random stock counts.

Current stock levels are not required to establish the short-term solvency of the company in compliance with s 151(1)(b). If the company is a going concern, certain levels of stock are required to stay in business. Stock is not going to be liquidated to meet current liabilities.

If there is doubt whether the company is a going concern, then stock levels can be critical. Stock levels may be estimated with reasonable accuracy, by use of gross profit margins or cost of sales records. Failing that, stock levels must be established by a stocktake.

3. Conclusion

Section 151(1) of the Companies Act 1955 requires sufficient accounting records be maintained to satisfy four requirements. The accounting records must be arithmetically correct (with minor errors excused); enable management reports to be prepared keeping management in touch with the profitability and solvency of the company throughout the financial year; enable annual accounts to be prepared at the end of the financial year; and to enable the annual accounts to be audited.

Section 151(2) specifies the minimum information which must be disclosed by the accounting records. For many companies, properly ordered source documents will suffice. More substantial companies will need to collate and summarise the source documents in order to comply with the Act. It is no more than recognised accounting practice being written into statute. □

(1) The first is the provisions of the Mental Health Act which provide staff with the power to administer whatever treatment they think is necessary. The law does not require that detained patients give consent nor any specific inquiry to be conducted into their competence to give consent.

(2) Patients have no right of access to their own medical records. They may therefore be unable to find out what treatment they have been given. It has been proposed that the Official Information Act be extended to cover Hospital Boards and already there is lobbying for disclosure of all medical records to remain at the sole discretion of staff.

(3) Legal actions for personal injuries caused by psychiatric malpractice are barred by the Accident Compensation Corporation Act. Patients may, in theory, claim compensation from the Accident Compensation Corporation who would refer them to a medical assessor, but there is no remedy in the Courts against a negligent doctor personally.

(4) Psychiatric patients have no right to legal information or representation and, in practice, they are not represented, even at committal hearings, where they are formally deprived of basic rights. In the studies I conducted, at 128 hearings fully attended in many different locations, two patients were represented. There are some hospitals at which patients are never represented.

(5) Should a patient somehow attempt to launch before a Court an action which is still available, such as an action for false imprisonment or intentional assault, it is unlikely they will ever get decision on the merits of their case due to the operation of s 124 of the Mental Health Act.

This section says patients must first obtain the permission of the High Court before they can even launch an action against any person who was acting "in pursuance or *intended* pursuance of the Mental Health Act".

It also sets a special six-month limitation period during which leave to proceed may be sought, although the limitation period for other citizens is six years.

This section is currently blocking the only recent patients' cases I am aware of: *Hastwell v Commissioner of Police* (Ongley J, High Court, Nelson, M49/83) and *Greatbatch v The Attorney-General and Auckland Hospital Board* (Prichard J, High Court, Auckland, A627/81). In both cases the Judges concede there was no legal authority for the arrest of these men which took place in their own home. In *Hastwell* permission to proceed with the action was granted but the Police have appealed this to the Court of Appeal. In *Greatbatch* permission to proceed was not obtained within the limitation period, the event happening several years earlier. Decisions on the merits have so far been prevented in both cases.

(6) The sixth feature is the entirely in-house and confidential nature of the medical complaints procedures contained in the Medical Practitioners Act. What psychiatric patient would have any confidence in complaining about a grievance to another group of doctors in a closed proceedings?

Added together, these features amount in practice to a complete shut-out. There is really no possibility of a lawfully detained patient bringing a successful legal action against a New Zealand mental health professional for abuse of the compulsory therapeutic relationship. There is no way they can hold hospital staff personally accountable in a neutral, fact-finding forum.

And, indeed, I know of no case in our history in which a patient-initiated legal action has been sustained against a member of a psychiatric hospital's staff.

So, despite the enormous imbalance of power, psychiatric patients in New Zealand must rely for the protection of their rights entirely upon professional self-regulation. This is ineffective because of the strength of the countervailing notion of clinical autonomy, which means that even if one's colleagues' standards of practice are inadequate, one has a very limited right to intervene. For example, the reluctance of professionals to interfere in the practices of their colleagues who suffer alcoholism or drug addiction is legendary.

In no other country with similar legal traditions to our own has the law abdicated its protective function so completely, conferring this unique immunity on mental health professionals. And what has occured?

The Case of *Niuean Boy* (1977)[1]

A 13-year-old Niue Island boy was given ECT while held in maximum security confinement at Lake Alice Hospital as an *informal* patient, without it even being discussed with his family or the Social Welfare Department who were responsible for his guardianship. This was not an isolated case. Sir Guy Powles' Ombudsman's report[2] in the same year gives details of another, similar incident.

The Oakley Inquiry[3]

The death of a Maori man, Mr Michael Watene, led to the establishment of the Oakley Committee of Inquiry in 1982.

I would like to remind you of some of the findings of the Committee, which included an Australian psychiatrist and a psychiatric nurse. The inquiry revealed:

(a) The "standard practice" of issuing drugs, including Paraldehyde, to be used at the discretion of nursing staff with no limits set on frequency of use or dosage (para 4.2).
(b) The routine placement of newly admitted patients in solitary confinement (para 4.4.10).
(c) Admission procedures and examinations which were "cursory and inadequate" and "provided no proper basis for what followed" (para 4.3.6).
(d) The placement of Mr Watene in solitary confinement for over a week with no explanation to him as to why he was in that position (para 4.4).
(e) The inquiries made as to his history were "inadequate for the purposes of diagnosis or for treatment" (para 4.5.6).
(f) The adminstration to Mr Watene over his violent objection of ECT without anaesthetic or muscle relaxant, and without any attempt to explain the procedure to him when it was questionable whether this mode of treatment was even indicated by the diagnosis, that of acute paranoid reaction (para 4.7).
(g) The extensive use of the drug

Paraldehyde which "is no longer commonly accepted as a drug for general use". On this the Committee commented:

"We consider the way in which Paraldehyde was prescribed and administered to Mr Watene to be completely unacceptable and to have indicated an indifference to the sensibilities of the patient" (para 4.8).

(h) "The ECT procedures carried out at Oakley Hospital were alarmingly deficient," and "the procedures adopted after ECT did not meet accepted professional standards" (paras 5.1 and 5.2).

(j) The internal investigation conducted after Mr Watene's death "was conducted in so inefficient and haphazard a manner that it is now impossible to say exactly what occurred" (para 7.15).

(i) "No adequate system of safeguards" existed for patients to make complaints of ill-treatment (para 8.1.14).

There it is — serious rights violations in our town.

Mental health professionals alone are not responsible for what occured at Oakley. We are all responsible, particularly those involved in the criminal justice system. But nor is there any doubt that the medical profession was in the driving seat at Oakley.

The question for the review of the Mental Health Act is this: is New Zealand law going to provide detained patients with access to legal remedies for violations of basic human rights, or not?

Our Task Force strongly believes it should, and in Towards Mental Health Law Reform,[4] we suggest a legal framework to make it possible. Our proposals are too extensive to cover in full, but these are some of them. We suport:

1 The right to legal advice and representation in practice in all committal and review proceedings.
2 The establishment of a patient's advocacy service.
3 The passage of regulations governing the use of seclusion.
4 The recognition of the right of all competent patients to give consent to treatment.
5 The right of patients found incompetent to a second opinion.
6 The placing of special restrictions on the use of psychosurgery, and hazardous treatments on child patients.
7 An affirmative statement of patient's rights placed within the Mental Health Act.
8 The establishment of Mental Health Review Tribunals, having jurisdiction over all non-criminal mental health issues, to which patients could appeal their detention and breaches of rights, and which could recommend changes in administrative practices designed to prevent future violations.
9 The repeal of s 124 of the Mental Health Act, removing the procedural barrier which denies patients a hearing on the merits of legal actions. The Department of Justice also support this repeal in its submissions. They comment that prison officers have no similar protection and have never felt the need for it.

The Health Department in its proposals so far has partially accepted some of these recommendations.

They propose that the Judiciary should be given a discretion to appoint legal counsel for patients. They favour the establishment of review tribunals to make decisions, but as to discharge only. They accept there should be special restrictions on the use of psychosurgery; and they agree that second opinions should be required for the forcible administration of ECT and "certain psychotropic drugs", to be decided upon by a "specialist technical committee". Who will sit on this committee, what criteria they will apply in making their decisions, and what drugs will be covered — all these remain unknown.

The requirement of second opinions for psychotropic drugs is actively opposed in the submission of the College of Psychiatrists, although this requirement is now operating under the new English Act and in England the negligence action for malpractice is still available also.

The College claims that a legal requirement of second opinions for psychotropic drugs would be a form of discrimination against psychiatric patients, because drugs with similar side effects are not controlled in other branches of medicine. With respect, this completely misses the point. Certainly hazardous drugs are used elsewhere but only in psychiatry are they administered compulsorily to detained patients. This is what sets psychiatry apart.

The upshot is that unless substantial pressure is brought to bear on the Health Department and Members of Parliament, effective legal remedies for human rights violations will not be included in the new Mental Health Act. We will have to push for the Bill of Rights with its vital clauses, cl 20(3) providing a right to consent to treatment; cls 15(3) and 15(2)(b) providing a right to humane treatment and legal representation for all detained persons; and cl 25, providing remedies.

Under those provisions we may seek to establish through litigation rights which should have been included in the statute all along.

When this is at last achieved and adequate protections have been injected into our psychiatric system there will be two big winners — detained psychiatric patients, and mental health professionals themselves. The sharing of responsibility and openness may eventually break down the aura of compulsion which surrounds our mental health services and which is its own worst enemy.

To summarise: at present the sole protection in practice of detained psychiatric patients' rights is professional self-regulation. This has failed to prevent serious abuses. What we need now are solid legal hooks upon which remedies can be hung. □

1 Report of the Commission of Inquiry into the case of *Niuean Boy*, Government Printer, Wellington, 1977.
2 Summary of a Report compiled upon an investigation into a complaint against the Department of Health and the Department of Social Welfare, Office of the Ombudsman, 1977.
3 Report of the Committee of Inquiry into Procedures at Oakley Hospital and Related Matters, Government Printer, Wellington, 1983.
4 Towards Mental Health Law Reform, Report of the Legal Information Service — Mental Health Foundation Task Force on Revision of Mental Health Legislation, Mental Health Foundation, Auckland, 1983.

Hear The Other Side: (II)

Further extracts from the Autobiography of Dame Elizabeth Lane

In The County Court

In August 1962 Randall and I were on holiday in Majorca. On an exceedingly hot day we played several strenuous sets of tennis against two Frenchmen.

My mind was still full of tennis balls when the hall porter put into my sticky hand a most official-looking letter. It contained an invitation from the Lord Chancellor to accept appointment as a county court judge. If the earth had opened before me I could not have been more astonished. True, years earlier, I had applied to be considered for such appointment but I only did so because of the urging of other women barristers who argued that unless such applications were made it could be said that women did not want to become judges. I had thought that the application was hopeless if not silly.

Applications were required for Silk, customary for Recorderships, permissible for county court judgeships but never allowed for High Court judgeships.

There could be no question of my refusing the invitation even if I had wished to (which was not the case), or my name would have been anathema to every other woman at the Bar.

Fortunately Randall and I were able to finish our month's holiday so there was time to get used to the idea before facing up to the actuality. It was an alarming prospect, not made any less so by the great publicity given to my appointment. I realised that if I made mistakes even such as might not attract attention in the case of a male judge, they certainly would do so in mine and I should be letting down the Lord Chancellor, the late Lord Dilhorne, who had shown such bold originality in appointing a woman, as well as damaging the chances of other women at the Bar.

In the event of course I made some mistakes but not of the kind to attract publicity. It is no disgrace for one's decisions to be taken to the Court of Appeal, so far as I know it happens to every judge. I daresay that I am being too kind to myself but I can only remember being reversed in one county court case and in one undefended divorce when I had refused to grant a decree.

Circuit 38

To begin with, I was told, I should be a "floater", that is to say might be required to sit anywhere from Newcastle to Penzance in order to assist or deputise for the local county court judge. But before I took up my appointment I was invited instead to become the second judge on Circuit 38 which comprised Edmonton, the principal court, Watford, Barnet, St Albans and Hertford. I did not learn until later that this had already been offered to other county court judges and declined, perhaps because Circuit 38 had the reputation of being the most overworked Circuit of them all. But this would not have altered my acceptance even if I had known of it. I was never averse to hard work and I was delighted with the prospect of being at home every night and of knowing exactly where I should be every day for up to a year ahead.

His Honour Judge Granville Smith was the senior judge of the Circuit, who showed no resentment at having a woman as number two, on the contrary he was welcoming and kind. Occasionally we both sat at Edmonton on the same day but normally we were at different courts.

The reputation of being a hard-worked Circuit was deserved. I frequently sat until between 5.30 and 6.30 pm and occasionally until later in order to finish the list and save the costs and inconvenience to the parties of having to come back on another day. On the other hand it was seldom necessary to work at home in the evening. Once a month we had a day off, officially known as a "Judgment Day". The purpose was to enable one to write any reserved judgments. I think that I am right in saying that I only reserved judgment in two cases so that day was more "off" than "judgment", although sometimes it was very useful for reading up one's notes and the documents in a case which had been adjourned and was coming back into the list. Also one was quite often asked to address magistrates, university students and others and could arrange to do so on one's day off.

No problems arose about the way I was to be addressed in court: "Your Honour" was sexless and "Her Honour" instead of "His Honour" was easy.

Although I had appeared in county courts as a member of the junior Bar I had not realised what a lot there was to learn about the procedure and it took some time to become familiar with it. Initially it seemed quite extraordinary that people could sue for, say, £30 and I had to make radical adjustments to my ideas about damages.

The parties were sometimes represented by barristers, more usually by solicitors and quite often not represented at all. With two litigants in persons one had to help them both and then judge between them. Without the assistance of counsel or a solicitor one had to rely entirely on one's own knowledge of the law. The Circuit had a library but it was split up between the courts, although the standard textbooks were available in all of them.

London Sessions

In 1965 new legislation came into force which provided for county court judges to sit periodically in criminal courts. One could refuse to do so and some judges did refuse, for instance if they had been Chancery Division practitioners at the Bar and had never been in a criminal court in their lives. A few of the provincial county court judges used to sit as Chairmen of their local Quarter Sessions but none of the London judges did so far as I know.

I would dearly have liked to refuse, but clearly I was well experienced in presiding in criminal courts and if I had refused it would have entailed other judges, who might be as reluctant as I was, having to sit for longer periods. But I did refuse to sit for two months on end annually which was to be the allotted stint: I was not prepared to abandon my county courts for so long at a time and I compromised by agreeing to sit for one month twice a year.

So in May of that year I sat for four weeks at the London Sessions at Newington Causeway. I disliked it intensely: the whole atmosphere was different from the provincial criminal courts I had known. I did not care for some of the court officials; I had some juries which acquitted when the prosecution evidence was overwhelming and there ought to have been convictions, as they must have known. Also the conduct of one or two of the counsel who appeared before me met with my disapproval. As I have said earlier, all this has changed in the last 20 years and now London Sessions deservedly enjoy a much better reputation.

In the High Court and a Bencher

On a county court "Judgment Day" (day off) late in July 1965 I went out in the morning and bought myself a new hat. When I came home for lunch my housekeeper said that there had been a telephone call for me, which she had not written down, and she could not remember the name of the caller except that it was "something like water and sounded chilly". Not for nothing had I been doing *The Times* crossword puzzle for years and I immediately asked if it was Sir George Coldstream (then the Secretary to the Lord Chancellor); it was. The message was that I was to go to the House of Lords at 2 o'clock that afternoon as the Lord Chancellor (then Lord Gardiner) wished to see me.

My heart nearly stopped beating; what could I have done in the county court which could possibly merit a rebuke from the Lord Chancellor himself? Well, perhaps I had been a bit too sharp with that solicitor and an order I had made was perhaps somewhat unorthodox, but I was sure that I had done nothing which would deserve dismissal. I did not enjoy my lunch, but I put on my new hat and duly presented myself.

Sir George, who was the most delightful man and whom I already knew, received me most amiably: he asked me how things were going in the county court, how I was enjoying my life there and so on. This did not sound like trouble ahead but I was mystified. After a few minutes, in which I had not been given the slightest hint of what was to come, I was shown in to the Lord Chancellor. He was very agreeable and then said that he wished to appoint me a High Court judge assigned to the Probate, Divorce and Admiralty Division. I was stunned, so much so that, to my shame, I had to ask him to repeat what he had said. So that was that.

Randall's comment which, much to my disapproval he later made to the Lord Chancellor was "I always knew this would happen"—which was a lot more than I did.

People were always very kind in writing letters of congratulation each time I had received an appointment and this time there were more letters than ever, including some from complete strangers, more than one of whom were patients in mental hospitals. One of the latter wrote that he was sorry to see from the newspapers that as the junior judge I should have to walk at the tail end of the Lord Chancellor's procession "but never mind, it's the end of the tail that keeps the flies off."

My Clerk

A day or so after my appointment had first been announced Lord Denning telephoned to ask if I had thought of having a woman as judge's clerk. I said that I was still in a state of shock and had not thought about anything. He told me that he had a most excellent secretary who would very much like to be my clerk and asked if I would see her. Within moments of doing so I decided that I could ask for nobody better.

Her name was Molly Hall, a widow with grown-up children. She was a remarkable woman, tall, good-looking, sweet tempered, tactful, resourceful, extremely loyal, conscientious, and a beautiful typist. She also played tennis, table tennis and croquet, so if we were on circuit where these facilities were available I was never short of a partner or opponent. She became very popular with everyone who came in contact with her. She was the first woman judge's clerk, so we were beginners together.

While I was still a judge a certain aloofness had to be maintained but after we had both retired she came to stay with me once or twice and we played Scrabble for hours on end. To my great sorrow she has since died. I am grateful to be able to pay this little tribute to her. I am sure that any of the judges, their clerks, barristers, their clerks, solicitors and court officials who knew her and may read this will be very pleased that it has been done.

DBE

All male High Court judges are knighted by Her Majesty the Queen. Clearly this could not happen to me so Her Majesty created me a Dame Commander of the Order of the British Empire (DBE). According to the table of precedence, a Dame has precedence over a Knight. Not that this made any difference to my position in legal processions and the like: there of course I took my place according to judicial seniority.

Like all High Court judges on receiving their honour, I had the great privilege of spending 20 minutes alone with Her Majesty in a drawing-room at Buckingham Palace, during which she presented me with the insignia of a Dame. All that the men receive is the Knight's badge of cross swords, which, by tradition is never worn, but I was able on suitable occasions to wear the badge of the Order and the silver star. Randall had already been made a Commander of the same Order (CBE) in recognition of his service with the British Council, so we made a nice pair.

On my appointment, inevitably

the question arose as to how I should be addressed in court. Was it to be the only known form in the High Court of "My Lord" or was reality to be faced and was it to be "My Lady"? This was a matter of discussion in high places and, as I knew what powerful voices were being raised in support of the latter, I deemed it prudent not to put in my oar. All was well and I became "My Lady".

Of course it took some time for barristers to grow used to the novelty and for the first few months it was quite often "My Lord, I beg your pardon, My Lady". Early on I had a long case in which Silks were appearing and before it ended they were well accustomed to "My Lady". So much so that when one of them went on to his next case which was before one of our more outspoken judges and called him "Your Ladyship" I was told that the ceiling was almost cracked by the resulting explosion.

A Bencher

High Court judges who are not already Benchers of their Inns of Court are invited on appointment to become such. The Bench is the governing body of an Inn, presided over by the Treasurer of the year, and having a number of committees such as the Church Committee, the Scholarship Committee and so on. It is a considerable honour to be elected a Bencher.

No woman had ever been a Bencher of an Inn until I came along and invaded this masculine preserve. Other Inns beside the Inner Temple now have women Benchers and my Inn has another two besides myself. I was most kindly received and never made to feel the odd one out. Being a Bencher has been a source of great happiness and pride to me.

Farewell

When it came to my final sitting in December 1978 I expected that perhaps up to a dozen members of the Bar would be present in court to say good-bye. I could not believe my eyes when I entered my very large Court. It was packed tight and people filled the aisles. Not only barristers but solicitors, social workers, court officials, and members of the public were squeezed in. My usher told me that there had almost been fighting in the corridor to get inside and that a lot of people had failed to do so. Standing on the Bench beside my chair was a member of the Court of Appeal, unrobed because otherwise he would have taken precedence and had to sit in my chair—which would have rather spoilt the effect.

There were valedictory speeches, which is usual when a judge is retiring, but I was so moved by all the kindness, that for the first time in court, I had difficulty in maintaining my composure and only just managed to keep my voice steady when I expressed my thanks and said my own farewell. It was a wonderful send-off which will always remain a very proud memory.

In Retirement—But Not Quite

In August 1975 Randall died. He was in hospital for less than three weeks during which he underwent two operations, but his life could not be saved. In another five months we should have celebrated our golden wedding. If it had not been for the affectionate care and encouragement of my brother and of my friends I do not think that I could have managed to get back to my judicial duties by the beginning of the October term. Once I did so, it was a great help to have absorbing work to do.

Before Randall died we had been looking for a house where we could live when I retired, as he had done some years earlier. For a couple of years after his death I did not bother to re-start the search, but then it seemed that the matter must be taken in hand. It took over a year before I found and bought my present house. It stood empty for several months until I retired in January 1979, some 18 months before reaching the compulsory retirement age of seventy-five. Until after the last war there had been no retirement age for judges. Several of them who had been on the Bench when I was appointed stayed on until they were well over age, for happy examples, Lord Denning and Mr Justice Stable.

It was painfully plain that it would be a great wrench to leave the life I had loved and the fine residential chambers in the Temple where Randall and I had been so happy. But, for various reasons, I did not wish to stay on in the Temple after I retired and it seemed wise to make the break while I still had plenty of energy left to start a different kind of life.

It took the best part of a year to get the house as I wanted it and to settle down with, as I thought, my working life behind me. But in January 1980 I was invited to sit as an additional member of the Court of Appeal. Thereafter, for periods of between a week and a month I continued to do so when required for two and a half years. Different Lords Justices presided over the courts in which I sat. Most of the appeals were on matters of which I had had experience but, for the first time, I had to learn some of the intricacies of the Immigration Acts and some of the Employment Acts. It was all extremely interesting and very hard work. I loved it.

Thanks to the kindness of friends, I was able to stay in the Temple when I was sitting. It was rather strange to find myself once more treading the way I knew so well between the Temple and the Law Courts. At first, I felt somewhat posthumous.

One other honour came my way which gave me great pleasure: I was made an honorary member of the Western Circuit. As such I could, and still do, attend some of the Circuit dinners among Circuit judges and members of the Bar, where I still feel very much at home.

Winchester is a delightful city and I know of no other place where I would prefer to live. There are Judges' Lodgings and it is a joy to dine there as I do quite frequently. By great good fortune, there are two families who are very close neighbours and are charming and kindness itself. If ever I need a helping hand, it is always available. They have become dear friends. I also have other friends in Winchester and have no need to feel lonely, but I am beginning to feel rather antique and I am content to be quietly at home, without too much entertainment.

Looking back, the deep sorrow over my son and the death of Randall were the two great tragedies of my life. In every other way I have been exceptionally fortunate and have led an extremely interesting and privileged life. I have met with much kindness and known deep happiness. I am duly thankful to the Almighty for what I have received. □