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1987 And Conferences

Within the last few years there has been a marked change within the legal profession regarding the recognition of the importance of continuing education. The New Zealand Law Society now runs a very full set of seminars on various topics during the course of the year and some District Law Societies run additional courses of their own. The support for these courses on the part of those who give them in the first instance and of the large number of those who attend, show the extent of the recognition there is within the profession of the need to deep abreast of the law and the many changes that are taking place in it. This year the triennial New Zealand Law Conference will be held in Christchurch. The dates have been fixed, being 1-5 October.

It was Christchurch that hosted the very first conference in 1928. This was done in effect because nobody else was really interested. It was noted at the time (1928) 2 NZLJ 44 that at a New Zealand Law Society meeting:

> The proposal received the tepid approval of that meeting chiefly because it did not arouse any dissent or opposition and after the District Law Societies had been consulted it was decided that, as Christchurch had made this suggestion, Christchurch should carry the proposal through.

In an earlier edition of the *Law Journal*, or more accurately in its predecessor, *Butterworths Fortnightly Notes* for 8 November 1927, p 221, there was an editorial comment on the suggestion for National Conferences in the following terms:

> The Societies of England meet in annual conference and find that by so doing much useful work can be accomplished. This work is not necessarily confined to those subjects of interest and profit to the profession, but extends to far wider fields. Who shall say where the limits of good shall extend to, as a result of the American Bar's visit to London as the guests of the English and Canadian Bars. The American Bar Association also finds it convenient to function for the promotion of international goodwill. The invitations extended and accepted by the leading lawyers of both countries to address the Law Conferences must add much to the appreciation of American and English viewpoints. The same happy results have attended the Annual Legal Conferences held by the three Scandinavian countries, Norway, Sweden and Denmark. Within the Scandinavian Union, many concrete achievements have been realised. The Congress of Northern Jurists have [sic] met regularly ever since 1872. Uniformity of law between the three countries has been aimed at to assist intercommunication.

Practitioners will have already received some preliminary notification of the forthcoming Conference. It will be noted that it marks a departure from the normal timing of the Conference just after Easter. This time the Conference is to be held in Christchurch in the spring when the city is at its famous best with the beauty of its gardens.

Christchurch practitioners have been busy for some time in organisational matters. The Chairman of the Organising Committee is Austin Forbes, assisted by Colin Averill, Alan Shaw, Terry Sissons, David Saunders, Chris McVeigh, Ian Pringle and Tom Weston. The Conference Secretary is Cushla Sullivan who is the Secretary of the Canterbury District Law Society. As usual there is expected to be a substantial group of distinguished overseas visitors and speakers.

Earlier in the year there will be three major legal conferences overseas that will be of interest to New Zealand practitioners. The first of these is the LAWASIA Conference to be held in Kuala Lumpur from 29 June to 4 July. LAWASIA conferences are held every four years and this one has as its general theme "To uphold the cause of Justice without fear or favour within the Asian Region". It will be of particular interest and value to New Zealand practitioners because of our growing involvement in trade and tourism and cultural understanding with the countries of Asia which are our immediate neighbours. Registration should be made before the end of April. Further information is available from the New Zealand Law Society.

Then at the beginning of August, from 3-13 August, there is the annual conference of the American Bar Association. This year it will be held in one of the Pacific rim cities, namely San Francisco. American Law has a much greater influence on our legal system than is usually recognised. A growing number of New Zealand practitioners have been making use of the general invitation extended so generously by the Americans to attend their Association meetings.

The third conference is that of our immediate neighbours. The Australian Law Conference this year will be held in Perth from 20-25 September. This conference will no doubt attract a large number of New Zealand practitioners. It is not only of course that a greater degree of harmonisation of New Zealand and Australian law is to be expected over the years ahead, but also there will be many who will want to look on the sacred waters where New Zealand won (or dare it be said, nearly won) the America's Cup.

Further information about each of these conferences will be published in the *Law Journal*. Certainly it is clear that 1987 is a year that will provide a good deal of variety in the conferences that will be available and open to New Zealanders, and that will be of considerable interest and value to us in varying ways.

P J Downey

Case and Comment

Medical information and accident compensation

Medical misadventure under the Accident Compensation Act 1982 remains a concept fraught with difficulty. The recent inter-departmental review of the accident compensation scheme identifies a number of obscurities within the present approach to cases arising from medical treatment: prominent amongst them is the degree of significance, if any, to be attached to the patient's expectations of the outcome of treatment when deciding whether that treatment has led to a personal injury by accident (*Review by Officials Committee of the Accident Compensation Scheme*, August 1986, Vol 1, 19). The general question is also canvassed in Ms Sandra Coney's dissenting opinion to the recently-released and controversial IUD Committee Report (*Report to the Department of Health on Some Aspects of Intrauterine Contraceptive Device Usage in New Zealand*, Department of Health, July 1986). A subsequent decision by the Accident Compensation Appeal Authority exemplifies many of the unresolved difficulties in this area.

In *Appeal by K*, unreported, 21 October 1986, ACAA 149/86, to be reported in the next part of NZAR, the appellant claimed compensation under the 1982 Act in respect of conception and childbirth following a laparoscopic sterilisation. The Appeal Authority found as a fact that the operation itself had been performed competently, that such a failure was not unexpected and, in consequence, that a claim for medical misadventure could not be sustained on this ground. The remaining question for the Appeal Authority was whether the doctor and/or the hospital staff had either failed to inform the appellant of the risks involved in the operation or had given the appellant the wrong information as to the use of contraception following the operation and, if either was proved to have taken place, whether a medical misadventure had occurred.

The claim that medical misadventure had occurred in terms of the information provided to the appellant fell under two heads. First, it was alleged that the consent form signed by the appellant did not mention the possibility of failure. That form stated simply that the patient agreed to undertake the operation which was "designed" to produce permanent sterilisation. Here Judge Middleton held that the word "designed" suggested that there was no full guarantee of permanent inability to become pregnant. Further, that the duty fully to inform a patient of risks arose only if the patient asked a specific question or questions on this point, applying *Smith v Auckland Hospital Board* [1965] 2 NZLR 191. The second allegation, that wrong information had been given, arose out of a chapter of accidents. The appellant was not given the usual advice to use alternative methods of contraception until the sterilisation had been confirmed. Instead, having asked for her IUD to be left in, she was told that the device would be removed in the course of the operation because it was no longer necessary. She was then mistakenly given a form relating to a different surgical procedure, which stated that no further contraception was required after the operation. Judge Middleton was satisfied that the Hospital Board staff were negligent in these respects and that the appellant's pregnancy resulted from the wrong information which she had been given. On this basis, the claim for medical misadventure was established.

The case was remitted to the Accident Compensation Corporation for the necessary assessments to be made. It might be recalled that in *XY v Accident Compensation Corporation* [1984] 4 NZAR 219, another claim based on pregnancy following sterilisation, Jeffries J held that ". . . the artificiality which calls conception, pregnancy and the event of birth an injury ends with the event, and normalcy reimposes itself". Whilst certain economic and non-pecuniary loss could be compensated where they arose on or prior to the birth, the maintenance of a healthy child was held not to be an expense or loss within the meaning of what is now s 80 of the 1982 Act. Jeffries J accepted that this could fairly be described as a "line-drawing stratagem", pointing out that the same could be said of a decision to pay for the child's upkeep to the age of 16.

In one sense, *Appeal by K* appears to confirm that the law of negligence remains relevant to some cases of medical misadventure. Yet it should not be overlooked that the Appeal Authority recently held that "the question of what amounts to medical misadventure presupposes a standard of care which is less than the common law standard of negligence" (*Re Overton* [1986] 6 NZAR 3): this observation apparently brings within the ambit of medical misadventure the slippery concept of "inherent error" in medical treatment, avoiding the further question – necessary at common law – whether that error was negligent or not. With respect, regardless of the standard of care applied, reference to such a standard begs some important questions. For

example, why is fault relevant at all in cases decided under a "no-fault" regime? In areas other than medical misadventure, the legal quality attaching to the act which causes injury is irrelevant to recovery under the legislation (*G v Auckland Hospital Board* [1976] 1 NZLR 638). Further, if the standard of care in the context of medical misadventure differs from that at common law, what justification remains for carrying into claims under the 1982 Act the confusing baggage of common law negligence actions, such as the doctrine of informed consent?

The answer seemingly lies in the policy distinction between "sickness" injury and "accident" injury under the 1982 Act, which again requires arbitrary lines to be drawn in hard cases. It is feared that if a patient's expectations are taken into account in deciding whether an accident has occurred in the course of medical treatment, the effect would be to underwrite the success of such treatment and hence to extend the accident compensation scheme to cases of sickness alone (see, for example, the judgment of Speight J in *Accident Compensation Corporation v Auckland Hospital Board and M* [1981] NZACR 9). With respect, this is a doubtful premise on which to base exclusion of a whole category of claim under the 1982 Act: to compensate the patient whose injuries derive from the treatment itself would not entail underwriting the vast majority of "adverse response" cases — those where, without more, the patient simply fails to respond to treatment. Nevertheless, the Appeal Authority has drawn a firm line in most cases against using the patient's expectations of the outcome of treatment to ground a claim for medical misadventure (*Re P* [1984] 4 NZAR 215, cf *Re M* [1978] 1 NZAR 567). The apparent exception after *Re K* lies in those cases where the patient asks for specific information but is left in ignorance, or is misinformed.

Superficially, the result in *Re K* is easy enough to reconcile with the existing policy under the 1982 Act. This policy appears to assume that patients are informed of, and must expect, certain consequences to flow from treatment so that coverage arises only where the consequences result from the treatment and are outside the expected range of responses. Yet, in restricting coverage to those who actually ask the right question, *Re K* arguably exposes the very myth on which that policy is founded. Reported medical misadventure cases reveal few patients who have asked detailed questions of their doctor but many who claim to have been unaware of the possibility of a particular adverse response. More general evidence suggests that cases involving injury as a result of IUD usage are prominent within the latter class. Carried to its conclusion, the approach in *Re K* would also seem to entail undesirable arbitrary distinctions between patients undergoing treatment, in that it will lead to discrimination against those who are less confident in their dealings with the medical profession or, in extreme cases, less able to frame the appropriate question. Given present practise (which is challenged by patients' rights groups) further arbitrary distinctions may arise based on the type of treatment involved. Fear of adverse consequences is in itself occasionally seen to negate the underlying rationale for some surgery, the risk being consequently (and controversially) down-played. An example in the present context might be the woman undergoing sterilisation because fear of pregnancy interferes with her ability to express herself sexually.

In summary, *Re K* is yet another case which raises more questions than it answers. The approach of Bisson J in *MacDonald v Accident Compensation Corporation* [1985] 5 NZAR 276 which gives misadventure its natural meaning of "bad fortune or mishap" whilst not directly on the point raised by *Re K*, indicates that a broader approach is available when construing medical misadventure than that which has prevailed hitherto. The extent to which Bisson J's reasoning will be accepted remains unclear. The general question of the relationship between accidental and non-accidental disability in terms of compensation will, of course, be a central feature of the *Report of the Royal Commission on Social Policy.* Pending that report, patients will be well advised to bridge the professional distance between themselves and their medical advisers and to make the right enquiries. For most patients, the telling question: is Who will give them such advice?

John Hughes
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Oppressive credit contracts — applicability of Moneylenders Act 1908

The recent decision of Hillyer J in *Bambury v Hayes Securities Ltd* [1986] BCL 1581, provides an example of
a finding of oppression in respect of a credit contract. This was an action claiming the taking of accounts, or reopening of a transaction, either under the Moneylenders Act 1908, or the Credit Contracts Act 1981.

About 1972-73, the plaintiff had become involved in a substantial subdivision project, involving over 350 building sections. He had been selling sections in the subdivision under long term agreements for sale and purchase. Some of these agreements had been sold at a discount of 10-15% to finance companies, while others imposed obligations on the purchasers to continue paying the plaintiff for the sections over several years. The plaintiff's solicitor, R, had undertaken to provide finance for the venture. About 1979, further finance was required, and R, on the plaintiff's behalf, approached the defendant, a company holding a money-lender's licence. The managing director and principal shareholder of this company had personal and business connections with R who, acting for both parties, effected an agreement between the plaintiff and the defendant company. The agreement was dated 31.8.79, and provided that in consideration of the sum of $60,000 paid by the defendant company ("the assignee") to the plaintiff ("the assignor"), the plaintiff would assign to the defendant the balance of the purchase money due under the long term agreements for sale and purchase of the sections in the subdivision, totalling over $142,000. It was further agreed that if the sum of $60,000 plus interest was paid by the plaintiff to the defendant on 31.12.79, the defendant should reassign all its rights under the agreements to the plaintiff.

On 3.1.80, the first working day

after 31.12.79, the defendant moved with some speed in writing to the plaintiff saying that, since the option under the deed of assignment had not been exercised on the due date, it had elapsed. The defendant also wrote to the purchasers of the sections, advising them of the assignment, and steps were taken to ensure that payments due under the agreements for sale and purchase were made to the defendant. The plaintiff did nothing in response to these actions, continuing to trust that R would do something about the transaction. In fact, nothing was done until December 1981, when the plaintiff issued a writ claiming that the deed of assignment was a mortgage and that notice of desire to redeem it had been given; or alternatively that the deed was unenforceable under the Moneylenders Act 1908. The action did not progress until 1984 when, because the Credit Contracts Act 1981 had come into force, an amended statement of claim was filed in which relief was also claimed under that Act.

The first point of dispute concerned the true nature of the transaction. The plaintiff argued that the assignment was intended to operate as security for a loan; the defendant, however, contended that it was an absolute assignment, similar in kind to those discounting arrangements which the plaintiff had previously made with other finance companies.

Hillyer J noted that the authorities indicated that, in determining whether a conveyance, absolute in its terms, was intended to operate by way of security only, he was entitled to take into account parol evidence. Various factors here were significant; for example, the defendant had itself referred in its correspondence to the transaction as a "loan" or "advance"; the plaintiff thought he was obtaining a loan; the value of the assigned agreements for sale and purchase was greatly in excess of $60,000 and bore no comparison with the 10-15% discounting arrangements the plaintiff had made on other occasions; His Honour also considered it significant that the plaintiff had paid for R's services to arrange the transaction, it being normal for a borrower to meet the costs of the lender's solicitor. On all the evidence, it was held that the transaction was a loan.

His Honour then proceeded to consider the effect of s 48 of the Credit Contracts Act 1981, which repealed the Moneylenders Act 1908. Although the Court of Appeal had decided in *Sharplin v Broadlands Finance Ltd* [1982] 2 NZLR 1 that a consequence of the passage of the Credit Contracts Act was that a contract could not be reopened under s 3 of the Moneylenders Act, the plaintiff nevertheless contended that relief should be granted under s 8 or s 9 of the Moneylenders Act. This argument was rejected by Hillyer J, who held that the intention of the Credit Contracts Act was that any relief available to a borrower must now be obtained only under that legislation.

In considering whether the transaction was oppressive within the meaning of s 9, Hillyer J examined all of the circumstances. In particular, he observed that the difference between the sum advanced and the eventual benefit received by the defendant, the speed with which the defendant moved to take advantage of the "bargain", the fact that the same solicitor, on whom the plaintiff was relying for finance, acted for both parties, and the plaintiff's urgent need to obtain money amounted in total to oppression. Accordingly, it was ordered that the transaction be reopened.

Although the distinction was not drawn in the course of the judgment, it is submitted that this case would fall into any one of the three categories defined in s 10(1) (a), (b) or (c) which empower the Court to reopen a credit contract on the ground of oppression. The extreme disparity between the respective benefits provided by the parties under the agreement indicates that the contract itself was oppressive; the defendant's haste in acting to take advantage of the literal terms of the assignment indicates the exercise of a right conferred by the contract in an oppressive manner; and the plaintiff's reliance on a solicitor acting for both sides at a time when money was urgently required no doubt constitutes oppression in the means whereby he was induced to enter the contract.

The decision also indicates that credit contracts may now be reopened only pursuant to the Credit Contracts Act. It was pointed out both in *Sharplin* and in the present case that the repeal by the Credit Contracts Act of s 55 of the Statutes Amendment Act 1936, which allowed relief to a lender from the consequences of a contract's being declared illegal or unenforceable under ss 7 or 8 of the Moneylenders Act, was an indication that the latter provisions did not survive the passage of the Credit Contracts Act. It seems that these provisions of the Moneylenders Act may now be laid to rest.

Cynthia Hawes
University of Canterbury

Reliance and expectation damages in contracts:

New Zealand Motor Bodies Limited v Emslie [1985] 2 NZLR 569, *Bay of Plenty Fruit Packers Limited v Crabb & Others* [1986] BCL 1340. It would seem to the writer that our Courts are still having some difficulty with respect to damages questions, particularly with respect to the distinction between reliance and expectation damages and the principles governing their recovery. In an earlier note, [1984] NZLJ 169, the writer suggested that both the commentators and the Courts may have made damages questions more difficult by their reliance on labels rather than pursuing a pure analysis of what loss a plaintiff has actually suffered. The writer's comments were echoed by McLauchlan, (1985) 11 NZULR 346, 354.

Once a breach of contract has been established, it has to be determined what loss has been caused by the breach and whether that loss is too remote to be recovered. The underlying principle in all cases where the plaintiff has incurred expenditure and also suffered a loss of profits is that any damages awarded must not compensate the plaintiff for more than his actual loss. (Once the plaintiff steps outside the bounds of contract however, different rules apply. For example, it has long been the rule that on a repudiation, a plaintiff has an election between pursuing a contractual remedy or a quasi contractual remedy eg *Planche v Colburn* (1831) 8 Bing NC 14. If the plaintiff elects a quasi contractual remedy, the plaintiff will not necessarily be prevented from recovering his expenditure even if he has made a bad bargain.)

The writer does not mean to suggest that damages questions are simple matters. Rather, the reverse is often the case. However, the writer

believes that damages questions, particularly with respect to reliance and expectation damages, can be made simpler by resorting to a fundamental analysis and leaving the more heady propositions stated in many learned articles to the academics.

Two recent cases are noted. The first does not necessarily demonstrate the difficulties which the writer has suggested exist but is nevertheless of interest.

New Zealand Motor Bodies Case

In *New Zealand Motor Bodies Limited v Emslie* [1985] 2 NZLR 569, the plaintiff and the defendant had thoughts of merging. The defendant sent a copy of its financial accounts to the plaintiff and at the request of the plaintiff, the defendant's secretary prepared a budget forecast. The budget forecast was of vital concern to the plaintiff. Notwithstanding that there were some adverse factors involved, the plaintiff decided to proceed with the merger. However, an important factor that was not disclosed to the plaintiff was that the defendant was technically insolvent. The plaintiff purchased shares in the defendant, the purchase price for the shares being satisfied partly by cash, partly by an allotment of shares in the plaintiff, and partly by a mortgage of the purchased shares in favour of the defendant. The defendant's land and buildings were sold to the defendant's shareholders who leased them to the plaintiff.

Business did not go well and losses were suffered. The plaintiff eventually declined to pay rent under the lease and brought the present action. The plaintiff claimed a refund of the purchase price of the shares, losses suffered by the defendant company through its trading operations and "extraordinary" losses relating to redundancy payments and "closing down" expenses.

Barker J, after reviewing the law relating to misrepresentation, made the following comments (at p 598):

> [It] is difficult to know whether the plaintiff would have made profits now foregone as a result of the breach, and if so, what those profits would have been. . . . A claim for foregone profits would have represented the plaintiff's expectation interest. . . . The present plaintiff makes no claim for profits foregone. . . in view of the positive proof they would have faced.
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> An award of damages representing the difference between the value of the shares in the business as it was represented to be and their value as it actually was also reflects the plaintiff's expectation interest. . . . Not so the claim relating to [the defendant's] trading and operating losses and the closing down costs. . . . [As] was noted in Ogus, *The Law of Damages* TL & D (1973) at p 285:
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> > . . . while the expectation interest is the primary item of damages in most actions of breach of contract, it is by no means the only one. The breach of contract may have resulted not only in the plaintiff's failure to acquire benefits to have been secured on performance, but also in his sustaining "positive" pecuniary losses: that is, his financial position is worse than it would have been if he had not entered into the contract.
>
> As the object of damages in contract is to put the plaintiff into the position he would have occupied had there been no breach, there is no reason in principle why a plaintiff who has suffered provable pecuniary losses as a consequence of the defendant's breach should not be able to recover in respect of that as well as in respect of his own disappointed expectations. . . . The only caveat is again to ensure that there is no overlapping of damages or double recovery.

Barker J allowed the plaintiff's claim for damages in respect of the diminution of value in the shares (representing the plaintiff's expectation interest) and also the trading and operating losses and closing down costs (representing the plaintiff's reliance interest).

With respect, it is submitted that Barker J was correct in stating that the "expectation interest" is only the primary item of damages and in stating that a damages award can be made up of wasted expenditure on the one hand and loss of profits on the other. (The writer made this submission in his note, [1984] NZLJ 169.) As Barker J stated, the only caveat on the latter proposition is that the plaintiff must not be over-compensated for his loss. (There are those who would argue that by altering the emphasis on an award of damages from expectation to reliance, even this proposition would be susceptible to attack — see for example Owen's article (1984) 4 *Oxford Journal of Legal Studies* 393.)

Bay of Plenty Fruit Packers Case

In *Bay of Plenty Fruit Packers Limited v Crabb & Others* [1986] BCL 1340, Gallen J also had to consider whether wasted expenditure could be recovered along with loss of profits and, incidentally, had to consider the question of the recovery of pre-contractual expenditure.

The plaintiff company sued members (or perhaps more correctly, ex-members) of the company for breach of the Articles of Association. Members of the company were essentially obliged to submit kiwi fruit to the company for processing and if any member wished to withdraw from this arrangement, it was obliged by the provisions of the Articles of Association to give 12 months' prior notice. It was not disputed in the present case that the defendants had not given such notice and it was not disputed that the defendants had breached the Articles.

One of the defendant's main contentions was that the plaintiff could not claim both loss of profits and wasted expenditure as this would breach the principle illustrated in *Anglia Television Limited v Reed* [1972] 1 QB 60. It was in this context that Gallen J briefly commented as follows (at p 14):

> Under normal circumstances, pre-contractual expenditure is not claimable for the logical reason that it is expenditure which would clearly not be claimable if no contract ever eventuated and the loss which may be expected as a result of breach of contract would normally be calculated without reference to such expenditure because it would be loss related to obtaining the contract rather than as a result of its breach. The principle enunciated in the [*Anglia*] *Television* case is that pre-contractual expenditure can in

> certain circumstances be recovered, but not in addition to loss of profits. I think it is important to confine the principle to the situation it is designed to cover, that is a pre-contractual loss. I do not think it can be regarded as authority for the proposition that wasted expenditure other than pre-contractual waste and expenditure cannot be claimed in addition to loss of profits. Where this cannot be done. . . is because of the application of the Rule that there may not be a double recovery.

With respect, it is submitted that *Anglia Television* should not be regarded as standing for the principle enunciated by Gallen J. It is true that Lord Denning stated that the plaintiff had to elect between recovering loss of profits or wasted expenditure. However, it is submitted that Lord Denning's real concern was simply to ensure that a plaintiff should not be over-compensated and at first sight, a statement to the effect that a plaintiff can recover his wasted expenditure and his loss of profits would seem to allow a double recovery. However, it is again simply a question of being precise when using terminology. Provided that the loss of profits recovered does not include the wasted expenditure, there is no double recovery. In this regard, if it is accepted that pre-contractual expenditure can be recovered in a contractual action, it is further submitted that there is no reason to distinguish between pre-contractual and post-contractual reliance expenditure. Accordingly, provided that the plaintiff has not made a bad bargain, he should be able to recover (subject to the rules of causation and remoteness) the expenditure which he has incurred in order to derive profits and his loss of profits (or if it is uncertain whether he would have made a profit or it is otherwise impossible to reasonably calculate the profit that he would have made, he should be able to recover his wasted expenditure).

With respect to the recovery of pre-contractual expenditure, Gallen J clearly did not intend to make definitive comments. However, it is submitted that the comments that were made are confusing. If under normal circumstances pre-contractual expenditure is not recoverable, it may be asked what was special about *Anglia Television*? It is unfortunate that the Judge did not have to consider the matter in more detail and that the Judge did not therefore have to refer to McLauchlan's article (supra). Nevertheless, the case is helpful in that it represents at least one more instance in New Zealand of a willingness to allow pre-contractual expenditure to be recovered (albeit, seemingly, in undefined circumstances).

McLauchlan has argued that pre-contractual expenditure should be recoverable provided that it meets the normal remoteness test expounded in *Hadley v Baxendale* (1854) 9 Ex 341. (Though less publicly, the writer argued to the same effect in an opinion written while studying for his Masters Degree in Law at Auckland University in 1978. As the writer recalls, neither his fellow students nor the "Master" of the class were particularly convinced by the argument.) Indeed, it is implicit in Lord Denning's judgment in *Anglia Television* that provided the rule or rules in *Hadley and Baxendale* (supra) are met, pre-contractual expenditure is recoverable.

It seems to have been generally assumed that *Hadley and Baxendale* (supra) only permits the recovery of losses incurred on or after the formation of a binding contract. The assumption has been based on the premise that only "bargained for" losses should be recoverable and that pre-contractual losses are not bargained for losses. However, it is submitted that this begs the question of what is bargained for (expressly or impliedly) when a contract is entered into and the writer, like McLauchlan, considers that, one way or another, persuasive arguments can be made for the recovery of pre-contractual expenditure.

Breach the effective cause of loss

First, as the writer has previously argued, it is submitted that it is incorrect to assert that pre-contractual loss is not caused by breach of contract – [1983] NZLJ 169. Breach is surely the effective cause of loss. The question that is more difficult to answer, in the writer's view, is whether the loss caused by the breach is too remote to be recoverable.

If the law of contracts, both in terms of primary and secondary obligations, has a truly consensual base, it may be that a defendant should not be liable for the plaintiff's pre-contractual expenditure unless the plaintiff had *assumed* liability for that expenditure. The writer's argument is based on Professor Coote's thesis (which he presumably adheres to but unfortunately, has not put to writing, at least to the writer's knowledge) that the reason why mutual promises are held to be binding is because each party assumes or undertakes obligations. If secondary obligations (ie obligations to pay damages) are just as consensual in nature as primary obligations, then it must be ascertained whether the defendant has assumed liability to pay damages of the kind in question – contemplation alone would be insufficient.

In that regard, as the writer has previously suggested, it may be difficult to distinguish between assumption of liability and contemplation. It may be relatively simple to determine what the defendant should have contemplated but it will not necessarily be simple to assert what liability the defendant assumed. It was in this regard that the writer suggested that "the difficulties surrounding the recovery of pre-contractual expenditure [may be] insurmountable" – ibid. (McLauchlan thought that this statement was confusing in view of the writer's earlier statement that "the effective cause of the loss is the breach of contract" – ibid fn 60. With respect, there should not be any confusion because causation in itself is not the measure of recovery ie even assuming that the effective cause of loss is the breach of contract, it still has to be determined whether the loss is too remote to be recoverable.)

These difficulties, of course, would not arise if the Courts are prepared to accept a simple contemplation test as argued for by McLauchlan.

The writer believes that the New Zealand Courts are taking the right approach by acknowledging that

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Judicial appointment:
Mr Justice Tipping

The announcement that Andrew Patrick Charles Tipping was to be appointed a Judge of the High Court was made at the beginning of October 1986.

Since 1967 the new Judge was a partner in the Christchurch firm of Wynn Williams and Co. At the time of his appointment he was the senior common law partner of the firm.

Mr Justice Tipping was educated at Christ's College in Christchurch and graduated from Canterbury University in 1966 with the degrees of BA, LLM (Hons). He won the Canterbury District Law Society gold medal and also the Sir Timothy Cleary Memorial Prize. He has been a Tutor at the University of Canterbury in evidence and commercial law, and was moderator for the law schools in the law of Torts.

The Judge was a member of the Canterbury District Law Society Council from 1976 to 1984. He was President in 1984. He served on the New Zealand Law Society Council from 1982 to 1984, being a member of the Executive Committee in 1984. He was appointed to the New Zealand Law Society Courts and Tribunals Committee in 1981. He became the Chairman of that Committee in 1985.

Mr Justice Tipping is married and will sit in Christchurch. □

Mr Justice Tipping

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pre-contractual expenditure should be recoverable provided that the normal tests of causation and remoteness are satisfied. The precise rationale for allowing recovery seems to have been somewhat confused or blurred but whether recovery be allowed on the basis of the writer's thesis (ie causation, assumption of liability and contemplation and assuming for the moment that any difficulty in distinguishing between assumption of liability and contemplation of damage could be overcome) or a simple contemplation test in accordance with the rule or rules in *Hadley v Baxendale* (supra) (McLauchlan's thesis), the writer believes that there is nevertheless a logical justification for allowing recovery of pre-contractual loss.

S Dukeson
Whangarei

Correspondence

Dear Sir,

Re: Compulsory disqualification

I read with interest the article in the November issue of *New Zealand Law Journal* by Mr La Hatte. As a Court practitioner sometimes involved with clients facing compulsory disqualification, I tend to agree with the view expressed in the article.

Only a few days ago, I had represented a defendant who unsuccessfully attempted to defend a charge essentially of driving at a speed which might have been dangerous to the public. The speed was a long way in excess of the statutory 50 kph limit, but no actual danger resulted to anyone. A modest fine and the minimum disqualification was duly imposed.

Because of the necessary one-month period before which a limited licence can begin to operate, my client will probably as a result lose his livelihood.

Earlier in the same Court, an overseas visitor had pleaded guilty to driving with excess blood alcohol. He was fined a slightly larger sum and disqualified for a similar period commencing on the following day. It was stated in Court that the tourist would be returning to his own country on the following day.

These cases illustrate an additional reason in support of Mr La Hatte's argument which he does not expressly mention; an equal penalty can have grossly unequal effects on the recipient. This surely offends society's basic notions of fairness.

It is quite often said from the Bench that people who derive their livelihood from the possession of a driver's licence should not do things which jeopardise that licence. Whilst this may sometimes be a valid argument, there are several offences carrying mandatory disqualification (eg careless use causing injury) which have little or no deliberate content in them. Furthermore, the inevitable loss of licence upon conviction simply does not appear to be an effective deterrent in practice. Reverting to the notion of fairness, why in any case should some citizens face far greater sanctions in effect than others for the same transgression?

If Mr La Hatte's suggestions were adopted, another strange anomaly would be removed from our traffic law. I have often wondered why a motorist who is slightly careless and thereby causes injury to another should suffer inevitable loss of licence whereas another motorist who is grossly careless but is lucky enough to avoid injuring anyone as a result may very well suffer no loss of licence at all.

While I would support the changes advocated on the basis that loss of licence was a presumption and retention an exception, I fear that the political climate may, as the original author implies, make such a change difficult.

B M Cropper
Auckland

Partnership profit sharing

By Murray Landis, a solicitor of Sydney, Australia.

The author of this article is in practice as a partner in a firm of solicitors in Sydney. He practises in the areas of Foreign Investment Revenue and Commercial Law and acts as Managing Partner of his firm. The article has previously been published in professional journals in Australia. The article points out the division of profits within a partnership is only as good as the way in which it is implemented and acknowledges that complete satisfaction on the part of every partner is probably not obtainable. The article looks at a wide variety of matters that can be taken into account.

Almost nothing has been written (or at least published) in Australia on the subject of profit sharing between partners. Most firms are reluctant to discuss what they earn or how they share it, except with their own consultants or perhaps in legal practice management workshops such as those conducted by the Financial Management Research Centre at the University of New England ("FMRC"). As one might expect, the Americans have overcome this reluctance and have published quite a deal of material on partnership profit sharing. A comprehensive bibliography of source materials is included at the end for those who may wish to delve deeper into this subject.

Equality or systems which work towards equality are the most common forms of profit sharing amongst legal partnerships in Australia according to Sam Beasley of FMRC. One can only speculate whether lack of information on alternatives to equality has anything to do with why it is so common. The American material indicates there is a great diversity of systems, and differential schemes in that country are the norm.

Equal profit sharing

Equal profit sharing between partners enables firms to avoid what is regarded as the most difficult and unpleasant task facing partners – dividing their income. It is an unsophisticated system which certainly simplifies the distribution of profits.

Equality is supposed to promote the level of comfort in dealings between partners by removing the competitive element of monetary differences based on their individual performance. It is supposed to make a partnership a unified team, rather than an assemblage of sole practitioners and competitors sharing expenses and incidentally practising under the same firm name.

Equal profit sharing is supposed to enable partners to work more closely together and engender a sense of cameraderie which is infectious to the staff. Equality is supposed to make partners feel secure and the firm regard itself as an institution, not a congregation of rivals each of whom is bent on out-performing the rest. All of this certainty of remuneration share is supposed to reduce rivalry amongst the partners, improve their morale, make the firm more effective, and reduce tensions.

The partners in an equal sharing firm believe that although their talents may lie along different lines, they are all of equal ability, they have respect for each other's ability, and the relative contributions they each make to the firm's income in one way or another, are perceived to be roughly equal over time.

Equality has a lot going for it when each partner is satisfied that each other partner is contributing to the firm at roughly the same level as he is. Equal sharing can promote unhappiness when any partner is not satisfied that any other partner is contributing at roughly the same level as he is.

The Equality theory holds that while partners may emerge who seem to make greater contributions to firm profits than others, (for example, the partner who works hard on a "Bonanza" matter, the partner who brings in substantial new clients and fees) it is likely the efforts of the others also contributed substantially to the fees earned. Proponents of equality believe the good years balance with the not-so-good ones and the difficulty of assessing the relative contributions and the antagonisms and injury to firm morale which results is not worth it. Equality seems to work best when the firm does not keep (or does not publish) statistics which might draw attention to differences or create arguments on the value of various contributions. The problem is that with the adoption of modern techniques, more and more firms are going over to computerised data processing which produces these statistics.

The basis for equality is the (often not recognised) principle that the worth of each partner must be duly and properly assessed and accepted when he becomes a partner. The risk and problems inherent in trying to make a single and permanent judgment on each partner when he is admitted, is the major objection to equality. This problem may be tempered by a longer period of Associateship, or Non-Equity Partnership. Even so, great shifts can, and do, occur in how partners are valued by others. Partners change, and some do not develop as expected.

Equality is in effect a rigid formula system and suffers from as many disadvantages as advantages. It has the capacity to destroy individual incentive if any partner is not pulling his weight. This may not be the case when everyone has an "adequate" income, since some partners don't care what their partners are making if they have sufficient income to satisfy their aspirations, provide them with incentive, as well as enabling them to live comfortably, meet their

needs, and relieve them of unnecessary personal problems. However in a bad year or two, where growth is significantly decreased, where there is a visible discrepancy in hours worked or other significant actual or perceived differences in contribution, equal sharing can become unfair. Differing abilities exacerbate this problem. Equality in this situation can be very detrimental and stifle the growth the firm is seeking to achieve.

All rigid formulas can create tensions and pressures. Apart from equality the most common rigid formulas are "lock-step" and "seniority". Under lock-step, groups of partners (usually in the same age group or with like experience) receive the same increases as a group at the same time. Under seniority systems the distribution is based on length of service with the firm. Most of the comments made here about equal profit sharing can be applied to the other rigid formulas.

Differential profit sharing

Theoretically, *equal* profit sharing should decrease rivalry between partners, promote team effort, and common purpose. Theoretically, *differential* profit sharing rewards those individual differences, who are recognised by the firm as contributing to a greater extent to the well being of the firm. Differential profit sharing arrangements are either "objective" (involving the determination and application of a formula to weight compensation points for particular kinds of activity), "subjective" (in which the allocation of profits is determined by a committee of partners, or even the whole partnership, on an essentially random or guided basis), or a mixture of objective and subjective.

Those who support differential profit sharing, accept two things as axiomatic. Firstly that profits of the firm should be divided amongst partners on the basis of individual performance, which is regarded as the measure of the individual contribution to the prosperity of the firm. Secondly that not all partners are equal in their contribution and hence there should not be equal income distribution. They then seek to try to find a fair method to reward those unequal contributions.

If professionals are going to embark on group practice, we can make the pretty safe assumption they believe it is necessary to provide adequate service for their clients. Statistics show that group practice enables all members to have a higher income than if practising alone – sharing overheads, specialisation and more efficiency result. If we start with this premise, then we must accept that each partner can no longer be considered solely on an individual basis, but as part of the whole. Any profit sharing scheme should recognise this and promote harmony of group as well as providing incentives to each of its members.

The writings of Reginald Heber Smith in 1940 on what has become known as the Hale & Dorr system, is a landmark work concerned with the basis for distribution of profits to law partners. It is the most copied, and diversely applied system for "cutting the pie" not only amongst law firms but in other professions.

Essentially under the system, Smith credited or pro-rated income to partners on a weighted statistical basis having regard to who obtained the business, who did the work and how profitable it was. The basic system encouraged doing the work by valuing this at twice the weight given to bringing in the business. There is a huge number of variations from the basic Hale & Dorr system. Newer firms may more heavily weight the origination of business factor, whilst more well established firms may weight more heavily the work done factor. It is interesting that in the Hale & Dorr system, fees collected are the only basis used for statistical recording of work done. Smith's view was that until payment was assured, the business or work had no economic value, and only contributed to overhead.

The Hale & Dorr method allocates to each partner a share of credit for each fee received based upon the weighted factors. The business credit went to the partner who was responsible for getting the client, the work done credit to the one who did the work and the profit credit was based upon the profitability of the work compared to the time cost invested in the matter. The profit credit is divided amongst those who by nature of their effectiveness and efficiency in their practice regularly generate greater profits (not fees) than others. In a simplified Smith system this factor is not included due to the difficulties which may be involved in its calculation.

Any formula system tries to reward so called finders, minders, grinders and binders.

- Finders are the originators of business;
- Minders are those who maintain and retain the client, and often enlarge the client work;
- Grinders are those who do the work on the matter;
- Binders are those who are engaged in management and administration.

In the formula systems, averages of data may be taken over periods as long as 3-5 years. Special recognition may be given to a rising star or to the most recent year's performance. Allowances may be made for management, either as billable time, or by a set "salary". Origination credits can either be perpetual, or scaled down over a number of years.

The major reaction to the Hale & Dorr and other formula systems is concern about potential "manipulation" by a partner so inclined and the ultimate overloading of credit to certain partners, particularly in the area of business credit. When partners concentrate on activities to improve their own compensation serious side effects for the firm result including hoarding of clients and uneven distribution of work. Formulas seldom adequately credit meaningful management time, training, team spirit or attitude.

The more one looks at all formulae systems, the more it becomes apparent that prime statistical data serves only a limited purpose. The latest profit distribution theories increasingly criticize and reject objective formulas in favour of approaches which, whilst still not perfect, involve a conscientious effort to consider all of the relevant factors.

Objective v subjective

One of the most respected US authors of articles and books on structure and management of law firms has been scathing in his criticism of objective formulas (Hildebrandt):

> The formula approach is used because firms believe it will be less divisive, and will accurately measure on an "objective" basis, a partner's contribution to the firm. The reality is that most formula systems over-emphasise factors of

direct contribution (such as the origination of business and hours worked), while de-emphasising difficult to measure factors that are vital to the operation of the firm's business, such as firm management, client retention, efficiency in work habits, ability to delegate and train other attorneys, and para-professionals in the firm, and longevity.

Under most formula systems, firms usually struggle with the question of origination of business, almost to the exclusion of everything else. Any firm that does not know its entrepreneurs, and does not reward them accordingly, is headed for problems. However, an over-emphasis on business origination often encourages partners to work towards the wrong goals, and encourages the "my client" syndrome.

The goals of any firm, large or small, should be to ensure that all clients should become clients of THE FIRM, and that obtaining new business, and keeping the business is the standard method of operation, not subject to whether the compensation formula will properly reward such efforts. Determining origination credits has taken more law firm managerial time than almost any other single endeavour, usually at the expense of other criticial functions.

Several other major fallacies accompany the formula approach. For example, proponents believe that such a system is "objective". The truth of the matter is that such systems may turn out to be far less objective than "subjective" systems, simply because a formula system has to deal with such complicated issues that clearly invite manipulation. Further, formula systems tend to destroy firm leadership. Instead of firm managers dealing with "unproductive" attorneys in a direct, subjective manner, they believe the system "will take care of the problem". Sadly, the "system" rarely takes care of the problem and the unproductive partner is usually permitted to continue in the firm.

Subjective systems usually have a number of criteria in common:

1 They are usually kept as simple as possible.
2 Prior to determination of a partner's worth each partner has the opportunity to discuss the situation.
3 Major swings in compensation from one year to the next are avoided to prevent a destructive form of competition amongst partners developing based on good years and bad years.
4 Recognition is given to the partner who supervises and directs subordinates.
5 General critieria which focus on billable hours as well as the nature and amount of non-billable hours including time spent in firm management, client development, education, level of work in progress, accounts receivable, business development, seniority and loyalty.

Those who reject formulas assert the problem with them is that individuals have such varied talents, a formula cannot comprehend the value of the different contributions they make. A formula may depreciate the benefit and contribution to a firm by some of its most valuable members.

On the other hand, some data does lend itself to precise mathematical measurement. The use of that data as a factor in determining income shares may avoid subjective assessments of those matters which can cause much friction.

Systems which are a mixture of objective and subjective are often called "total contribution systems". Almost invariably these systems work with a pre-agreed set of critiera some of which cannot be measured and some of which can be.

Evaluating contribution

The most useful starting point, no matter what system is ultimately used is the determination of criteria against which the contributions of each partner can be evaluated. The partners may discover that equality is fair and equitable to all partners and that personal subjective assessments of unequal contributions (if they exist) are not well founded. The evaluation process does not have to lead to differentiation in partners' incomes. It can equally be used as a method of evening up contributions to the firm. This can be illustrated by the following table (with credit for the table and the idea to Sam Beasley of FMRC):

INPUT
1 Hours
2 Capital

CONTRIBUTION
1 Fees
2 X Factors

REWARD
1 Salary
2 Return on equity
3 Y Factors

X Factors are those things the firm values, as determined in the evaluation criteria.

Y Factors are only necessary when contribution cannot be equalised.

> The criteria that are used to determine a partner's contribution will vary from firm to firm. The problem is first of all to determine what the criteria should be, and then get a consensus as to the relative importance of each of the criteria selected to be used in the evaluation process.
>
> Once this consensus is obtained from all or the majority of the partners, it is then easier not only to ascertain contributions to the firm, but also to allow each partner to focus on where he or she can improve. In most firms these criteria have not been established and the consensus not obtained, therefore most partners are flailing around with a host of activities which *they* believe are important to the future growth of the firm. (Lezzi).

The suggested list of evaluation criteria is based upon that prepared by Lezzi. This list should be discussed among the partners to reach an agreement about what criteria are important to the firm. Although each firm may handle the individual ranking of the selected criteria in any way it wishes, Lezzi suggests proceeding in the following manner:

> First, decide on a scale of 1 to 10 (1 being lowest and 10 being highest) the importance of a particular item within a category that was selected. For example, a partner may decide that billable hours and technical ability both are extremely important in the

evaluation process; however, the partner may consider technical ability to be more important than billable hours. Thus, he would give technical ability a rating of 10 whereas billable hours may receive a rating of seven. This method of scoring not only reflects levels of importance, but, in addition, will establish relationships among items that are of value within the different categories. One can then obtain an average score in one's firm based on the composite results.

Partner compensation evaluation criteria

		Extremely Important	Moderately Important	Not Important
1	Years as a lawyer			
2	Years as a partner			
3	Recorded Billable Hours as % of Target Billable Hours			
4	Actual Fees Rendered as a % of Target Fees			
5	Fees paid as a % of Fees Rendered			
6	Total Fees Rendered – current year			
7	Level of unbilled Disbursements			
8	Monthly average % of Partners' WIP to Actual Fees Rendered for the year			
9	Exceptional legal work performance			
10	Exceptional performance in management or supervisory role			
11	Fees rendered from new clients introduced by the Partner			
12	Fees rendered from new work type introduced by the Partner from existing clients			
13	Servicing difficult clients			
14	Special Management or Marketing Activities			
15	Firm endorsed Teaching/Lectures/Seminars – Giving Externally			
16	Firm endorsed Publishing			
17	Firm endorsed Law Society Activities			
18	Firm endorsed Community Activities			
19	Professional Staff Training and Development			
20	Work Delegation			

Under several of the criteria the following basic data is essential if any proper assessment is to be made:

1 Summary of billable and non-billable hours worked by each individual;
2 Non-billable time should be categorised so that there may be some control of partners' activities;
3 Amount of new business brought into the firm by each individual;
4 Relationship between the number of billable hours worked and the number of dollars brought in, so that profitability of the work may be monitored;

Some comments on the evaluation criteria

Origin of Business — Attracting Clients

If a partner's activities produce new business for the firm, virtually all differential compensation schemes give that partner credit. In a formula system, this credit usually is a percentage of the total fees generated by the new business and continues for a pre-determined time period perhaps reducing over a number of years as the client more clearly becomes a firm client.

No firm can ignore the growth concept entirely, but often it is difficult to determine who brought the work in.

> Often it is a mixture of circumstances and sometimes it is based upon chance. You would have to recognise that many people or businessmen want to speak to the oldest member of the firm, or the man whose name is at the top of the door, regardless of who he is. (LOE & M).

Origination is certainly entitled to recognition, but it should not be structured so that it leads to argument amongst partners, or even hidden feelings of dissatisfaction in determining who originated what work, or it may be detrimental to the firm . . .

Whilst all different schemes provide incentives for business-getting, a number of commentators observe that rewarding business-getters through a rigid formula is not a good idea, because it fosters too much competition within the firm . . .

> Attorneys who are going to bring in business will do it regardless of any formula for compensation. You look for business-getters who are entrepreneurs, and give them the tools they need, but don't overcompensate them. The most powerful originator of business is a law firm where partners are working together. (Hildebrandt)

The crediting of business to originators can often cause more friction and problems in determining who originated and is to receive credit for the business, than such a system

is worth. In an established law firm, the origination of new business is increasingly believed to be due more to group dynamics than the activities of any one individual. Clients are more attracted by a range of services or depth of skills in a particular area than the marketing ability of the firm's "rainmaker".

Even the best business-getters also observe that partners who develop a client once it is brought in are performing an essential service. It is for this reason the origination credit is often reduced over a period of years.

The whole area of origination credits is a potential minefield of dissension and problems. The aim of developing new business for the firm should not be made dependent on rewarding individuals for those efforts.

The examples that follow show the kinds of business origination problems that have to be addressed.

Examples of business origination problems

- Who gets credit for the business when a client calls and asks for Mr A, and because Mr A is out, discusses the problem with Mr B?
- What about references. Suppose Mr A has a friend, C 1 who refers to the firm, friend, C2. Is client C 2 credited to Mr A or to Mr B, the lawyer who actually does the work for C2?
- How long can a lawyer claim credit for originating business? A reasonable time, as long as he remains in active contact with the client, no time limit, as long as the firm continues to do work for the client, only as long as he is doing that client's work?
- Mr A is being given credit for XYZ company, a corporate client. Partner B is given an assignment by A, with XYZ company. A director of XYZ company asks that Partner B handle another matter. Who gets the credit? A, because it is basically a reference from XYZ company, or B, because the Director personally selected B, or both?
- G is the tax partner, he has written an article on a new tax law. A's client engaged the firm for this service. Does G get the credit for business that developed as a result of his expertise in a particular area that helped to bring the client in to him?
- What if an Associate brings in a major new client? If the firm does not give Associates credit for the business obtained, what happens when the Associate becomes a Partner?
- Partner A is advancing in years, and placing increased client responsibility on B. How is business credit handled between A and B.
- A matter comes through the mail, or phone, addressed to the firm, or simply to the senior partner. Who gets credit for the client? The firm, or the partner who is assigned to the work, or the senior partner, simply because his name was on the top of the letterhead?

It will be clear that there are any number of variations, difficulties and problems involved in giving credit for the origination of work.

Time & Efficiency

No system should act to discourage the hard worker. The fact that someone, by their nature, is going to work long hours whether he is paid for them or not, should not deprive him of fair treatment when it comes to compensation. As lawyers get older, their contribution changes – billable hours decrease, but business origination and quality work based on experience should increase. Some lawyers are extremely efficient, and produce more in a shorter time than other lawyers, and this cannot easily be built into a formula. Given that all partners achieve a threshold level of performance, special recognition should be given to those who regularly contribute the most billed and collected hours.

Practice Economics

Credit should be given to such efforts as prompt billing, accounts receivable follow-up, collection of fees from clients, other fees directly resulting from partners' work, profitability by type of law, avoiding write-offs, and overhead control. Some firms are beginning to identify differences in the inherent profitabilities of different types of law. "Some firms will choose to pay more to those partners in the areas of practice producing the most profits." (Heintz) eg Liability for overheads, use of office space, secretarial/para-legal services, WP, searching, filing services, high debtors/disbursements/WIP may decrease the profitability of particular areas of practice. Fees rendered or hours worked do not necessarily equate with a profitable activity for the firm. It should be recognised however that the information on profitability of different work areas which is important for budgetary purposes, staffing and planning may not be appropriate as a major measure of compensation.

In a firm which adopted a full service approach, profits would appropriately be shared amongst all partners regardless of what type of law they practise. If the firm aims to provide full service, some areas of work must be unprofitable and it may be unfair to penalise those who do it. It may be vital to do marginally profitable work in order to retain other profitable work for a client.

> Each lawyer must be willing to devote his time to the matters in which he is most efficient so that other members of the firm may, by utilising their own time, produce the maximum dollar return. If we fail to recognise this, then we are immediately disregarding one of the greatest benefits of firm practice. (Heintz)

Training and Supervision

Recognition should be given for effective work delegation, supervision and good staff relations. Those contributions are hard to quantify, but they are essential to a true partnership.

Marketing Advancement

This includes firm promotion, enhancement of the firm's public and professional image, and the pursuit of specific marketing opportunities.

Other Factors

There are many quite intangible or difficult to measure contributions to the success and well-being of the firm.

What of the ideas man who may come up with ideas that solve problems, but who doesn't even get a note on his time sheet, or those partners whose views/reactions are sought because their opinions are valued? Those contributions cannot be valued in a formula.

The thorough lawyer is valuable where a matter is important and the client can afford to pay. The practical lawyer who can immediately evaluate the worth of a matter, give it that much time and no more, and still get the job done well is particularly valuable. On those latter kinds of

problems, the overly thorough lawyer may be an economic detriment.

What can a partner earn somewhere else – more? less? – as soon as pastures look greener elsewhere, the risk of loss increases. The importance of a partner to the firm is a factor that must be taken into account but no one should ever be allowed to become so important that the firm would collapse without him.

Loyalty and dedication to the firm is also important. Someone who feathers his own nest is not as valuable as someone who puts the firm first and the firm's clients first.

The quality of work produced – the thing that should be valued the most – in the long run, is probably the single most valuable contribution to the reputation of the firm. Work quality may be extremely difficult to measure subjectively but would be impossible to measure in a formula.

Who determines the division of profits

In many firms, the decisions on who gets how much are made solely by a strong senior partner. In others, the decisions are made by an office committee. In others, the partners decide themselves, through negotiation and agreement.

> Some feel that this is the healthiest way because it requires frank and open discussion between each of the members. If adequate data and figures are available everyone can make an evaluation, which should justify the distribution. However, some lawyers are afraid of this approach because of the hostilities it might create. It is this fear which has been responsible to some degree for the lack of analysis and communication about this subject. Of course, one of the factors which is so very important is the disposition on the part of the partners to be fair, and to treat their fellow members as they themselves would like to be treated. At least when all the figures are laid before each lawyer, the injustices sometimes jump right out at you, whereas without proper documentation, there can be nothing but hurt feelings. (LOE & M)

Methods of division of net income

Virtually every author recommends that the share of each partner in the firm should not be shown as a percentage. Instead they advocate that points be allocated representing the share of the net profit each year. When new partners are taken on, or adjustments made, additional points can be assigned to the new partner. In this way, the psychologically damaging reduction of percentage shares when a new partner is added can be avoided.

Summary

> When all is said and done, each partner should feel comfortable that those who are "dividing the pie" have put forth reasonable and prudent efforts in their equitable distribution of the firm's net profits. Such an approach requires a great deal of trust on the part of each partner plus the sacrifice of his or her ego. This trust and sacrifice is essential to the well-being of today's law firm. (Hildebrandt)

A differential compensation system can accommodate different goals for different partners but discontent over an imbalance in the income distribution system may cause a firm to break up. It is essential that any change to a firm's compensation system is related to the stage of evolution and management of the firm. Each system has to accommodate the particular firm.

It has been said that there are as many different ways of dividing partnership income as there are partnerships. It is equally true, that any system for division is only as good as its implementation and that complete satisfaction on the part of every partner is probably not obtainable.

It may be helpful to use outside experts to work on the change and reduce emotions which can be unleashed. Consultants have no axe to grind whereas a proposal by one partner or group of partners may be seen as self-serving by others.

> Once the flames of discord start burning they are difficult to stop. The most common cause of discord is money. Others include dissimilar objectives, bad habits on the part of partners, such as too much drinking, or not enough working. (Weil)

If the problem is drinking or laziness it must be addressed directly and not through adjustments to the compensation system.

Some lawyers just don't live up to their partners' expectations in terms of productivity or contributions. The problem must be recognised, the causes identified and agreement reached on steps to be taken. If the cause cannot be found and solved, the individual must be expelled for the good of the group.

> It is important to remember that the compensation system not only allocates dollars, but also determines the type of relationship that will exist between partners. (Hildebrandt and Kaufman)

> Law partnerships are fragile, volatile enterprises that can easily come unglued, regardless of how careful the partners were at the outset, how great their reputations, or how financially successful they become. . . . The skills needed to practise law, are quite different from those needed to be a good partner. Law is an independent, do-it-yourself problem solving occupation, whereas partnership involves teamwork and co-operation. (Kroll) □

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Brauereibezugsverpflichtungen:

Obligations to purchase from a brewery

By Jason C Lofts, a former Christchurch solicitor, presently an intern in a Munich law firm.

On the question of beer: "2p or not 2p?"

If beer is not your "cup of tea", you may face a cultural clash, at least in the West German state of Bavaria, where its composition is dictated by a 470-year-old Beer Purity Law of 1516, where workers take "beer-breaks" rather than tea-breaks and around 5,000,000 litres are drunk during the annual 16-day Oktoberfest beer festival held in Munich.

It is therefore not surprising that the American partners in an Austro-American joint venture company to be formed in Germany found amusing the following translated clause in the proposed company's lease agreement for premises in Bavaria to be used simply as a clothing warehouse and offices:

> *Miscellaneous*
>
> 4 The Tenant hereby covenants with the Landlord for the term of this lease agreement to purchase all beers to be dispensed on the leased property exclusively from ABC Brewery provided the appropriate types of beer are produced by this brewery. Should the prices of ABC Brewery be higher in comparison to other breweries or liquor merchants, the Tenant's obligation to purchase shall be to that extent inapplicable. In this case however it is agreed that for every litre of beer dispensed on the leased property – whether in a public restaurant, cafe or the canteen – two pence shall be paid to Mr & Mrs X (a third party connected with the brewery which in turn is obviously in league with the landlord), to be accounted for twice-yearly on 30 June and 31 December each year. The Tenant further covenants to enter into an agreement with the respective beer supplier that this "*Bierzwilling*" (literally "beer twin", ie the two pence) will be paid to Mr & Mrs X directly by the supplier.

From a German point of view it is wholly acceptable, although such beer supply arrangements are more commonly found where the premises (leased or otherwise) are a public house or other liquor outlet. The following restrictions under German law are however relevant.

Section 15 of the Law Against Restraints of Competition 1957 would have the effect of rendering void a beer supply arrangement which purported to obligate the reseller not to sell the beer below a minimum price. The Federal Cartel Authority can also exercise control over beer supply arrangements by virtue of s 18 (Avoidance of Exclusive Dealing Arrangements).

The "gute Sitten" (public policy) provision of the German Civil Code 1896, s 138, may also be applicable. The tendency in reported cases has been to hold beer supply arrangements for longer than 15 years to be contra bonos mores. In exceptional circumstances a 20-year term has been pronounced valid.

In this regard are also to be noted the special provisions as to beer supply (or "tied house") agreements in the 1983 Regulation 1984/83 of the Commission of the European Communities, granting a block exemption under Art 85(3) of the EEC Treaty of Rome 1957 from the anti-competition prohibition of Art 85(1). Article 8(1)(d) of the Regulation disallows such exemption where the agreement is concluded for an indefinite duration or for a period of more than 10 years, however there is one important exception: where the specified premises are operated by the reseller under a leases or licence from the supplier, the time limit is extended to the whole period during which the reseller operates the premises (Art 8(2)(a)). □

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Independence of the legal profession:

How to create and sustain it.

By Param Cumaraswamy, Advocate and Solicitor, High Court, Malaya, and Chairman, Bar Council, Malaysia

This article was delivered as a paper at the International Bar Association Seminar held in New York on 12 and 13 September 1986. Mr Cumaraswamy is one of the two co-chairmen of the LAWASIA Standing Committee on Human Rights. In 1983 he attended a Special Committee Meeting of the International Commission of Jurists in Sicily which prepared a declaration on the independence of the legal profession. When Vice President of the Bar Council of Malaysia, Mr Cumaraswamy faced a sedition charge because of a statement he issued in respect of a young man sentenced to death. Mr Cumaraswamy was duly acquitted of the charge of sedition as he notes at the end of this paper, in which he expresses his appreciation of the support that he received from so many international organisations of lawyers. The New Zealand Law Society was one of these.

1 Introduction

The Montreal Universal Declaration on the Independence of Justice spells out three general principles for the recognition of the independence of the legal profession:

(a) The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential promotion and protection of human rights;
(b) There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason;
(c) All quarters shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights.

Further in the same Declaration it is provided that

> it shall be the responsibility of the lawyers to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.

These are lofty platitudes and have been repeated over the centuries as the prerequisites for the protection of fundamental freedoms in any democratic state. But the very fact that they needed re-affirmation in a universal declaration as recent as 1983 is clear acknowledgment of universal violation of the same principles. To the masses in the third world countries stricken by poverty and illiteracy these ideals mean nothing. To many the term independence of the Bar is an ornamental slogan used by the profession for its own enrichment. Government politicians loathe it. It is a threat to their positions as political masters thriving generally on the ignorance of the masses. Lawyers who stand firm and challenge every action of governmental lawlessness are often characterised as subversives or anti-nationals. In some countries they are subjected to severe harassments, detentions without trials under security legislation on flimsy grounds, unjust prosecutions and even assassinations.

While independence of the legal profession is recognised as an essential guarantee for the promotion and protection of human rights yet the architects of constitutions of nations do not seem to have found it necessary to entrench this concept as fundamental in the same constitutions. However, in some countries it is provided in local legislation. The Malaysian Legal Profession Act of 1976 provides the first purpose of the Malaysian Bar as

> to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour.

It will be seen that this objective is more onerous than the first function of a Bar Association spelt out in the Universal Declaration of Justice which merely speaks of promotion to uphold the cause of justice, without fear or favour.

2 Role of the legal profession

Before embarking on any discussion on the organisation of the profession for the preservation of its independence it is first necessary to identify and circumscribe what should be the extent of the role of the legal profession in society and in particular third world societies. In 1981 the Malaysian Parliament was about to debate some far reaching amendments to the Societies Act. The amendments violated fundamental rights on freedom of association. The Bar Council and several public interest groups protested publicly. Some 100 members of the Bar stood outside Parliament building under heavy drizzle to distribute the Council's memorandum to members of Parliament who were leaving that House. This action received considerable publicity in the media and embarrassed the Government. The then Minister for Home Affairs was reported to have said that the legal profession should decide whether it should be law interpreters or law makers. The same question was raised in Pakistan a few years ago.

Very recently, in June 1986, the Law Society of Singapore was very severely reprimanded by Government Ministers over a well reasoned and constructive memorandum the Society submitted to the Government on a proposed amendment legislation to the Newspaper and Printing Presses Act. This was the first time, after many years, the Society took the Government to task publicly. The amendment was, inter alia, to make it an offence for foreign publications to be critical of domestic politics of Singapore. The Memorandum was submitted in March and made public in May. Government Ministers took strong objections to the conduct of the Law Society. A senior Minister was reported in *The Straits Times*, 14 June 1986, to have said that the Society "had gone political". Another Minister was reported to have said:

> Public policy is the domain of the Government. It is not the playground of those who have no responsibility to the people and who are not answerable for the livelihood or the survival of Singaporeans. (*The Straits Times*, 1 June 1986).

The same Minister went on to ask:

> Does the Law Society seriously think it is better qualified than the Government to decide on matters of public interest?

The Republic's government has further retaliated by moving amendments to the Legal Profession Act to further restrict the already muzzled Bar (*The Straits Times*, 28 and 30 August 1986).

Incidentally of the one hundred lawyers outside the Parliament building in Kuala Lumpur 40 were charged in Court for unlawful assembly and found guilty. Prior to 1983 one of the purposes of the Malaysian Bar provided in the Legal Profession Act 1976 was:

> to advise the Government and the Courts where necessary in matters affecting legislation and the administration and practice of the law in Malaysia.

As a sequel to the protest outside Parliament building this purpose of the Bar was repealed and substituted in 1983 to read:

> *Where requested so to do*, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia. (writer's emphasis)

Earlier in 1977 the same legislation was amended inter alia to exclude lawyers under seven years standing from getting elected into the Bar Council which is the governing body of the Malaysian Bar. The exclusion came in at the aftermath of a resolution adopted by the general meeting of the Bar advising all members to refuse briefs to defend internal security cases if they so wished. The Bar was most unhappy with the Essential Security Cases Regulations 1975 resulting in inter alia the mandatory death sentence imposed on a 14-year-old schoolboy for possession of a firearm. The Government was under the impression that the resolution was masterminded by the younger lawyers, thus their exclusion. That amendment has been challenged by the Bar Council as violative of the equality principle under the constitution. The Supreme Court is expected to deliver its judgment soon.

These are some incidents which reflect the thoughts of our political masters on the role of the legal profession. Politics and law making are their domain to the exclusion of all others. They justify this on the ground that they are the elected representatives and therefore they know what is best for the electorate.

The role of the legal profession, particularly in third world countries, must necessarily be wider than the traditional role of advising clients on legal matters and advocating their causes in Court. It will not only be a betrayal of society but a betrayal of the profession itself if the legal profession adopts a passive traditional role in society. Which other profession or section in the society has the skill and understanding of the intricacies and niceties of the law and the constitution than the lawyers? In presenting legislation before Parliament politicians, being what they are, very often fail to realise and appreciate the implications and far reaching effects of their proposals. Even if they realise they are more concerned with the political exigencies of the situation. In the course they are prepared to sacrifice well settled principles for short term political gains. Would not the profession fail in its duty to society if it fails to alert the people of the obnoxious features of such legislation? Lawyers are duty bound to promote and protect human rights as spelt out in the first principle in the Montreal Declaration. Human rights often have political undertones. Hence where lawyers are involved in the promotion and protection of human rights they will often be branded as being political. Despite such characterisation and accusation it is

imperative for lawyers to continue to advance the cause of their profession without fear or favour. There should be no compromise on this role. The stark realities must be accepted by the governments. Governments should not fear the profession. Instead they should appreciate and be respectful of the role of the profession. On the other hand the profession must be constructive and not destructive.

3 Organisation of the legal profession

In practically all third world countries the profession is governed by statute. It is also assumed that in such countries the profession is fused rather than distinct as in England and Wales and some other advanced countries. There needs to be some control over qualifications, practice and discipline. Statutory provisions over such matters are quite common. The disadvantage of such statutory control is that it negates the concept of absolute independence. Parliamentary control may lead to control by the government. The ruling party forming the executive arm of the government will necessarily control Parliament. In those circumstances the profession cannot be said to be absolutely independent. That is quite true. Executive interference through Parliament was seen in recent years in the number of amendments to the legal profession legislation in Malaysia and Singapore. One advantage of statutory control is the legal recognition it entails for the profession. What is of uttermost importance is that the legislation recognises, declares and expresses in clear terms the independence of the profession. Once that is secured the commitment of the members of the legal profession to uphold the cause of justice without fear or favour will be the motivating force to nurture and preserve the independence. Without commitment from the rank and file within the profession it will be an exercise in futility. Independence will remain a dead letter.

To secure and preserve independence the profession must be given responsibility to decide on the qualifications of entrants and it must be self regulatory and self disciplining. Any legislation governing the legal profession should leave these three essentials to the profession itself. There may not be much objection if some or all these matters are left to be dealt with by the profession together with the judiciary. But there should be no involvement of any government organs or departments save maybe the Attorney-General in the case of qualifications.

(a) *Qualifications for admission to practise*

The profession is in the best position to decide on the qualifications for practice so as to see that uniform standards within the profession are maintained. However, this should not be abused by applying closed shop policies and being too restrictive. The profession must be conscious of the need for legal services within the country and constantly monitor the situation. In practice this responsibility is shared with other bodies interested in the administration of justice and institutions of higher learning namely the Judiciary, the Attorney-General and the universities.

In Malaysia this is left with a board known as the Qualifying Board set up pursuant to the Legal Profession Act. Up to 1982 the Board consisted of the Attorney-General as Chairman, two members of the Faculty of Law of the University of Malaya, two Judges of the High Court appointed by the Chief Justice and four members of the Bar including the Chairman of the Bar Council. It will be seen that the Bar Council had the largest representation. However, in 1983, for reasons best known to the government and amidst protests from the Bar, the composition was changed and the Bar's representation diluted to only one. The Attorney-General, who is not a member of the Bar, retained his chairmanship. The Bar virtually lost its influence in the Board. The inherent danger is that the Board can now be subjected to extraneous influences including political pressures for recognition of qualifications and the views of the Bar may not carry much weight.

(b) *Self regulation*

Self regulation is imperative for maintenance of the independence of the profession. Here again the Bar should not abuse this privilege and take a lackadaisical attitude. It should regulate the practice of the law for the achievement of the highest standards and integrity from its members. Stringent rules should be formulated to achieve these goals. There should be an effective enforcement machinery to enforce these rules.

The Malaysian legal profession is self regulatory. All rules and regulations affecting the practice of the profession are left with the Bar Council. This was provided in the legislation. Presently there are rules governing Solicitors Accounts, Accountant's Report, Advocates and Solicitors (Issue of Sijil Annual) Practice and Etiquette), Advocates & Solicitors compensation fund, Legal Profession (Articled Clerks) and Solicitors' Remuneration. All these Rules emanated from the Bar Council either solely or in association with the Judiciary. However, again in 1983 there was an encroachment into this area. The power enabling the Bar Council to make rules for regulating the professional practice was amended and now that power is subject to the approval of the Attorney-General. The Attorney-General on his own motion cannot regulate the practice yet the Bar cannot any longer independently regulate professional practice without his approval. Despite protests the amendment was carried through Parliament. The Bar has still not been told the reasons for this interference.

While entrusted with the power to self regulate the profession must review the rules from time to time so as to see that the rules are adequate to meet with the changing times and the public interest. The Malaysian Bar Council under its various sub-committees is currently reviewing some of these rules. In particular are the rules pertaining to the solicitors' trust accounts. Complaints over the manner in which some solicitors handle clients' accounts are often voiced in the media.

(c) *Self discipline*

Stemming from self regulation is self discipline. This has been a sore issue in practically all jurisdiction including the advanced. The Law Society in England and Wales commissioned a firm of accountants to advise on their structure including the disciplinary

procedure. The English Bar too has recently received a report by the Rawlinson committee with recommendations for change. The public cannot possibly understand the rationale of a lawyer being tried for professional misconduct by his own peers. There is a constant suspicion in their minds that the profession cannot possibly be independent in such adjudications as it will at all times protect its members. This does not conform with their notion of justice. To them the very structure of the profession is to protect itself and the interests of its members. The system cannot possibly be expected to protect the public against delinquent lawyers. Hence the public outcry continues supported by the media which always finds the legal profession a target for sensationalism. Governments, particularly in third world countries, where the profession is active, exploit the situation and further add to the injury by interfering under the pretext of putting some order in the profession as the profession itself is unable to handle the situation. Governments achieve their purpose. The profession becomes discredited and the public begins to lose faith in its lawyers. The profession's influence in society is lessened. It is often suspected that in third world countries where the media is often controlled by the governments issues are sensationalised by the media and blown out of proportion to the detriment of those groups who are critical of the government and its policies.

Be that as it may the profession is to some extent to be blamed for such a situation. The cumbersome disciplinary procedures resulting in long delays of adjudication of complaints leaves the public utterly frustrated. In that event whatever explanations may not redeem the profession. The profession's apathy to the feelings and aspirations of the general public is another causative element. Complacency is yet another cause. All these culminate into a public outcry for the discipline to be taken over by another body like the government. The government is only too ready to oblige.

The Malaysian Bar has in recent years been subjected to criticisms by the public over its disciplinary procedures. For a period such complaints became a feature in the letters to the editors column in the English dailies. The Bar Council took cognisance and began a soul searching exercise and in November 1985 set up a high powered committee to look into the disciplinary procedure provided in the Legal Profession Act and consider its adequacy and if inadequate recommend changes. The committee is headed by a former Prime Minister Tun Hussein Onn who was a practising lawyer himself. In the committee are the former Lord President of the Federal Court Tun Mohamed Suffian, representatives of the Chief Justice, public interest groups and members of the Bar. The formation of the committee was generally welcomed by the public. Media editorials hailed it as a step in the right direction. The committee's report is expected by the end of this year. Radical changes are expected amongst its recommendations including the presence of lay persons in disciplinary tribunals. Such representation will allay the public suspicion of protectionalism within the Bar. Presence of lay persons in such tribunals are now accepted in many countries. Their presence will not in any way erode the independence of the Bar but could very well enhance the public image of the profession. What is important here is that the public is made aware that self regulation and self discipline also involve self examination and self correction. For the preservation of independence it is imperative that the profession handles these problems and not give the government an excuse to encroach.

4 Sustaining the independence of the profession

Under third world governments particularly those controlled by power thirsty and politically immature politicians an activist profession will always be threatened. Such threats can take a variety of forms. The profession must always be on the alert and protest loudly and clearly at the slightest threat. Against such threats the profession's support must necessarily come from the people. Politicians' survival ultimately depends largely on the people. It is therefore of utmost importance for the profession to gain the goodwill of the general public. In addition to providing legal services of quality and displaying honesty and integrity in the discharge of professional duties the profession collectively must be involved in public interest issues. In developing countries the larger section of the populace is often illiterate and survives below poverty level. Their goodwill is important for the profession. It is this group which is often exploited and sometimes neglected. The profession's involvement in legal aid for the poor and human rights issues and public interest litigations will result in considerable respect for the Bar and will immensely enhance the image of the Bar. Public respect for the profession cannot possibly be ignored by governments.

In this respect the Malaysian Bar is active. It is currently involved in legal aid work. The programme is entirely funded by the profession by each lawyer contributing $100 per year to the fund. It is managed and run by the Bar Council and assisted by voluntary lawyers who do not get paid for their services. The centre was first opened in the capital city of Kuala Lumpur in 1983 and is now expanded and centres opened in four other state capitals with clinics in smaller districts. It is the intention of the Bar Council to intensify this programme by not only providing legal advice and assistance for the poor and the needy but also to provide legal literacy programmes in rural areas to educate the people of their rights and obligations. All police stations where legal aid centres are operating carry posters explaining the services of the centres. Negotiations are now in progress with the police to publicise in all police stations by way of posters to inform suspects and accused persons of their rights and the limits of police powers. This is done in conjunction with the Bar Council's Human Rights sub-committee.

The Human Rights sub-committee is another active organ of the Council currently involved in public issues. Any violation of human rights brought to the attention of the Council is attended to and action taken either by making public protests through the media or writing to the authorities concerned, and as a last resort challenging the conduct before the Courts. The Malaysian public are

gradually beginning to appreciate the public-spiritedness of the profession. This is evident from the many letters the Council receives from the public for assistance with regard to their problems with the bureaucracy. The sub-committee also organises seminars on human rights issues. These seminars are valuable in that they generate public awareness of important issues affecting fundamental rights. Biannually the Council organises national law conferences over a period of three days. The subjects for discussions are often of national importance and receive wide media coverage. Again it generates considerable public awareness of issues of the day. There are other committees of the Council involved in law reform and matters affecting administration of justice which monitor both substantial and procedural laws and call for reforms whenever necessary. Often the Council is invited to submit its views on any changes proposed by the government.

5 Public relations

The legal professional is by far the most misunderstood of all professions. To the average layman the profession is clouded by a mystery of legal jargon, antiquated laws, and procedures perpetuated to keep it exclusive for the enrichment of its members. Very little attempt is made to explain and unveil the mystery by the profession. One consumer association in Malaysia has called for simplification of legal language for the benefit of the people. There is a great deal of sympathy for this call. The need for such simplification is even more so needed in third world countries for a better understanding of the law and its ramifications.

But what is needed immediately is for the profession to explain itself to the people to allay their suspicions. In 1930 Lord Atkin in the course of his Presidential address to the Holdsworth Club advised lawyers as follows:

> There is so much ill-considered criticism of the law and lawyers at the present moment I cannot help thinking it is the duty of every lawyer, in whatever position he finds himself, to explain, maintain, and defend both the law and the profession of the law. I find myself sometimes in mixed companies of laymen and lawyers where, for the sake of jocularity, the lawyers themselves are a little inclined to repeat sophisms of the laymen in respect of the greed or rapacity, or its contentiousness or the insincerity of lawyers. I suggest to you that you should not follow that practice, however jocular you may feel. You will have many opportunities in your lives of meeting the attacks upon the Law and upon the profession, and my last words are that in view of the importance of the Law, the importance of the observance of the Law, the importance of the respect for the substantive law and the devotion to justice, which I do believe to be now the prevailing feeling in every man's mind, that you should when you find attacks are made either upon the Law or the administration of justice or the profession — if they are unfair attacks or ill-founded attacks — you should do what is in your power to meet them. And you cannot do anything better for the purpose of removing criticism than by taking what part you can in conveying to the layman some sort of general impression of what the Law is, what its ideals are, and how they animate our profession. (The Rt Hon Lord Atkin, *Law and Civil Life*, p 137.)

This problem seems to be faced by the profession even in the advanced countries. The Bar of England and Wales have engaged a public relations firm for this purpose. In Malaysia the Bar Council encourages its members to accept all invitations to speak at seminars, conferences and other group discussions organised by public interest groups to explain the functions and role of the profession and answer questions. The legal profession is a component part of the machinery for the administration of justice. It is therefore important that there be a cordial relationship with the judiciary and the Attorney-General. Such relationship must be one of mutuality in an equal partnership. It should not be at the expense of the profession playing a subservient role. Not one component party should consider itself as more superior than the other. The paramount interest should be the dispensation of justice and this can only be done if there is harmony among the three. Suspicions of one another's role can mar the quality of justice and undermine public confidence in the system of justice.

6 Conclusion — international support

Lastly, and in conclusion, it may be thought by some that what has been said in this paper for the creation and sustenance of the profession's independence is easier said than done. The practical problems may be there. But the struggle must go on. At times the price may be very high. Considerable personal sacrifices may have to be made. But the burden and stress of those who struggle for these ideals would be lessened if it is known that their cause is shared and actively supported by others and in particular by international and other national associations of lawyers. This was demonstrated late last year when the writer stood trial before the Kuala Lumpur High Court on a charge of sedition. It was over a public appeal made to the Pardons Board to review its advice to the King to commute the death sentence imposed on a young labourer for possession of a firearm. The concern and support expressed and shown by so many national and international Bar associations was most heartening. The presence at the trial of eminent counsel either holding watching brief or as observers for the International Bar Association, the International Commission of Jurists, LAWASIA and the Bar Council of England and Wales clearly demonstrated to the Malaysian public the solidarity of lawyers all over the world to uphold the cause of justice and for the effective promotion and protection of the rule of law and human rights. The local Bar stood united in support of the Defence. Five eminent Malaysian lawyers conducted the Defence in the highest traditions of the Bar over a period of nine days. They did not seek any remuneration. That was their commitment to the cause of the legal profession. The writer was acquitted; justice triumphed; independence of the Malaysian Judiciary was reaffirmed; but the young labourer was eventually executed after further unsuccessful legal battles to save him. The writer acknowledges with grateful thanks to all and everyone for their concern and support. □

Lloyd's of London

By Peter Aitchison, Chairman of Cotesworth and Co Ltd, Lloyd's Underwriting Agents

The author's firm of Cotesworth and Co Ltd is one of the firms of Underwriting Agents who act for New Zealand Members of Lloyd's. In this article he explains the working of Lloyd's and the present trading conditions

Lloyd's is a unique insurance market composed of individual Members, known as "Names" who participate in the underwriting of insurance business by joining a number of syndicates. Members are severally liable for their own personal share on each of these syndicates and will either receive their share of the overall profit if the syndicate trades successfully – or will have to meet their share of a loss if there is one.

Members join Lloyd's through the intermediary of underwriting agents but must first be sponsored by at least one Member who has personally known them for at least one year. To be eligible for membership, and begin underwriting at Lloyd's, unencumbered assets in an approved form of at least the equivalent of £100,000 must be shown and on election to membership a deposit of £75,000 lodged at Lloyd's in the form of either a bank guarantee or approved UK stock exchange quoted securities. Membership is personal and a corporation cannot underwrite at Lloyd's.

Members of Lloyd's are effectively making their assets work twice for them because any income on the deposit – or on the underlying security pledged to the bank in the case of a guarantee – remains the income of the Member.

New Zealand Members of Lloyd's

Whilst the majority of Members of Lloyd's are United Kingdom residents, a growing number now live overseas, particularly in the USA and "Old Commonwealth" countries. With over 85% of its business coming from outside Britain, Lloyd's is an international business with continued success and prosperity dependent on exporting its service. Insurance comes to Lloyd's as a result of marketing effort by London insurance brokers and in recent years a number of Lloyd's underwriting agents have also developed their businesses by travelling overseas. Practitioners may be asked to advise clients on the subject as several underwriting agents now visit New Zealand on a regular basis in order to keep the Members from whom they act up to date with their underwriting interests and also to advise individuals who are interested in considering membership.

All Lloyd's underwriting agents are required to be authorised by the Council of Lloyd's and can be expected to advise competently on:

1 The procedures leading to election as a Member of Lloyd's, including introduction to New Zealand bankers who are interested in providing bank guarantees for members.
2 Suitable Lloyd's Syndicates to join. Principals of Lloyd's Underwriting Agencies are always Names themselves and it would be wise to establish that they are recommending that their New Zealand Members participate on the same syndicates.
3 Arrange for the Member's UK taxation affairs to be competently handled by a UK accountant. As far as the British tax authorities are concerned, all Members, wherever resident, are carrying on business in the UK and are taxed in the same way as UK citizens. Under current NZ tax regulations, profits from Lloyd's are export earnings and not subject to NZ tax.

Return from membership

It is in the nature of insurance that the various classes of business eg, marine, non-marine, aviation, motor, are each subject to their own profitability cycle. Anyone considering membership should therefore ensure that he is being given the opportunity to participate on a spread of syndicates each transacting a different type of business. The object is to achieve a more even and consistent return from underwriting, rather than feast one year, and famine the next.

Prospective Members will be shown a "track record" of the last seven years' results on the syndicates recommended by the agent. Although a syndicate's past track record is encouraging, as with many business ventures, past years' profits are no guarantee of future success. They show the results produced by the underwriter and underwriting agency management at the relevant time and changes for better or for worse may have taken place in the intervening period. No investor can afford to make decisions today based solely on the success or otherwise of a venture three years ago.

Lloyd's operate in a three-year accounting cycle and a Member joining 1 January 1987 will not see the results of his first year's underwriting until the year's underwriting account is closed at 31 December 1989 and the audit completed – in June 1990. However

interim management figures are available for all syndicates on the three "open years" that indicate how the syndicate is currently trading. Members also assume liability for all claims notified to a syndicate from the beginning of the year they join it, even if the proximate cause of the claim arose prior to the year in which the Member joined Lloyd's. A substantial reserve is carried forward into each year of account against this liability and the monitoring of its adequacy is an important part of underwriting agents' duties.

These considerations, together with reports on current market trading conditions, will be discussed with Members in respect of each syndicate. A Member's bottom line profit depends entirely on which syndicates he joins. Syndicates which have in the past shown higher than average returns are not always the soundest choice as they may possibly reflect a high risk/reward ratio and be unsuitable for a Member in his early years of underwriting. In current market conditions however, a Member commencing underwriting with a deposit of £75,000 and wanting to keep a low risk profile might reasonably expect a return of 10% overall across all his syndicates, ie say £20,000 per annum, which would be liable to a measure of UK taxation.

Downside risk

Insurance underwriting is a risk-taking business and losses can be made as well as profits. Members accept unlimited personal liability in respect of their underwriting liabilities at Lloyd's. In practice Members are able to control this by:

a. Underwriting on a spread of syndicates.
b Arranging a personal stop loss reinsurance against the possibility of suffering a substantial overall loss. The amount of such reinsurance and the "excess" point is considered by the underwriting agents in the course of advising Members. Members do not join Lloyd's in the anticipation of making losses. Likewise householders do not expect their houses to burn down, but insurance is equally advisable in both cases.

Recent years in the insurance industry

During the late 1970's and early 1980's, savage international competition drove premium rates down to wholly unacceptable levels on most of the important international accounts at Lloyd's. Not only were established insurance companies engaging in cutting rates, but in addition a large number of American industrial corporations decided that they should diversify into insurance. For several years the high interest rates that prevailed until 1984 concealed the true cost of the underwriting losses that resulted from this behaviour.

Once interest rates fell, the competition had to face up to an enormous erosion of solvency and shareholder's funds that had resulted from their action. Consequently, premiums began to rise in a spectacular way, though in some cases too late to save insurance companies from insolvency. Meanwhile at Lloyd's, margins were also eroded. However, even during a generally adverse period for insurers worldwide, a well advised and prudent Member of Lloyd's could certainly expect to be making, albeit modest, profits at a time when very few other insurers were.

Current trading conditions at Lloyd's

Until 1982, Lloyd's operated under the Lloyd's Act of 1871 and a short amending Act of 1951. It would be fair comment to say that these were entirely appropriate for a somewhat small, unique and exclusive operation run by "gentlemen" in the traditional sense of the word. However, not so appropriate for a leading worldwide insurance organisation in the 1980's within which a very small minority of participants showed only too clearly that their standards of business morality were inadequate.

The passing of Lloyd's Act, 1982 vested in the Council of Lloyd's new and extensive powers to supervise and control for the protection of both policyholders and the Underwriting Members. Subsequent bylaws have provided for supervision of underwriting agents and significant improvements in the requirements for auditing and reporting of Lloyd's syndicate accounts which should ensure that improper behaviour by underwriters and their agents of the sort that brought discredit upon Lloyds in the early 1980's should not be repeated in the future.

With much of the competition nursing its wounds, from the period of adverse profitability referred to earlier, Lloyd's are currently experiencing attractive trading conditions in most classes of business. This is particulary so in the non-marine market which for many syndicates is now proving to have reached the bottom of its profit cycle on the 1983 account. Interim figures indicate that both the 1984 and the 1985 accounts will each show further improvement. Marine and aviation underwriting recovered earlier, and for most syndicates 1983 showed much improved results. 1984 may be somewhat less good than 1983 but for most marine syndicates there will be overall profits. Currently the 1985 marine underwriting account is looking like being the best for many years.

In the opinion of many professionals at Lloyd's, the only area of insurance underwriting which still gives concern is the legal liability section of the US$ casualty account. Many prudent underwriting agents would say that unless and until there is a total change in the US legal system, Members of Lloyd's should not join syndicates underwriting direct legal liability business in the United States.

Professional indemnity insurance

Lloyd's underwriters have always specialised in transacting the more unusual forms of insurance that call for more than clerical reference to a manual of premium rates. Lloyd's have significant presence in the professional indemnity insurance business in New Zealand, and in view of the steep rises in premiums over the last two years, readers may be interested in what has brought this about and in developments that are taking place in the professional indemnity field in the UK and other overseas jurisdictions which have developed from the English common law.

Throughout such countries the last decade has seen a new willingness by clients to sue their professional advisors in circumstances which would have previously at worst led to a severing of relationships. On the whole, it is large commercial practices that have

fared worst, particularly during times of commercial and construction boom when deals have been rapidly put together in a spirit of commercial urgency with less than full consideration being given to downside risks.

It is fundamental of insurance practice that "the losses of the few shall fall lightly upon the many and upon they that venture rather than upon they that do not venture" and as a result of this the premium increases necessary in order to return insurers books to profitability are applied to all professional firms and not only the ones who have had claims made against them. Naturally, firms who have had claims made against them may find themselves being treated somewhat more harshly than the average.

An interesting development during the last year in both the UK and USA has been the establishment of mutual funds by groups of larger law and accountancy firms. Such firms are arranging indemnity on a mutuality basis. The majority of professional indemnity underwriters see this as a very satisfactory move, as it is the very same larger firms that have caused most of the claims and indeed who should be better qualified to assess the risk than the legal or accountancy profession themselves? A potential result is the recovery of insurers profitability in this class of business with a return to lower premium costs for the remaining insured firms. The professional indemnity account is looked at on very much a global basis, so New Zealand firms may well benefit.

The developments of mutuals of this type is not new and several funds have been established for various professions in the past, particularly in the USA. Past experience showed that firms would initially enter with enthusiasm as the initial costs were lower than the prices required by the insurers. However problems arose when claims were notified and it became necessary to call for additional subscriptions from members in that it became apparent that the mutual had changed a finite annual charge for insurance into an unknown. In the writer's opinion it is unlikely that there are sufficient members of the New Zealand professions to warrant investigation of the "mutual alternative". □

LAWASIA CONFERENCE 1987

The Bar Council of Malaya is organising the 1987 LAWASIA Conference. It is to be held in Kuala Lumpur from 29 June to 4 July 1987. Kuala Lumpur is only a short flight distant from either Singapore or Bangkok, and is generally recognised as one of the most pleasant of the major cities of Asia.

The Conference is to have as its theme the general subject: *To Uphold the Cause of Justice - Without Fear or Favour.* Malaysia is notable for the strength and independence of both Bench and Bar, and a lively and interesting Conference can be confidently expected. There has already been a wide degree of interest shown from many Asian countries and especially from Australia from which a large number of papers have been promised.

The organisers are surprised, and a little disappointed however, at the lack of interest to date from New Zealand practitioners. The Bar Council of Malaya particularly wishes to have some papers concerning New Zealand aspects on topics such as for instance, Commercial Law, Press Freedom, Protection of Minorities, or Environmental Law, by the end of February.

The full programme for the Conference is as follows:—

LAWASIA
The Role of Lawasia in the Asia and Pacific Region — Past and Future.

HUMAN RIGHTS
Protection of Minorities in the Asian and Pacific Region.

AUTOMATING THE LEGAL SYSTEM
(i) Office systems
(ii) Computerised information retrieval
(iii) Court Administration through computers.

LABOUR LAW
Employer Worker Relations and Adjudication of Labour Disputes.

COMMERCIAL LAW AND SHIPPING
(i) Law Relating to Trade, Investments and Joint Ventures in the People's Republic of China.
(ii) Problems relating to Shipping Laws in Asia and the Pacific Region:—
  (i) Arrest of Ships
  (ii) Need for Uniformity in the Rules Governing Carriage of Goods by Sea.
(iii) Lawasia's view on the Law of the Sea Treaty and the 200 mile Economic Zone.

ENVIRONMENTAL LAW
The Need for Laws to Protect the Environment and Exploitation of Natural Resources in the Asian and Pacific Region.

PRESS FREEDOM
Restriction on Press Freedom in Countries of Asia and the Pacific Region.

LEGAL PROFESSION
(i) The Role of Bar Associations in the Protection of Human Rights in the Lawasia Region.
(ii) Developments in Legal and Continuing Legal Education in the Lawasia Region.

FAMILY LAW
The Adequacy of Laws in the Lawasia Region Relating to Domestic Violence.

LAWASIA — LES
Licensing session.

Full details of the Conference, with registration forms, and any other information needed can be obtained from:

Mr Martin Broad
New Zealand Law Society
PO Box 5041
Wellington

Judicial activism

The following item originally entitled "Modest as a Judge", concerning comments by Lord McCluskey in the Reith Lectures for 1986 is reprinted with permission from [1986] NLJ 1052 being the issue for 7 November 1986.

Lord McCluskey, the Scottish Judge giving this year's Reith lectures on BBC Radio 4 comes from the traditional school of judicial modesty. Not for him Lord Denning's "trust the Judges", Lord McCluskey believes that Parliament should make the law and that Judges should confine themselves to administering it. In his opening lecture on Wednesday he warned against Judges substituting their own notions of justice for the requirements of the law. It is not the function of Judges to advance social or moral aims except to the extent that those ideals have been made part of the law, he argued. "Justice itself is not a legal concept, but an extra-legal or pre-legal one. Insofar as he builds a just society the Judge's role is to be not an architect but a bricklayer."

Neither the Courts nor the Judges are fitted to lay down social policy. The Courts have only a "limited portfolio" of individual remedies such as damages or injunctions. Their training as advocates has equipped the Judges to consider the interests of the individual litigants rather than general consequences and they cannot be supplied with what the Americans call a "Brandeis Brief"—evidence on which to predict the social consequences of judicial rulings. For that reason the British Judge "must be slow to let his thinking be influenced by the real or apprehended consequences for others of what he decides for the litigants before him".

Lord McCluskey did not consider whether our rules of evidence should be relaxed so as to allow Brandeis briefs but he was not so naif as to believe that Judges semi-automatically apply given law to established facts. They have, he accepted, a large degree of freedom of choice in their intepretation of the law and findings of fact. He acknowledged that: "It is difficult to escape the conclusion that the choices which the system leaves the Judge free to make are influenced by the Judge's personality, his instincts and preferences, his accumulated social and philosophical make-up and his sense of the public mood.

Sentencing policy

As an example, he cited *Donoghue v Stevenson* where Lord Atkin's "proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt" was disputed by two fellow Law Lords and had been previously described by an Appeal Court Judge as "little short of outrageous". The discretion given to Judges on sentencing bothered Lord McCluskey especially. The Judge must decide with the help only of a plea for leniency, he pointed out. The Judge is unlikely to be reassured by references to "sentencing policy" since "the only real policy is to let the Judges get on with it". Should the jury, or the prosecutor not play a part, he asked—or what about the suggestions for a Minister of Justice answerable to Parliament for developing a coherent sentencing policy. At this point the modesty of the Judge came into conflict with the demands on a broadcaster and the Judge won out: "It is not for a Judge to assess the arguments for such a step. I advocate no particular system." □

They also serve who only write

The judgment concurred in by all Their Lordships in the case of *Spiliada Maritime Corporation v Consulex Limited*, (House of Lords judgment 19 November 1986) was given by Lord Goff of Chieveley. At the conclusion of his judgment His Lordship offered a graceful compliment to the work of academic jurists. His Lordship said:

> . . . for the reasons I have given I would allow the appeal with costs here and below, and restore the order of Staughton J.
>
> (11) *Postscript*
> I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion. Although it may be invidious to do so, I wish to single out for special mention articles by Mr Adrian Briggs in (1983) 3 Legal Studies 74 and in [1984] LMCLQ 227, and the article by Miss Rhona Schuz in (1986) 35 ICLQ 374. They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.

The appeal of "local circumstances" to the Privy Council

By P G McHugh, Fellow in Law, Sydney Sussex College, Cambridge

The author is a New Zealand graduate at present studying in the University of Cambridge. In this article he looks at the relationship of the New Zealand Court system to that of the Privy Council. He puts forward an argument that the common law as received in New Zealand is technically only that decided before 14 January 1840 and that thereafter decisions of the English Courts were persuasive only except for decisions of the Privy Council in respect of New Zealand appeals. As far as the question of retention of appeals to the Privy Council the author recognises that this is ultimately a political question.

I The introduction of English law to New Zealand

English law became the *lex loci* of New Zealand in 1840, at the latest, upon the formal annexation of the islands by Governor Hobson in May of that year. Previously English law may have had a personal character as among the British inhabitants of the islands but, if so, its actual enjoyment required formal constitution from the Crown. The Crown refused to consider the exercise of any such power without formal Maori consent (Glenelg, memorandum, 15 December 1837, CO 209/2:409; Stephen, minute, 16 November 1838, CO 209/5:51). Once this had been obtained, the exercise of the constitutent power to erect Courts and the institutions of colonial government, it had been decided, would proceed from the territorial sovereignty of the Crown over parts if not all of the islands. In this way, that is as a consequence of the sovereignty of the Crown, English law became the *lex loci* of New Zealand.

By the beginning of the nineteenth century it was a settled rule that English law was only introduced to a colony to the extent it suited "local circumstances" (P Yorke A-G, opinion, 1729 in Forsyth, *Opinions*, 2; Henley A-G and C Yorke S-G, opinion, 1757, Chalmers, *Opinions*, I: 197-8). The rule had developed in the American plantations[1] where the colonists sought to invoke the English common law as a source of constitutional right without in so doing affecting their local private law with its strong Mosaic and manorial law features.

In June 1840 the Legislative Council of New South Wales, to which New Zealand was then temporarily annexed, passed an Act declaring the laws of New South Wales to extend to its trans-Tasman dependency "so far as the same can be applied therein" (extension of New South Wales law to New Zealand, 3 Vict 16 June 1840, No 28 (NSW), s 1. In June 1841, once New Zealand had been separated from New South Wales by letters patent issued under the authority of an Imperial Act (3 & 4 Vict, c 62, s 2), Governor Hobson's Legislative Council passed the first local enactment. This Ordinance declared the legislation passed by the New South Wales legislature for New Zealand to apply "in like manner as all other the laws of England" (Ordinance No 1, 4 Vict, s 1). This Ordinance was the result of an opinion by Francis Fisher, then Attorney-General designate – a post he was destined not to fill, since William Swainson had been sent from London to take the post – in May 1841.

This opinion had cast doubt upon the applicability of the New South Wales legislation for the colony – in particular that affecting land claims, enacted after the separation of New Zealand by the passage in London in November 1840 of letters patent under the Great Seal. This doubt notwithstanding, Fisher advised that under the position:

> in which this colony now stands, there cannot be a doubt but that the common law of England, as well as all laws of the British Parliament which are applicable to the condition and situation of the colonists, are in force.
> (F Fisher, opinion, 11 May 1841, CO 209/9: 190-1.)

It remained unclear, however, the date from which the introduction of English law was to be fixed. The English Laws Act 1858 settled the matter stating that the laws of England existing on 14 January 1840:

> shall, so far as applicable to the circumstances of the said Colony of New Zealand be deemed and be taken to have been in force therein on and after that day.
> (English Laws Act, 1858, No 2, preamble, s 1.)

Section 2 of the English Laws Act 1908 provided similarly.

II "English common law" and the "New Zealand common law"

The English Laws Acts established the date from which the introduction of English law was to be timed. What, it may be asked, was this "English law"? English law comprised those statutes of "general application", such as, for example, the Habeas Corpus Act and Frivilous Suits Act. After the date set by the English Laws Acts, an Imperial Act did not extend to the colony unless expressly providing otherwise (see W Keith, opinion, 1728, in Goebel *Cases and Materials*, 278; P Yorke A-G,

opinion, 1729 in Forsyth, *Opinions*, 2; opinion of W de Grey A-G and E Willes S-G, 1767, *id*), a rule which now must be read in conjunction with the Statute of Westminster (22 & 23 Geo V, c 4).

A more difficult question, one which underlies the reversal of the New Zealand Court of Appeal by the Privy Council on the two occasions discussed below, concerned the importation into New Zealand of the English rules of common law and equity. There are two approaches which might be taken to this question. (Generally, Roberts-Wray, *Commonwealth and Colonial Law*, 565-9.)

First, take the traditional approach that the Judges merely declare and interpret the ancient common law. If the common law is timeless then the judgments of the English Courts after January 1840 interpreting and declaring the ancient common law did not cease to have effect in New Zealand. That is to say, these post-1840 decisions were strictly speaking binding *unless* there were local circumstances justifying their non-adoption in the local Courts. Thus by this approach one is able to speak of a "New Zealand common law" only in respect of those rules our Courts have developed in response to the local circumstances which have necessitated some departure from the English common law.[2] All other rules of common law (including those of statutory interpretation – where no local circumstances exist) are no more than the "principles of the English Common law as applied in New Zealand Courts."

The second approach would hold that the rules of the English common law and equity as they existed on 14 January 1840 were imported into New Zealand but thereafter their interpretation became a local process which might take account and be persuaded without being bound by the decisions of the English appellate Courts after that date. This body of English common law as it stood on 14 January 1840 could be judicially sifted and discarded if inappropriate to local circumstances. However the common law which thereafter was applied in the local Courts was that of the colony and not of England. In other words, the colonial Courts were not bound by the interpretation of the common law made by English Courts *after* 14 January 1840, being free to interpret it and develop a "New Zealand common law". They were only bound by English decisions *before* 14 January 1840 which could be discarded if shown unsuitable for local circumstances. "Local circumstances" only had to be proven for the rules of English common law recognised in the English Courts before 14 January 1840.

The relationship between the two approaches had been, as one might expect, subtle and covert. In many cases New Zealand Judges draw upon a variety of English, Commonwealth and even American cases in their interpretation of the common law without bothering *what* common law, English, New Zealand (in the sense of the first approach) or Commonwealth, they are to apply. Were the judicial mind directed towards the question, it would doubtless tend towards the second approach: That the only non-local cases which have obligatory effect, as opposed to the merely persuasive, are those handed down before 1840 and applicable to the circumstances of the country. The Court of Appeal's judgment in *Hart v O'Connor* (1983) perhaps illustrates the proposition.

III Hart v O'Connor

In *Archer v Cutler* [1980] 1 NZLR 386 at 401 (SC), McMullin J found the English, Australian and Canadian caselaw to be unsettled and therefore adopted the rule that a contract made by a person of insufficient mental capacity was voidable at his option not only if the other party knew or ought to have appreciated his unsoundness of mind, but also if the contract was "unfair" to the person of unsound mind. In *Hart v O'Connor* [1983] NZLR 280 (CA), McMullin J affirmed his own rule for the Court of Appeal as "the law of New Zealand".

The Privy Council did not agree, at [1985] 2 All ER 880 at 886 f-g:

> If *Archer v Cutler* is properly to be regarded as a decision based on considerations peculiar to New Zealand, it is highly improbable that their Lordships would think it right to impose their own interpretation of the law, thereby contradicting the unanimous conclusions of the High Court and the Court of Appeal on a matter of local significance. If however the principle of *Archer v Cutler* if it be correct, must be regarded as having general application throughout all jurisdictions based on the common law, because it does not depend on local considerations, their Lordships could not properly treat the unanimous view of the Courts of New Zealand as being necessarily decisive. In their Lordships' opinion the latter is the correct view of the decision.

It would appear the Board adopted a view tending towards the first approach mentioned earlier; that is to say, that any local variation upon the common law rules of general application, which unlike the Court of Appeal they found *Archer v Cutler* to be, must be justified by reference to local circumstances. They made this position and their findings in relation to it explicit towards the end of their report, at 894, e-f:

> In the opinion of their Lordships, to accept the proposition enunciated in *Archer v Cutler* that a contract with a person ostensibly sane but actually of unsound mind in the sense of contractual imbalance, is unsupported by authority, is illogical and would distinguish the law of New Zealand from the law of Australia . . . for no good reason, as well as from the law of England from which the law of Australia and New Zealand and other "common law" countries has stemmed. In so saying their Lordships differ with profound respect from the contrary view so strongly expressed by the New Zealand Courts.

The Privy Council's reversal of the New Zealand Court of Appeal in *Hart v O'Connor* can be explained simply on technical grounds relating to the misinterpretation, as the Board saw it, by McMullin J of the Commonwealth cases on "contractual imbalance" and "procedural unfairness". Each was separate and he had confused the two, treating them as synonymous. More fundamentally, however, the case also reveals differences as to the

status in New Zealand Courts of the common law rules of general application. McMullin J saw the rules handed down in other Courts of common law jurisdiction as optional, whereas the Privy Council treated them as applicable and binding within New Zealand in the absence of local circumstances justifying a variation. The message was that if New Zealand has a common law of its own, it is only that portion of the rules followed by our Courts which have taken unique shape in response to the requirements of "local circumstances". In *Hart v O'Connor* the Privy Council informed the New Zealand Court of Appeal that the variation from the rules followed in other common law jurisdictions could only be justified in law were there the necessity of "local circumstances".

IV Aboriginal title and the Protest of Bench and Bar (1903)

During the late nineteenth century, the New Zealand judiciary had developed a rigid stance in relation to Maori claims to a right of property in their traditional lands, forests and fisheries. The Courts held such rights were of a moral rather than legal character, subsisting at the sufferance of the Crown. This position was a direct consequence of their application of the feudal doctrine of tenures (together with Austinian theory and contemporary, if unrepresentative, perceptions of international personality) to all land titles in the colony. The common law presumption of the continuity of pre-existing property rights upon British annexation only applied to "civilised" systems of tenure. Where none existed, the sole source of private title to land was the grant of the Crown ((1984), Canter L Rev, 235).

This overlooked the rule that feudalism, as with other rules of English law, was only introduced to a new colony to the extent it was suitable to local circumstances. In *doe dem Silveira v Texeira* (1845), to give an example, Anstruther R considered the application of the feudal rule of Crown-derived title to the property of an inhabitant of Bombay claiming title under the pre-existing (Portuguese) law. The thorough-going application of the feudal rule, he said, could only be made:

> . . . by supposing the King of England to have at once annihilated all the preceding rights of the whole native landholders of Bombay, and of every English settlement in India. We must suppose, that, either by the mere fact of English conquest or acquisition, or by the subsequent act of establishing Courts of Judicature upon the principles of the English law, all former titles to land were at an end; that the land of British India immediately, *ipso facto*, became the property of the King; and that all rights in any lands in British India are emanations from this universal property of the Sovereign. I should have supposed such a propositon, in the very statement of it, sufficient to carry its own refutation. . . . We must not in our zeal for the principles of English law, forget that land may in nature be a subject of property in individuals, independently of any imaginary grant from the Crown, (1845), 4 Ind Dec (OS) 529 (Bom Rec Ct).

In short, the introduction of the feudal rules of title were qualified by the "local circumstances" of the indigenous inhabitants. The common law presumed they held a Crown-recognised as opposed to Crown-derived title in the absence of any pre-annexation "act of state" suspending those rights.

The position local Courts had taken to the Maori aboriginal title was contrary to long-settled British practice which had consistently recognised the property rights of tribal societies over their traditional lands. This recognition had become incorporated into that part of the common law known as colonial law and is too overwhelming to bear rehearsal here. The early colonial history of New Zealand was founded upon the *legal* right of the tribes to their lands, yet the landmark decision in *Wi Parat v Bishop of Wellington* (1877) demoted this to moral standing.

When first the matter came before the Board in the early twentieth century, the Privy Council approached the aboriginal title of the Maori on the basis that they had a property right in their land. The "local circumstances" – massive European settlement, the primitive system of traditional tenure, the need to control settlement and protect the Maori, combined to give this continuity a modified character. This "modified dominion" had been explained exhaustively in *R v Symonds* [1840-1932] NZPCC 387 (SC). The Privy Council did not go into this modification, to them the mere fact of the continuity of the tribal title was sufficient to dispose of the issues presented by *Nireaha Tamaki v Baker* (1902) and *Wallis v Solicitor General* (1903). No "local circumstances", such as those that arguably existed in the case of the extremely primitive and sparse Aboriginal population of Australia, were presented to the Board to justify departure from the common law presumption of the continuity of local property rights.

The Solicitor-General's instructions accompanying the brief for *Nireaha Tamaki v Baker* asserted by way of allusion to the "local circumstances" rule that the supposition of the tribes' lack of a legal right to their land:

> has been taken and constantly adopted from the foundation of the Colony up to the present time, and that upon that view has been founded the whole system of title and conveyancing in the Colony.[3]

The Privy Council made short work of this argument, pointing out that "the native title of possession and occupancy" was not "inconsistent with the seisin in fee of the Crown" which was the supposition upon which land titles in the country were based. The Board continued:

> Indeed by asserting his native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession [1840-1932] NZPCC 371 at 379.

The Board thus held that the Maori had an aboriginal title cognisable in colonial Courts by reason both of statutory and, though less emphatically, common law recognition. The "local circumstances" of the country proved the very thing the Crown was refuting – the aboriginal title of the Maori to their traditional lands.

Stout's reaction to this advice as Chief Justice was a terse comment that the Privy Council did not "seem to have been informed of the circumstances of the colony (*Hohepa Wi Neera v Bishop of Wellington* (1902), 21 NZLR 655 (CA)).

This was only true in an obverse sense: The Board had not been shown any local circumstances justifying the departure so much as the confirmation of the application of a common law presumption of the continuity of local property rights.

A year later great controversy arose with the Privy Council's advise in *Wallis v Solicitor-General* (1903) which, again, predicated some legal right in the tribes to their traditional lands. In particular, the report scorned the *Wi Parata* position that relations between the Crown and tribal owners in matters of the traditional land were matters purely of executive policy (or "acts of state") beyond judicial purview. The Board derided this position in forceful and provocative terms. It was, Lord Macnaghten said at [1840] NZPCC 173 at 188:

> . . . certainly not flattering to the dignity or independence of the higher Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions?

The Privy Council's advice aroused the fiery colonial temperament. In an unprecedented "Protest of Bench and Bar", Stout gathered his brethren and members of the local Bar in the Court of Appeal Buildings, Wellington on a Saturday in April 1903. He called the meeting to deliver a stinging rebuke of the Privy Council's advice. His heaviest criticism of the Board was directed at their recognition of the tribal title to their traditional lands as subsisting at law rather than mere Crown sufferance. Again he asserted that feudal rules of title applied to *all* titles in the colony and that lacking a basis in Crown-grant there could be no such thing as a legally cognisable tribal title. He declared:

> The matter is really a serious one. A great Imperial, judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of the British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present in my province to suggest. *ib*, Appendix, 730 at 746.

In the end Salmon stepped in and drafted the Native Lands Act 1909 so as to codify the *Wi Parata* position that the Crown was not legally bound by the (territorial) aboriginal title. (Native Lands Act 1909, No 15 s 84).

Nonetheless, it is not without passing interest that when the issue subsequently arose in his Courts, Stout took a "statute-based" approach to aboriginal title such as the Privy Council had insisted in *Nireaha Tamaki v Baker*. He saved face by locating the *first* statutory recognition of the Maori aboriginal title in the Native Lands Act 1909 in *Tamihana Korokai v Solicitor-General* (1912), 32 NZLR 321 (CA).

The Protest of Bench and Bar showed the Privy Council and local bench differing on the question of "local circumstances" so far as they affected the common law rules applicable in New Zealand. The Board applied the usual presumption of the legal continuity of property rights, which they found everywhere confirmed by the Crown's activity during the acquisition and government of New Zealand. The "local circumstances" of the country confirmed rather than challenged the applicability of this rule. The New Zealand judiciary argued otherwise, dogmatically insisting that the feudal doctrine of tenures had wholesale application to all title to land in the colony. In this case, at least, the Privy Council (despite the manifest clumsiness of its advice in *Wallis v Solicitor-General* was better attuned to "local circumstances" as well as the "Imperial ideal" than the colonial Bar. The Protest of Bench and Bar may have had its heroic aspect but like most heroism its basis was defiant.

V Conclusion

Hart v O'Connor and the early twentieth century differences over aboriginal title are two examples, one historical, the other recent, of the relevance of "local circumstances" to the Privy Council's interpretation of the rules of common law applicable in New Zealand Courts. In *Hart v O'Connor* there were no "local circumstances" justifying the adoption of a rule regarding contractual capacity different from that followed in other common law jurisdictions. In the two cases on aboriginal title, the "local circumstances" confirmed rather than challenged the legal status of the Maori right to their traditional lands. The Protest of Bench and Bar was a dramatic assertion otherwise but proceeded in the face of historical and legal evidence showing the Crown's recognition of the aboriginal title of the Maori.

Whether New Zealand wishes to retain appeals to the Privy Council or not is ultimately a political question. In the meantime we can be sure that the test, theme, or howsoever else one might characterise it, of "local circumstances" will continue to underlie, if covertly most of the time, the Privy Council's approach to appeals from New Zealand. The full independence of our common law really only commences where the "local circumstances" of the country begin. We are more closely tied to a non-local common law than probably we care to admit. There is only a distinct, unique "New Zealand common law" in those matters where our "local circumstances" set us apart from other common law jurisdictions. Is this a situation with which we should be happy? Do we think it

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Market survey evidence — Admissibility and weight

By Tom Weston, a Christchurch practitioner

The growth in intellectual property litigation has raised the question of the value of evidence of market research surveys. The evidentiary problem of admissibility is related to the rule against hearsay. The English and New Zealand cases on the topic are considered. It is argued that the decision of Holland J in the Noel Leeming *case [1985] BCL 1669 recognises the reality of the market place in making such evidence admissible when properly presented and supported.*

A recent decision of the High Court *(Noel Leeming Television Limited & Others v Noels Appliance Centre Limited* [1985] BCL 1669) has canvassed the issue of the admissibility of market survey evidence. More recently, the Chief Justice in *Klisser Farmhouse Bakeries Limited v Harvest Bakeries Limited & Others* [1985] 2 NZLR 129, an interim injunction application, noted the earlier decision with apparent approval.

In the *Noel Leeming* decision, the plaintiff had alleged a passing off as to name. The plaintiff commissioned a market research survey for the particular purpose of establishing its market reputation. Incidental to this main object was an inquiry as to whether there was any deception or confusion amongst those persons interviewed.

Rule against hearsay

It is in this field of intellectual property litigation that the market research survey has proved of particular use. There had, however, up until recently been a conceptual uncertainty as to the exact basis of admissibility of such evidence and this had resulted in a multiplicity of approaches. The principal hurdle had been the rule against hearsay and, prima facie, the response of those persons interviewed, but not present in Court, would seem to infringe it.

The basis of the rule against hearsay is straightforward enough. The "sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination" (Chadbourn, revised 1976 ed of *Wigmore on Evidence* Vol 5 para 1420). The difficulty arises, not from that simple statement, but from the multiplicity of exceptions that clothe the rule.

Nowadays, the market research survey is a sophisticated device. The law, however, had developed from earlier, less sophisticated models. The American and English common law (and, additionally, in America, legislation) had grown separately, although from common sources. The New Zealand Courts only first considered the matter in 1976 *(Customglass Boats Limited & Another v Salthouse Bros Limited & Another* [1976] 1 NZLR 36, Mahon J).

Three legal positions

Prior to the *Noel Leeming* decision the law had developed three positions in relation to market survey evidence. Either it was not hearsay at all (admitted to show a designated opinion held by the public), or it was a recognised exception to the rule (public state of mind on a specific question) or, thirdly, it was admitted as some new, but largely undefined, exception to the rule (the English approach).

The first two of these three approaches were not substantially different from one another. It is clear from the authorities and texts there had been a great deal of

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right our Judges should have to prove their view of "local circumstances" to a tribunal in London? The English Laws Acts and the common law rules regarding the introduction and application of the English common law are with us still. □

1 For example, Anon, *Essay upon the Government of the English Plantations* (1701), 23 (criticising "the Crooked Cord of a Judge's Discretion"); Blackstone's *Commentaries*, I:107-8 (not included in the first edition, but soon added to subsequent additions at Lord Mansfield's advice).

2 The Privy Council took this position from the first, eg *Catterall v Sweetman* (1845), 1 Rob Ecc 304 at 318 per Dr Lushington; *Trimble v Hill* (1879) 5 App Cas 342 at 344; *Robins v National Trust Co* [1927] AC 515 at 519 per Lord Dunedin.

3 Unpub at p 11. I am grateful to Judge E J Haughey for making his copy of the brief available.

semantic uncertainty as a consequence. Two different editions of *Cross on Evidence,* for example, carried apparently contradictory views. In the fifth edition at p 589 the learned editor stated, "the view that this is not hearsay is suspect". On the other hand, in the New Zealand edition at p 435 the opposite conclusion is reached.

Cross (NZ ed) relied on Mahon J's decision in *Customglass Boats* (supra). The learned Judge was not there required to give a definitive answer as the survey evidence was admitted by consent, the only argument being one as to weight. Despite this, Mahon J at p 42 concluded that such evidence was not hearsay at all. In any event, if he was wrong as to that, he considered it clearly fell within a recognised exception (the second of the three approaches listed above).

The English procedure, referred to, but not adopted by, Mahon J had a different complexion. The principal authority was that of *Bailey v Clark Son & Morland* (1937) 54 RPC 134 (CA), (1938) 55 RPC 253 (HL) used as authority in the more recent decision of *General Electric Co v General Electric Co Limited* (1969) RPC 418, (1970) RPC (CA) 339, [1972] 1 WLR 729 (HL). In both cases, a representative sample of those persons interviewed swore affidavits as to their answers to the questions. The balance of the answers received were then annexed to a single affidavit. However, as the learned editor of Cross (5 ed) concluded, "The English Courts have admitted evidence ... without consideration of the theoretical problems involved". Effectively, then, a new exception to the rule against hearsay had evolved though without any real effort having been made to define it.

Against this background, Holland J was called upon to decide the matter in the *Noel Leeming* decision, the defendant having put admissibility at issue. At p 4 of his judgment, His Honour concluded:

> With respect to the learned text book writers, I am of the view that the evidence given here is not hearsay at all. The evidence given by the interviewers of the results of their interviews was no more than testimony tendered as a foundation for the expert opinion evidence of Mr Kalafatelis [Managing Director of the Survey Company] and of other qualified experts.

And quite clearly Mr Kalafatelis was present in Court and susceptible to cross-examination.

A matter of semantics

Purists might well argue that such a distinction is, itself, a matter of semantics. After all the witness had done little more than assemble figures derived from the answers given by the interviewees. Although clearly an expert in the art (or science?) of market surveys, his evidence on this point was only an arithmetical summary that, in no substantial way, interpreted the raw data. At pp 5 and 6 of his judgment, His Honour considered this of little moment. So far as he was concerned, the evidence was admissible, his principal concern going only to weight.

Despite the arguments that could be mustered against His Honour's finding, it seems possible that a long standing shibboleth may have been set to rest. If nothing else, the reality of the modern day market place has been substantially recognised. Market survey evidence per se is now admissible, the argument more realistically being directed to the weight to be attached to it.

At this stage, a recent English decision, concerned with weight rather than admissibility, proved to be of some assistance to the Court. Whitford J in *Imperial Group PLC & Another v Phillip Morris Limited & Another* (1984) RPC 293 had given detailed consideration to this second aspect of market survey evidence and the head note at p 294 sets out the numerous factors going to weight established by the Judge in that particular instance. A recital of that is not necessary here.

Disclosure prior to trial

It is with this second aspect that practitioners will continue to encounter difficulties. It is clear from the English authorities that disclosure should be made to the other parties prior to trial. This is not the law in New Zealand but, as Holland J noted at p 8 of his judgment:

> little weight is likely to be given to public surveys in the course of litigation if they are produced by one side and the other side has not had an adequate opportunity to check the honesty and accuracy of the survey.

But giving notice to the other parties can be easier said than done. In the *Noel Leeming* decision the substantive hearing had been accorded urgency and the results of the survey were available only a week prior to trial. The 500 persons interviewed had had their responses noted on separate answer sheets of five pages each. The survey company was ethically bound not to make the originals available to either the plaintiff or the defendant. One hundred randomly selected answer sheets were photocopied (with some details as to the interviewee excised) and made available to the defendant several days prior to trial. Even if the full 500 had been made available, it was clear that the defendant had not time properly to analyse the full survey.

The results of the survey were presented in Court by the company's Managing Director. He had been responsible for drafting the questions, overseeing the telephone interviewers, and then arranging for a computer breakdown of the results. He covered, in some detail, the methodology of the survey for the purpose of satisfying the Court that it had been conducted in a bias-free manner.

His evidence was followed by that of the seven telephone interviewers who each formally produced their "bundle" of original answer sheets. Each gave evidence as to their experience and training as a telephone interviewer, and the steps taken by them to counter any possible influence of bias.

It is clear from the above that the extent of disclosure required prior to trial is still uncertain. It is obviously desirable that there be some sort of disclosure but the extent required will depend on the facts in each instance. If there is any doubt, it is best to err on the side of over-disclosure. It seems clear, however, that unless the other parties to the litigation intend analysing the results themselves then disclosure of a sample will suffice. □

Insurance Law Reform Acts in practice (I)

By Andrew Borrowdale, Senior Lecturer in Law, University of Canterbury

In two articles to be published this month and next month Andrew Borrowdale looks at reform of the law relating to insurance in Australia and more importantly in New Zealand. He compares this with what has been the paucity of similar reform in England. In this present article he considers the law on such topics as mis-statements, materiality, and exclusion clauses. In the following article he will discuss agency and insurable interest.

Introduction

Until very recently law has been something of a step-child as far as law reform goes. In England the first initiative for reform was made in 1957 in the fifth report of the English Law Reform Committee, and again in 1980 further proposals for reform were developed in a Law Commission Report on non-disclosure and breach of warranty in insurance law. None of the recommendations made has been translated into legislation, although the Department of Trade is now in the throes of drafting a Bill. But elsewhere insurance law reform has bloomed with abundance. In Australia there has occurred a virtual codification of the law of insurance contracts and insurance intermediaries by virtue of two Federal Acts, the Insurance Contracts Act of 1984 and the Insurance (Agents and Brokers) Act of 1984. (The Acts are the fruit of two comprehensive reports by the Australian Law Reform Commission, *Insurance Agents and Brokers* ALRC Report No 16 (1980) and *Insurance Contracts* ALRC Report No 20 (1982). For a commentary on the Acts see now Kelly and Ball *Insurance Agents, Brokers and Contracts* (1986).

Reform in New Zealand has been more modest. Two separate statutes, the Insurance Law Reform Acts of 1977 and 1985, totalling only 32 sections, have implemented the now defunct Contracts and Commercial Law Reform Committee recommendations for the amelioration of the most glaring inadequacies of the common law of insurance. (The provisions of the 1985 statute are thoroughly surveyed by Tarr "Insurance Law Reform" (1985) 11 NZULR 362.) This is certainly piecemeal reform; and in respect of the possibility of reform of the Canadian law of insurance it has been commented:

> Piecemeal reform is inappropriate in that gaps, duplication and inconsistencies may be created or aggravated. What is needed is an over-all review of insurance contract legislation (Brown "Restructuring the Insurance Act: The First Step to Insurance Law Reform in Canada" (1985) 10 Can Bus LJ 386 at 387).

Can it be said of the New Zealand statutes that "gaps, duplication or inconsistencies" have been created or aggravated? Regrettably the answer appears to be yes.

Mis-statements

Misrepresentation in the strict sense is of little significance in the insurance context because mis-statements are most commonly found in the insurance proposal, and by the device of a warranty these become terms of the contract itself. The proposal may expressly state that the insurer is entitled to avoid the policy for breach of the warranty, but this is not necessary for the mere creation of the warranty entitles the insurer to this remedy in any event. For this reason it may be argued that a warranty as to the truth and accuracy of answers given by an insured in a proposal form excludes wholly the application of the Contractual Remedies Act of 1979. Section 5 of that Act provides that if the contract makes express provision for a remedy then the relevant sections of the Act apply subject to that provision; a warranty may be said to amount to "express provision". Even if this is not valid, it is certainly the case that the Contractual Remedies Act does not govern cancellation because this is determined by the Insurance Law Reform Act of 1977, and s 15 provides that with some exceptions nothing in the Act shall affect:

> (a)ny other enactment so far as it prescribes or governs terms of contracts or remedies available in respect of contracts, or governs the enforcement of contracts (s 15(h)).

However, since the Insurance Law Reform Act of 1977 deals only with situations where the mis-statement is contained "in any document on the faith of which the contract was entered into, reinstated, or renewed

by the insurer" (ss 4(1), 5(1)), it is possible to envisage circumstances in the context of insurance contracts where the Contractual Remedies Act would apply. Possible instances would be a written contract where the insured has made a verbal misrepresentation but nothing contained in the proposal form or supporting documents is incorrect, and a verbal contract where no mention is made of any remedy for misrepresentation.

At common law an insurer is entitled to avoid liability under a policy of insurance for mis-statements contained in the proposal form, no matter that the mis-statement is immaterial or inaccurate only in some trivial respect or has no bearing upon the loss if one has occurred. The changes effected by the Insurance Law Reform Act of 1977 are as follows:

1 a life policy cannot be avoided at all by reason only of a mis-statement of the age of the life insured (s 7(1));
2 contracts of insurance other than life insurance may be avoided only if the mis-statement was substantially incorrect and material (s 5(1)(a), (b));
3 for avoidance of a life policy it must be shown in addition that the mis-statement was made either fraudulently or within the period of three years immediately preceding the date on which the policy is sought to be avoided or the date of the death of the life insured, whichever is the earlier (s 4(1)).

Section 5 has been considered in a number of cases. In *Preece v State Insurance General Manager* (1982) 2 ANZ Ins Cas 60-493 the insured stated that the vehicle in question had been modified by the installation of a new engine; it was held that this statement could not be said to be substantially incorrect on the basis that in fact the insured had also installed a new gear box and exhaust manifold, and had fitted wide rims with radial tyres. On the other hand, it was held in *Peters v National Insurance Co of NZ Ltd* (1982) unreported but discussed in *Tarr Insurance Law in New Zealand* (1985) at 58 that a burglary policy in respect of shop premises could be avoided where the insured answered "no" to the question "Have thieves ever entered or attempted to enter any of your premises?", and the insured had suffered four burglaries, two of them very recently. Clearly the answer given was both substantially incorrect and material. Similarly, in *Opossum Exports Ltd v Aviation & General (Underwriting Agents) Pty Ltd* (1985) 3 ANZ Ins Cas 60-624, [1985] BCL 261 the insurer was entitled to repudiate liability under a policy insuring a helicopter (to be used for deer capture) against accidental damage where it had stated that the intended pilot had 700 hours of flying experience in helicopters, the truth being that he had only 120 hours.

Provisions of ss 5-7

The provisions of ss 5-7 of the Insurance Law Reform Act of 1977 are in themselves perfectly workable and a major step forward. The point of greatest dissatisfaction is that it seems they touch only affirmative warranties, ie warranties affirming that the answers given in the proposal are true and accurate, but do not extend to promissory or continuing warranties, ie warranties in terms of which the insured undertakes that during the currency of the policy a certain state of affairs will or will not obtain. Since breach of a promissory warranty, no matter how slight or immaterial, entitles the insurer to avoid the policy, it is obvious that reform is quite as urgently needed here too.

Yet the Contracts and Commercial Law Reform Committee does not refer to promissory warranties in their first Report on Aspects of Insurance Law in 1975 which led to the enactment of the 1977 Act. The provisions of this Act dealing with mis-statements can be twisted to cover promissory warranties only by uncomfortable linguistic contortions. In particular it is difficult to bring a promissory warranty within the notion of a "mis-statement" which is "substantially incorrect". An affirmative warranty is breached in the making if the facts to which it relates are untrue or inaccurate. The warranty is breached because the insured's answers are incorrect. But by definition there can be no breach of a promissory warranty at the time of making the warranty; breach consists of the insured's failure during the currency of the policy to act in accordance with the warranty. It is the discrepancy between the insured's undertaking and his performance (or that of some person for whom he is responsible) that constitutes the breach, not the making of an incorrect statement. The insured under a motor vehicle policy may warrant that he will maintain the vehicle in a roadworthy condition; his failure to do so does not convert his undertaking into an "incorrect" mis-statement, but amounts simply to a breach of the undertaking.

There has been only one reported case in which this distinction might have been made. In *Hing and another v Security & General Insurance Co (NZ) Ltd* (1986) 4 ANZ Ins Cas 60-696, [1986] BCL 221 the insureds, Mr Hing and his wife, proposed to remove their house from one site to another, and completed a proposal form for insurance cover with the defendant company. The proposal stated that a Mr Bauer was to be the lifting contractor and that the haulage was to be done by a firm Western Removals. The insureds signed the following declaration which appeared at the foot of the proposal:

> We hereby declare that the statements made by us in this proposal are complete and true to the best of our knowledge and belief and we agree that this proposal shall form the basis and be part of any policy issued in connection with that above risk or risks.

In fact the haulage of the house, which was divided into two, was undertaken by a different firm of haulage contractors. The smaller portion of the house was successfully transported to the new site, but the haulage firm was unable to complete the haulage of the larger portion over the final stretch. Mr Hing then hired a bulldozer, operated by a person with no experience of house removal, to haul the trailer on which the house rested. Through the bulldozer operator's inexperience the left rear wheels of the trailer slipped off the road and the house was tipped down a steep bank. In an action on the

policy it was held that the insurer was not liable, for several reasons, inter alia the following:

1 the risk the insurer undertook was materially different from the risk in fact run since removal by qualified professional removers was quite a different matter to removal by absolutely untrained and inexperienced persons;
2 the statement in the proposal as to who was to undertake the haulage work was both substantially incorrect and material within the meaning of ss 5 and 6 of the Insurance Law Reform Act of 1977.

There can be no quarrel with the first of these grounds; but it might be thought that the statement as to who was to undertake the haulage was in the nature of a promissory warranty, and that the provisions of the Insurance Law Reform Act should not have been applied. It does not seem that the point was raised, and this would not be surprising since no different result would have been reached if it had.

The test of materiality

For the purpose of deciding whether a mis-statement is material s 6(2) of the Insurance Law Reform Act of 1977 provides that:

> notwithstanding any admission, term, condition, stipulation, warranty, or proviso on the application or proposal for insurance or in the life policy or contract of insurance, a statement is material only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms.

This accords with the test of materiality in relation to the insured's common law duty of disclosure (*Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485 (CA)). In *Avon House Ltd v Cornhill Insurance Co Ltd* (1980) 1 ANZ Ins Cas 60-429 the question was whether the failure of the insured under a fire policy to disclose that a fire had occurred on the same premises during the currency of an earlier insurance was material. Somers J held that the fact should have been disclosed, and continued:

> That is not to say that upon disclosure Cornhill would have increased the premium or refused the risk or accepted it on other terms. I think it probable it would simply have continued to insure on the same terms. . . . But it was a matter for consideration and Cornhill never had that opportunity to consider it (77,228).

This must be questionable. The test is, would disclosure have *influenced* a prudent insurer? There are many facts that the insurer would like to have disclosed but which once disclosed would not influence him in any way. Such facts may be material to the insurer in the sense that he may prefer to know about them and have an opportunity of considering them, but this does not mean that they are material for disclosure purposes. Similarly, it would follow that a statement is not material for the purpose of ss 4 and 5 of the Insurance Law Reform Act of 1977 unless it would actually have influenced the prudent insurer to change his position.

The application of the test of materiality is unclear in a further respect, viz whether the test is purely objective or involves asking how the prudent insurer in the position of the insurer in question would have responded. There is support for both these approaches. In *Edwards v AA Mutual Insurance Co* (1985) 3 ANZ Ins Cas 60-688, [1985] BCL 1776 (noted by J F Burrows [1986] NZLJ 33) Tompkins J held that a statement is not material unless it would have influenced a prudent insurer with the actual knowledge possessed by the insurer in question. The case involved also the application of s 10(2) which concerns the imputation of knowledge possessed by an agent to his principal, and is discussed more fully below in relation to this issue. Similarly, in respect of non-disclosure Kerr J in *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 took the view that the test of materiality was whether, by applying the standard of the judgment of a prudent insurer, the insurer in question would have been influenced (at 463). Were this not the test, the Judge continued, there might arise the situation where an insurer would be entitled to avoid a contract for non-disclosure of a fact which objectively a prudent insurer would have considered material, even though the particular insurer would not himself have considered it material. The effect of a mixed test as proposed in *Berger's* case would be as follows:

Prudent insurer
(1) Influenced
(2) Influenced
(3) Not influenced

Particular insurer
Not influenced
Influenced
Influenced

Result
Not material
Material
Not material

The test could be re-stated to be that a mis-statement is material if it would have influenced the actual insurer in question, except where it would not have influenced a prudent insurer; alternatively, a mis-statement is material if it would have influenced a prudent insurer, except where it would not have influenced the actual insurer in question.

Difficulties with mixed test

There are two difficulties with the mixed test. First, in *Avon House* Somers J affirmed the purely objective test as being more in accord with the authorities, and rejected the approach suggested in *Berger's* case. The second is that the statutory definition of materiality is on the face of it simply a re-statement of the objective test, and for a mixed test to be adopted this has to be read into the section. A preferable approach, albeit one that still requires an interpretative leap, might be to retain the purely objective test, but defeat the claim of an insurer to avoid the policy where subjectively that insurer himself did not regard the mis-statement as material by arguing that he could therefore not be said

to have relied upon the misstatement. Support for this may be gleaned from the wording of s 4(1) which states that:

> A contract of insurance shall not be avoided by reason only of any statement made in any proposal or other document on the faith of which the contract was entered into, reinstated, or renewed by the insurer unless. . . .

The phrase "on the faith of which the contract was entered into" is more likely to be taken to refer to "proposal or other document" than to "statement", but nevertheless to import the requirement of reliance may do less violence to the wording of the statute than reading into the definition of materiality a mixed test.

Exclusion clauses

Invariably a policy of insurance will describe the general risk covered by the policy and then state various exceptions to the general risk. For example, a householder's policy will commonly exclude:

> loss, destruction, damage or liability directly or indirectly caused by earthquake, volcanic eruption, subsidence, landslip or erosion.

From such clauses excluding from the general risk particular kinds of risk must be distinguished clauses excluding the insurer's liability where certain circumstances prevail which have the effect of increasing the risk. So the insured under a motor policy is stated not to be covered for any loss, damage, injury or liability while the insured vehicle is, inter alia, being used in an unsafe condition, being driven by any person who is not licensed to drive the vehicle, being driven by any person who is under the influence of intoxicating liquor or drugs. Exclusion clauses of this second kind are temporal in nature, ie the insurer's liability is excluded for the period during which the given circumstance operates, whereas exclusion clauses of the first kind are causative, ie particular causes of loss are absolutely excluded from the scope of the risk covered.

At common law the insurer is entitled to rely on an exclusion clause of a temporal kind notwithstanding that there is no causal connection between the insured's loss and the circumstance which excludes the insurer's liability. The Contracts and Commercial Law Reform Committee considered that this was unsatisfactory and recommended that the insurer be entitled to rely on an exclusion clause of this type only if a causal connection between the insured's loss and the exclusion of liability could be shown. This is now provided for in s 11 Insurance Law Reform Act of 1977 which provides as follows:

> Where
> (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
> (b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring,—
> the insured shall not be disentitled to be indemnified by the insurer by reason only of such provision of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Section 11 raises two particular points. First, when does s 11 apply? Second can promissory warranties be brought within the terms of s 11?

When does s 11 apply?

Obvious examples where s 11 could be invoked are the following. An insured has a personal injury policy excluding liability if the insured suffers injury "whilst intoxicated" and injury occurs when, through no fault of his own, the vehicle in which he is travelling as a passenger is involved in a collision. Or a motor vehicle insured under a policy excluding the liability of the insurer where the vehicle is used in an unroadworthy condition is driven with bald tyres and is crushed by a falling tree.

There are now several cases construing s 11. In *Sampson v Gold Star Insurance Co Ltd* [1980] 2 NZLR 742, (1980) 1 ANZ Ins Cas 60-043) the insured took out a comprehensive motor policy with the defendant insurance company. Clause 3 of the policy stated:

> It shall be the duty of the Insured . . . to ensure that in furnishing the Company with such information as may be required in connection with the occurrence of any accident injury loss or damage that all such particulars are in every respect true and correct . . . and this shall be a condition precedent to any liability of the Company to make any payment under this policy.

The insured was involved in an accident for which he admitted liability and claimed against his policy, alleging that the cause of the accident was the failure of the brakes on his car, which was untrue. On this being discovered the insurer repudiated liability relying on cl 3 of the policy. The insured then sought to rely on s 11. Barker J accepted that prima facie s 11 applied to the facts and that the insured had shown that there was no causal connection between his furnishing false information and the loss in question. But Barker J held that s 11 did not exclude the insured's common law duty to act with the utmost good faith, which duty had been breached by the provision of the false information, and consequently the insured could not recover. The result is correct but it can hardly be correct that clauses of the type in question fall under s 11. Barker J held that the requirement of s 11(b) was satisfied because the provision of false information was, in the view of the insurer, likely to increase the risk. But the provision of false information was made after the loss in question had occurred and so could not have increased the risk of

that loss occurring.

The applicability of s 11 was raised in *Barnaby v The South British Insurance Co Ltd* (1980) 1 ANZ Ins Cas 60-401 where a retaining wall had cracked after an exceptionally wet season and had to be replaced. The insurer repudiated liability for the cost of replacement on the basis of a clause in the policy stating that the policy did not cover loss or damage arising from fault, defect, error or omission in design. Hardie Boys J held that although the conditions which had caused the collapse of the wall were unusual, they could nevertheless reasonably have been expected, and the damage was consequently due to fault or defect in design. It is difficult to imagine how s 11 could possibly be relevant in a case of this sort; if the loss was not due to the defect in question, then clearly the insured would have no call to invoke s 11; if that loss were due to the defect then s 11 could not assist because s 11 applies only if there exists no causal connection. These points were not made by the Judge who contented himself with saying, quite correctly, that:

> The section is not designed to deal with exclusion clauses which specify the kind of loss or the quantum of loss to which the cover does not apply at all. . . . A "fault, defect, error or omission in design" is not a circumstance the existence of which excludes liability on the part of the insurer for a loss otherwise covered, nor is it a circumstance likely to increase the risk of occurrence of a loss otherwise covered – it is a kind of a loss which the policy does not cover at all (77,008).

Section 11 was successfully relied upon by the insured in *Norwich Winterthur Insurance (NZ) Ltd v Hammond* (1985) 3 ANZ Ins Cas 60-637, [1985] BCL 498. The insured was driving his motor vehicle at excessive speed when he encountered surface flooding on the road. The vehicle slid along the road on to a river bank where it hit a tree and was severely damaged. The insurer's liability was excluded if the vehicle was being driven in an unsafe condition; at the time of the accident the rear tyres were both severely worn. On the evidence Heron J found that the insured had discharged the onus of showing on a balance of probabilities that the condition of the rear tyres had not contributed to the accident.

Do promissory warranties come within the terms of s 11?

Promissory warranties will be included in a contract of insurance to ensure that the insured either acts in some way which diminishes the risk of loss occurring or refrains from acting in some so as not to increase the risk of loss occurring. Are such warranties affected by s 11? In *Hammond's* case the policy contained, in addition to the *express* exclusion from liability, a condition requiring the insured to take reasonable steps to safeguard the vehicle from loss or damage and to maintain it in an efficient condition. Heron J simply accepted without more that s 11 applied to this condition also.

If such a condition does amount to a promissory warranty (and as to this there may be some doubt; see *Conn v Westminster Motor Ins Association* [1966] 1 Lloyd's Rep 407, but contra *W J Lane v Spratt* [1970] 2 QB 480) and if s 11 does apply, then the insured may escape the consequences at common law of a breach of a promissory warranty if he can show that the loss suffered was causally unconnected with his breach. However, it is probable that s 11 does not apply, and that *Hammond's* case, if it suggests otherwise, is not correct on this point. It is difficult to bring promissory warranties within the language of s 11, especially s 11(a). Section 11(a) refers to provisions of the contract defining "the circumstances in which the insurer is bound to *indemnify* the insured against *loss*" (emphasis added). Now breach of a promissory warranty does have the effect at common law of entitling the insurer to avoid liability, and so indirectly a promissory warranty may be said to define "the circumstances in which the insurer is bound to indemnify" (s 11(a)), but this is without reference to loss since avoidance may be made before any loss occurs. So while breach of a promissory warranty is a circumstance which may relate to the question of whether the insurer is bound to indemnify the insured against loss, it has a broader effect, ie avoidance may take place before the question of indemnifaction for loss has even arisen. □

Woman rapes teenaged boy

Males *can* be raped, says the Maine Supreme Court in a June unanimous decision.

While Canadians have been congratulating themselves on taking rape out of the *Criminal Code* in 1982 and replacing it with sexual assault provisions which apply to both sexes, 10 years ago the State of Maine legislature revised all its statutes to make them gender neutral.

The decision of Justice Daniel E Wathen on a preliminary proceeding in *State v Stevens* concerns the alleged rape by a 23-year-old woman of a 13-year-old boy. The trial of the action may proceed, the Court held. Although the Maine statute's definition of sexual intercourse – "any penetration of the female sex organ by the male sex organ" – suggests that only the male can be the instigator, the Court stated that the definition merely "reflects the biological reality that during intercourse the male sex organ penetrates the female sex organ".

Despite the fact that this case deals with statutory rape, the alleged victim being less than 14, Asst Attorney General Wayne Moss told *The Lawyers Weekly* that the *Stevens* decision implies that even forcible rape would be gender neutral as well. □

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Tax and the academic:

A raw deal

By Andrew Beck, Lecturer in Law, University of Otago

In this article the author points to what he sees as an anomaly in the tax law as far as academics are concerned. He looks at the question of costs associated with research, expenses in acquiring qualifications, and expenditure on books. In all three he argues that academics have something of a raw deal from a tax point of view.

If your employment requires you to travel or attend conferences or refresher courses; if you are rewarded by your employer as a result of obtaining a higher degree, then you will be able to claim as a tax deduction (subject to certain limitations) the expenses which you have incurred in these pastimes. That is, unless you happen to be a university lecturer.

The duties of an academic, broadly speaking, may be classed as teaching and research; the expenses incurred for the purposes of such employment are the purchase of books and journals; conference fees; travel; accommodation and preparation of papers, theses etc. Yet despite the fact that these expenses are incurred in the performance of duties for the employer, they are often neither reimbursed nor claimable as a tax deduction.

To qualify as a tax deduction, the expenses involved have to fall within the provisions of one of the clauses of the Fourth Schedule to the Income Tax Act 1976. These have been interpreted on a number of occasions by both the Taxation Review Authority and the High Court; they have also been amended by the legislature to make the intention perfectly clear – an intention which does not seem to favour academics.

Costs associated with research

From the taxpayer's point of view, the most advantageous place to fall is under the provisions of cl 8: expenditure not provided for in the other clauses and incurred "for the purposes of, and as a condition of" the employment. In *Mathieson v CIR* (1984) 6 NZTC 61,838, Davison CJ held that:

> The requirement that respondent carry out such research was a condition of his employment. Where the respondent chose to carry out such research was, however, a matter for him. (61,842)

On the basis of this reasoning, all travel expenses were immediately excluded from the ambit of cl 8. Nevertheless in *CIR v Belcher* (1986) 8 NZTC 5,047, Hardie Boys J found that travel expenses incurred in going to London to do research fell within the ambit of cl 6 which provided for expenditure incurred on travel in the course of the taxpayer's employment. In *TRA Case 81* (1986) 9 TRNZ 669, Bathgate DCJ found that similar expenses fell within cl 5(b) which relates to expenditure incurred:

> In attending refresher courses or any other course or conference or research project for the purpose of enabling the taxpayer to keep up to date with, or to develop his capacity to perform, his existing duties in connection with his occupation, not being expenditure incurred for the purpose, in whole or in part, of obtaining a degree or any other qualification of whatever kind.

The only significant difference between these last two instances seems to be that *TRA Case 81* involved a "research project", a point not considered in *Belcher.*

The disadvantage of being covered by cl 5 is that that clause has an annual maximum allowable deduction; in the past this provided the Commissioner with a very useful weapon – he would simply assess in terms of cl 5, thereby casting on the taxpayer the onus of proving that the expenditure fell in some other category, a task made more difficult by the fact that the TRA considered cl 5 as the primary section: any expenditure falling under cl 5 was automatically excluded from the provisions of the other clauses (see *TRA Case H80* (1986) NZTC 553 at 557.)

Some of the interpretations of the TRA undoubtedly involved a strain on the wording of the Fourth Schedule. These are, however, now only of academic interest because the legislature has amended cl 5 to include a new cl 5(c) relating to expenditure incurred:

> In undertaking, as a condition of [the taxpayer's] employment, research for the purposes of his employment.

Because cl 5(d) includes all travel, and accommodation expenses for

the purposes of 5(c) and cl 6 now expressly excludes travel expenses covered by cl 5, all expenses incurred by academics relating to research are now effectively subject to the limits imposed by cl 5. Although the maximum has been increased from $400 to $1,000, this is still a mere drop in the bucket as far as overseas travel expenses are concerned.

The question which arises is why the legislature has seen fit to impose this limit. None of the cases mentioned has questioned that academics are required to do research as a condition of their employment. In *Belcher*, Hardie Boys J went so far as to commiserate that the interpretation in *Mathieson*:

> . . . obviously places a premium on insularity. The need to travel for one's own and the country's academic enhancement does not need to be stated. (5,050)

Whereas other types of employees may attend several courses or conferences per year and find the limit of $1,000 quite adequate, this is hardly the case for academics who have to include, in addition, all research expenses, which relate to the very substance of their employment. Given the fact that the Government seems intent on making the tax system as fair and general as possible, there does not seem to be much justification for any annual limit.

Expenses in acquiring qualifications

From a tax point of view the last thing academics should do is expend vast sums on the improvement of qualifications. The provision dealing with this is cl 5(a) which allows for expenditure incurred:

> For the purposes of obtaining a degree or other qualification where, as a direct result of the obtaining of that degree or other qualification, the taxpayer receives or is entitled to receive an increase in income from employment.

For a member of the teaching staff of a university, it is practically impossible to argue that any increase in income is the direct result of obtaining a higher degree. The Courts have acknowledged this fact, pointing out that any such promotion is at the discretion of the university council, the obtaining of a higher degree being only a factor to be weighed in the exercise of the discretion (*TRA Case 71* (1986) 9 TRNZ 625 at 628). It is difficult to dispute that this is an accurate analysis of the situation and it is doubtful whether any university would bind itself contractually to provide an increase in pay for the acquisition of a higher degree. (This is what the Court looked for in *TRA Case 64* (1985) 8 TRNZ 475 at 479).

Just in case one might consider arguing that such expenses should qualify for deduction in terms of cl 5(b) or (c), it must be mentioned that the Courts do not consider that the different subclauses:

> . . . provide for an election by the taxpayers. Subcl (a) expressly provides for the case where the taxpayer's purpose is obtaining a qualification. Although subcl (b) provides for courses for the purpose of enabling the taxpayer to develop his capacity to perform his existing duties in connection with his employment, it is to be read in such a way as to exclude courses for the purposes of obtaining a qualification. (*TRA Case G26* (1985) 7 NZTC 1,104 at 1,107).

This approach was opposed in *TRA Case 71* (supra) where it was confirmed that cls 5(a) and 5(b) are mutually exclusive (at 629). At that stage there was nothing in the actual wording of cl 5 to compel the conclusion that the subclauses were mutually exclusive. Subsequently, however, the section was amended to read as above, making subcls (a) and (b) mutually exclusive. At the same time cl 5(c) was introduced without any similar proviso; it is therefore arguable that a taxpayer may claim as a deduction all expenses incurred in research, whether or not a qualification is acquired. Adopting the approach used by the TRA in the past, on the other hand, one is led to the rather absurd notion that an academic may deduct expenses incurred in research, provided that he does not acquire a degree as the result of such research or, perhaps, that he does not intend to acquire a degree, but merely does so incidentally. If, however, the research resulting in a degree amounts to a "research project" in terms of cl 5(b), the expenses will not be deductible.

This capricious approach has no logic to commend it, nor does there seem to be any reason why academics, of all people, should be denied tax relief in pursuing the essence of their employment. Clearly some sort of legislative clarification is necessary.

Expenditure on books

Prior to the Amendment Act of 1983 it was possible to deduct the cost of any book, journal or periodical up to a maximum of $20 in respect of any volume, issue or instalment (cl 2). While the amended clause provides for an increased maximum of $50, it also provides that it does not apply to matters referred to in cl 5. The import of this appears to be that while there is still a maximum of $50 in respect of each volume, issue or instalment, (cl 5(f)) the annual maximum of $1.000 is still applicable.

It would be extremely difficult for any academic to argue that any books or periodicals acquired by him in connection with his employment are not related to his research. This means that while any ordinary employee may acquire unlimited volumes (valued at $50 or less) and deduct their cost for tax purposes, the academic is saddled with an arbitrary maximum.

It is surely impossible to find any method in this. Assuming that the Government is not prejudiced against academics, why should only portion of their expenses be tax deductible? Why, in any case, should a limit of $50 per volume be imposed? It is submitted that these limits are inconsistent with a general egalitarian tax policy and should be removed.

Conclusion

From the above analysis it is very difficult to draw any conclusion other than that academics have something of a raw deal from a tax point of view. Perhaps the Minister of Education could sort it out with the Minister of Finance. □