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Law Week in Wellington

The idea of holding a special Law Week is not original to the Wellington District Law Society. A similar activity is held in Australia each year. Indeed it has now grown to such a size that a company has been established in order to organise and run the Law Week activities. There has also been something similar done in New Zealand for instance, by the Wanganui District Law Society which had a very successful Law Week last year.

The essential purpose of a Law Week, as it is being organised by the Wellington District Law Society, is to make people more aware of the place that law has in our society and of the benefits of the rule of law. The role and function of the legal profession is only a secondary and incidental matter.

The idea for a Law Week grew out of discussions at the Public Relations Committee of the Wellington District Law Society. The Executive Director, Miss Colleen Singleton, was most enthusiastic and the idea was eventually adopted by the Committee. Law Week will be held from 27 April to 1 May.

A separate Organising Committee was established under the chairmanship of Mr Richard Cathie. This consisted of several outsiders including representatives of the Police, the Department of Justice, legal publishers and community groups. It is this body that has been responsible for the basic work in organising Law Week.

It was also decided that it would be wise to have an Advisory Board. Sir David Beattie kindly agreed to be patron of Law Week. The other members of the Advisory Board are the Chief Justice Sir Ronald Davison, a former Prime Minister Sir John Marshall, the Mayor of Wellington Mr J Belich, the Mayor of Lower Hutt Mr Glen Evans, the Chairman of the Broadcasting Corporation Mr Hugh Rennie, the Chief Judge of the District Court Judge Trapski, the Solicitor-General Mr D P Neazor QC, and the Dean of Victoria University Law Faculty Professor Orr. Before his recent death, the Chief Ombudsman, the late Mr Lester Castle was also a member.

The Advisory Board has been most helpful. The Organising Committee has had meetings with them to inform them of what was planned and to get the benefit of their views. Having such a distinguished group of people on the Advisory Board also assists, of course, in ensuring that Law Week is recognised by the community at large as the important activity that it is.

To put on such a substantial programme as is envisaged there are very considerable expenses. Sponsorship of particular events and activities has been forthcoming and at the date of going to print the list of sponsors was:

Baldwin Son & Carey
Bank of New Zealand
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New Zealand Guardian Trust
New Zealand Law Society
New Zealand Police
Shell
The Insurance Council of New Zealand Inc
Trustbank Wellington
Wellington District Law Society
Westpac Banking Corporation

It is proposed that every household in the Wellington District Law Society area will receive in the post a copy of the programme. The publication and distribution of this programme is being funded by Westpac Banking Corporation.

Sir David Beattie in his introduction to the programme lists some of the activities that will be undertaken, including free legal advice, free simple wills, and seminars on many topics of interest and importance to the public. In addition members of the Society will speak to community groups including school children who will be particularly involved in the primary school area through an art exercise.

It is proposed that the functions for the week will start on the Monday morning with a breakfast at which the guest speaker will be the Rt Hon Geoffrey Palmer, Deputy Prime Minister, Attorney-General and Minister of Justice. At this breakfast there will be a large and representative body of community groups. During the breakfast there will be the announcement and presentation of the Hon Rex Mason Award for Legal Writing.

One of the main activities in the educational area will be the opportunity that will be given for people to consult a lawyer otherwise than in an office. Arrangements have been made for free legal advice desks to be provided in shopping malls throughout the region. These will be staffed on a voluntary basis by members of the profession. There will be 15 different malls that will be serviced in this way on various dates and with occasionally different times. In addition, a number of them will have lawyers available who speak languages other than English, more particularly Maori and Pacific Island languages and those booths will be separately advertised. Finally, it has been arranged that there will be a representative from the Ombudsman's office available at a number of the malls at various times during Law Week.

A large number of firms have volunteered to provide free simple wills during Law Week. The list of the firms prepared to provide this free service will be included in the brochure being delivered to every household throughout the region.

The National Bank Legal Education Seminar Series will include one on Town Planning, one on Copyright,

one on Law and Health to be given by Dr Alan Hilless, who has some controversial views on the topical subject of how health care in New Zealand should be funded and administered. There will be a seminar on the Residential Tenancies Act, another on the responsibility of Cabinet Ministers, one on Fair Trading and the Commerce Act, the Family Courts, the Rule of Law, Maoris and the Courts, Maori Land Law Issues, establishing a new business and so on. All of these are being organised by different legal groups. For instance, the one on the Rule of Law, in which Sharon Crosbie will interview the Hon Mr Justice Ellis and Wellington lawyer Helen Cull, is being organised by the International Commission of Jurists, the one on Ministerial Responsibility is being organised by the Legal Philosophical Society, and the one on Health Care is being organised by the Medico-Legal Society.

It is also proposed to hold a mock sitting of the Small Claims Tribunal in order that people can see how a typical dispute is decided. There will be tours of the District Courts, of the Land Transfer Office and of Parliament.

The Insurance Council of New Zealand Inc is sponsoring the Lester Castle Memorial Lecture which will be given by Sir David Beattie. The Police Department is organising a series of visits to schools. It has been arranged that there will be 28 secondary schools visited during the week. A police constable and a lawyer, in conjunction, will talk to sixth and seventh form students about the roles of each in the legal system.

It is expected that there will be considerable media interest in Law Week. Arrangements have been made for discussions on radio. The YC Programme will broadcast a talk on Legal Ethics during that week and there will also be the first part of a two part programme on The Trial of Socrates broadcast at that time. Judge Trapski will be interviewed on Radio Windy, and 2ZB proposes to be actively involved in Law Week. Even 2ZM which is essentially a rock music station intends to have some special programme snippets. On the National Programme there will be on the Thursday night Philip Liner who will discuss legal issues with a panel consisting of Sir David Beattie, the Editor of the New Zealand Law Journal, and young Wellington practitioner Bridget Nichols. There has been considerable difficulty in getting any interest from Television New Zealand but it is still hoped that there will be appropriate television programmes as well as news coverage. The local Wellington newspapers *The Dominion* and *The Evening Post* are both going to put out special supplements devoted to Law Week activities.

The lighter side of things has been well catered for. There will be musical entertainment that looks at matrimony, its break-down and the law, called "Fresh Revolving Pleasures". This has been written by A K Grant with music by Philip Norman. There is to be a "Judicial Revue" written by David Smith and Terry Swanson. Sam Hunt will be reading legal poetry and at Lower Hutt there will be a presentation of the trial scene from "The Merchant of Venice". Inevitably, the Wellington Gilbert and Sullivan Society is prepared to sing the well known music from "Trial by Jury" and the Police Pipe Band will entertain Wellington shoppers by performing in the centre of the city.

There is also to be a debate between a team of parliamentarians on one side, and a team of lawyers on the other on the subject "That a flawed Bill of Rights is better than no Bill of Rights". Sir Guy Powles will be in the Chair and it will be interesting to see whether the lawyers' team of Noel Sainsbury, Donna Hall and Jack Hodder can display more rationality and convincing argument than the parliamentary team of Michael Cullen, Fran Wilde, and Jim McLay can display typical parliamentary wit and the telling force of the non sequitur and the argumentum ad hominem.

There are to be a number of exhibitions during Law Week; the major exhibition will undoubtedly be the Buddle Findlay Photographic Exhibition. This Wellington Law firm has commissioned four of New Zealand's foremost photographers to produce a portfolio of images on legal themes. An exhibition of this work of Adrienne Martyn, Peter Black, Lawrence Aberhart and Janet Bayly will be on show during the week in the Michael Fowler Centre. This is a particularly generous sponsorship by Buddle Findlay. Special films are to be screened.

There will be an exhibition of legal technology and a book display being sponsored by Butterworths and another law book exhibition being put on by Bells Techbooks Ltd. There is to be an exhibition of legal cartoons sponsored by "Inform". In addition, the Wellington District Law Society is awarding prizes in a Law Week Schools' Art Award. Primary and Intermediate schools are putting forward entries for these awards. Lawyers have visited the schools involved to answer pupils' questions and to talk to them on important basic legal rights issues. The entries will be shown at a variety of venues in the districts where the schools are during the week.

All in all, Wellington is about to have an instructive and entertaining week. It is, of course, mainly aimed at non-lawyers. It is felt, however, that many of the activities, particularly some of the public lectures, will have considerable interest for practitioners. Moreover, by way of compensation for the work that so many will have done during the week, there will be a golf tournament held on the Friday afternoon as part of the official programme.

It is obvious that undertaking a week of such extraordinarily varied activity has required an enormous amount of work by the Organising Committee. For its success it will be finally dependent on the enthusiasm with which the legal profession in Wellington supports it. Unless lawyers do support the various activities in large numbers and go out of their way to persuade their friends and relations – and their clients – to be aware of and to take an interest in the activities of Law Week then the organisation will have been in vain.

A great deal of work has already been put into it by the Organising Committee. There have, of course, been some occasional hiccups. These few difficulties that have arisen are not of any great significance. Law Week should do more for the popular understanding of the law than innumerable press statements reacting to some criticism of the profession that appears in the news media. It is, of course, necessary to respond when such an occasion arises, but Law Week is intended to be more positive in its approach to the public.

It is hoped that Law Week will enable the people of Wellington to appreciate better the fact that they live within a system of law, and that there is a profession that serves them. It is for the lawyers of Wellington to demonstrate that this is so during Law Week at the end of April.

P J Downey

Case and Comment

Unconscionable bargains

The lack of certainty as to the scope of the Courts' jurisdiction to strike down unconscionable bargains has often been noted. Sheridan concluded that:

> probably the only safe generalisation is that the Court considers each case on its individual merits to see whether one party has taken advantage of the weakness or necessity of the other to an extent which strikes the Judge as being a greater advantage than the current morality of the ordinary run of businessmen allows. (Sheridan, *Fraud In Equity* p 73.)

The decision of the Court of Appeal in *Nichols v Jessup* [1986] BCL 1573 helps to clarify the approach which New Zealand Courts should take to unconscionability cases in the light of the Privy Council decision in *O'Connor v Hart* [1985] 1 NZLR 159.

In *Nichols v Jessup* Nichols owned a large back section with a 3.6 m wide access strip along the side boundary of Mrs Jessup's property which fronted the main road. Nichols approached Mrs Jessup about granting him an easement over part of her land which adjoined his access strip, which would double its total width. In consideration he would grant her a reciprocal easement over his access strip. Mrs Jessup agreed but later refused to complete the transaction when she learnt that the mutual easement would increase the value of Nichols' property by $45,000 (since further housing development was now made possible by his increased access), while diminishing the value of her own property by $3,000, since Nichols' right of way would extend to within inches of her windows and prohibit her from parking in her drive.

Nichols' action for specific performance failed in the High Court. Prichard J first rejected a plea of non est factum put forward by Mrs Jessup's counsel. He then canvassed the possibility of refusing specific performance which may have been justified by the one-sided bargain, Mrs Jessup's obvious inexperience and her lack of professional advice — but rejected his option because recognition of the validity of the contract would entitle Nichols to an award of damages to the extent of $45,000, a more disastrous result for Mrs Jessup than an order for specific performance.

The more effective relief, he felt, was to set aside the contract altogether as being unconscionable. Ironically, the basis for Prichard J's finding of unconscionability was the *same* as that he set out for a refusal of specific performance. It is contended that, while the one-sidedness of the bargain was obvious, Mrs Jessup's disability and lack of independent advice were less so. Mrs Jessup had her architect son present, at Nichols' insistence, during the discussion of the easements.

She had also been advised against the transaction by an insurance representative. Prichard J, however, stressed her lack of "professional legal advice". The presence of independent advice operates to rebut the presumption of advantage-taking and has never been confined to professional legal advice. In one case, it was said that discussion with the complainant's friends would have been sufficient (*Evans v Llewellin* (1787), 1 Cox 353). In another, the Judge held that the complainant's family and particularly her son should have been consulted (*Knupp v Bell* 58 DLR (2d) 466).

Since equality of bargaining power has never been a pre-requisite for contracting, the lack thereof is legally irrelevant. What is required to support a finding of unconscionability is special disability or disadvantage which materially impaired the complainant's ability to protect his/her own interests in the transaction (*Commercial Bank of Australia Ltd v Amadio* 46 ALR 402 at 413, *Moffat v Moffat* [1984] 1 NZLR 600 at 606). Prichard J found that despite being a registered nurse and owning a block of flats, Mrs Jessup was unintelligent, muddleheaded, inexperienced in such dealings and likely to be swayed by wholly irrelevant considerations. This, coupled with the one-sided bargain and lack of professional legal advice entitled her to relief. Prichard J himself voiced a concern that his decision came "perilously close to the granting of an indulgence".

In giving his decision Prichard J acknowledged a line of cases which imposed an additional requirement of advantage — taking or overreaching by the enforcing party in the finding of unconscionability. However, His Honour expressed his preference for the "modern view" that relief was not conditional on such finding of moral fraud or unscrupulousness. This was crucial to the Judge's final decision since he found "nothing dishonourable, unscrupulous or improper" in Nichols' conduct.

Soon after, the Privy Council reversed a unanimous judgment of the New Zealand Court of Appeal in *O'Connor v Hart* (supra). This decision must now be considered the definitive, if not altogether clear, statement of the law on unconscionability. The Privy Council found no unconscionability in that case because, although the complainant lacked contractual capacity and had no advice, and although the bargain was improvident, the enforcing party was guilty of

> no equitable fraud, no victimisation, no taking advantage, no overreaching or other description of unconscionable doings that might have justified the intervention of equity (p 174).

This decision thus made overreaching by the enforcer a necessary component of unconscionability. Nichols appealed.

Requirements of overreaching

In the Court of Appeal decision of *Nichols v Jessup* Cooke P and Somers J affirmed the *O'Connor v Hart* requirement of overreaching on the part of the enforcing party. Somers J stressed that the aim of the unconscionability jurisdiction was not simply to assist those who had repented of foolish undertakings; rather it sought to "protect those under a disadvantage from those who would take advantage of that fact; equity *looks to the conduct of the stronger party*" (p 3). McMullin J however insisted that no overreaching was necessary following his own judgments in *Moffat* (supra) and *Archer v Cutler* [1980] 1 NZLR 386. The validity of this insistence will be examined later. Despite the divergence in approach, all three Judges were agreed on the outcome — that the case should be referred back to the High Court. This makes the establishment of a clear ratio somewhat problematical although it is contended that the approach of Cooke P and Somers J comes close.

Contents of the requirement: knowledge

Labels such as "victimisation", "overreaching" and "advantage-taking" are conclusions reached by the Courts rather than the reasons for them. What then are their substantive contents? On the basis of *O'Connor v Hart, Amadio* and *Moffat* Cooke P and Somers J held that the enforcer's conduct will have the necessary overreaching or unconscientious quality if he/she knew or ought to have known that the other party was under a disability or disadvantage in protecting his/her own interests in the transaction. This is consistent with the Privy Council finding of no overreaching in that case because the enforcer "was unaware of the vendor's unsoundness of mind and had no means of knowing or cause to suspect that the vendor was not in full receipt of and acting in accordance with the most full and careful advice" (p 174). It also accords with Lord Brightman's statement that victimisation "can consist either of active extortion of a benefit or the *passive acceptance of a benefit in unconscionable circumstances*" (p 171) (emphasis added).

Traditional contract theory allows a contracting party to rely on the objective manifestations of assent reasonably interpreted to enforce a contract. There should, therefore, be some proper basis for depriving the enforcing party of their contract over and above considerations pertinent to the other contracting party. It is contended that the possession of the relevant knowledge provides such a proper basis, not because it is culpable in itself, but because it renders unreasonable the enforcing party's reliance on the assent of the party known to be under some serious disadvantage affecting their ability to protect themselves. The enforcer's reliance ceases to be reasonable, and gone is the justification for enforcement.

A contrary view

McMullin J in the Court of Appeal takes a view diametrically opposed to that of Cooke P and Somers J. It is suggested that he not only rejects the need to prove active extortion or dishonesty but also the necessity of finding the relevant knowledge. In essence, McMullin J approved the facts found and result reached by Prichard J in the High Court. Moreoever, he interpreted *O'Connor v Hart* as *not* insisting on "some improper mental element by the party seeking to take advantage" of the bargain (p 4) and not requiring a "lack of good faith" (p 7) although he conceded that the contrary appearance may have been given by the case. This is certainly inconsistent with the Privy Council's interpretation, in which unfair or unconscionable may mean not "bona fide", not in "good faith" (p 173).

McMullin J's position is not supported by the cases he cites. These cases support the view that no active extortion is required, but *not* that no knowledge of weakness is necessary. On the contrary *Richardson v Harris* [1930] NZLR 890, *Blomely v Ryan* (1956) 99 CLR 362, *Moffat,* and *Amadio* all give a prominent place to the enforcer's knowledge of the complainant's weakness in finding unconscionability. McMullin J himself referred to the enforcing party's awareness of the other party's advanced years and some manifestations of her eccentricity in *Archer v Cutler* (supra).

McMullin J also cited to *Fry v Lane* (1888) 40 Ch D 312, for the proposition that a transaction will be set aside "where a purchase is made from a poor and ignorant man at a considerable undervalue the vendor having no independent advice", with no requirement of overreaching. Significantly, Cook P reconciled it with *O'Connor v Hart* on the footing that the purchasers "probably knew that the vendors had no independent advice", (p 7). Of course, this knowledge is only significant in the light of knowledge of their weakness and therefore of their need for advice. The relevant knowledge can also be inferred in the two final cases relied on by McMullin J. In *Riki v Codd* (1980) 1 NZCPR 242 knowledge by Codd that he was dealing with Maoris who were inexperienced, uneducated, in need of money and "tended to defer to the Pakeha", can be inferred from the 18 years of previous dealing during which he induced them to look to him as a provider who would meet their financial needs. In *Cresswell v Potter* [1978] 1 WLR 255 knowledge of weakness can be inferred from the parties' marriage relationship of four years.

Internal inconsistency appears in McMullin J's judgment. On the one hand, he said he did not read *O'Connor v Hart* as "insisting upon overreaching as necessary to establish an unconscionable bargain" (p 7); on the other, he admits that in finding *no* unconscionability, *lack* of "overreaching and advantage-taking . . . were the factors on which *O'Connor v Hart* finally turned" (p 8). McMullin J explained this apparent paradox by reasoning that although overreaching was generally unnecessary:

> Their Lordships regarded the finding of the trial Judge in *O'Connor v Hart* as to price and terms of sale as being insufficient in the absence of overreaching to support a finding that the bargain was unconscionable (p 8).

That is, where inadequacy of consideration is insufficiently gross for a finding of unconscionability it may be supplemented by some finding of overreaching.

On McMullin J's reasoning Prichard J's decision in the High Court should have been affirmed, since the $48,000 disparity in value there must be considered gross by any standard and so not necessitating an inquiry into overreaching. Nevertheless, McMullin J agreed with the other two Judges that the case should be remitted to the trial Judge for further hearing on the issue of overreaching.

McMullin J's reasoning in support of his approach on unconscionability is unconvincing. It is essentially a dissenting judgment which, the writer contends, should not be followed.

Constructive knowledge

Cooke P and Somers J's judgments, requiring the relevant knowledge as an essential element of unconscionability should be preferred for having judicial

support and soundness in reasoning. Knowledge may be actual or constructive:

> A party will be regarded as unconscientious not only when he knew at the time the bargain was entered into that the other suffered from a material disability or disadvantage and of its effect on that other, but also when he ought to have known. . . . If the circumstances are such as fairly to lead a reasonable man to believe that another is under some serious disadvantage affecting his ability to protect himself he is bound to make inquiry and will be taken to know whatever such inquiry would have disclosed. Cf *Owen and Gutch v Horman* [1853] 4 HLC 997, 1035 per Lord Cranworth LC (Somers J, p 30).

The standard against which knowledge is to be judged is therefore one of "reason to know". In this respect the degree of disparity or imbalance in the considerations exchanged becomes influential.

Contractual imbalance

On the facts, Cooke P said that it would be open to Prichard J to conclude that Nichols must have been well aware of the defendant's characteristics and must have known or suspected that she was no judge of her own interests (p 12). What reason would he have to know of this? According to Cooke P, Nichols must have realised at some stage that there was a real imbalance in the arrangement, which was "glaring", particularly in the light of his work as a real estate agent. This should have alerted Nichols to Mrs Jessup's lack of ability to appreciate the relative consequences of the bargain. This knowledge may also have been inferred from their relationship as neighbours, although this was not adverted to.

Not only does a gross contractual imbalance warrant an inference of *knowledge* of disability, it can also apparently support a finding of the disability itself. Somers J, after reviewing Prichard J's rather marginal finding of disability, added that in assessing Mrs Jessup's state at the time of contracting "the nature and quality of the bargain she entered into, the advantage conferred by it on the plaintiff and the disadvantages occasioned to her or her property, will of course be factors" (p 4). The inference is that no one *not* suffering material disability could have agreed to such a one-sided bargain. One may well wonder whether the advice of her architect son was considered insufficient because it had allowed such a one-sided bargain to result.

It is suggested that the presence or absence of a gross contractual imbalance can be strongly determinative of unconscionability. *Nichols v Jessup* shows that in cases where the complainant's disability, the enforcer's knowledge and the adequacy of advice given are unclear, which must be the great majority of cases, each element may be satisfied by a process of inference from the gross disparity in consideration. As Cooke P indicated, unconscionable means "not in accordance with the ordinary rules of fair dealing" and the disparity in consideration "may be so monstrous as to show that by itself" (p 5).

The judicial process: result and reasoning

Prichard J found no overreaching on the facts of the case and held that overreaching was unnecessary to his finding of unconscionability. On appeal, the majority followed the Privy Council and held overreaching to be a necessary element of unconscionability. Why then, did it not simply reverse the lower Court decision? The Court of Appeal obviously did not want to reach a contrary result which would leave Mrs Jessup without relief from an obviously harsh bargain. On the other hand Cooke P recognised that the Appeal Court could not simply make the contrary finding of overreaching necessary to grant relief since this would trespass into the sphere of the trial Judge. The solution was to remit the case to Prichard J to "make his own evaluation as to unconscionability" but with some suggestions as to how this should be done. Cooke P emphasised the grossness of the inadequacy of consideration, pointed to evidence of unfair persuasion by Nichols and indicated that there was room for finding that he had actual or constructive knowledge of the contractual imbalance and Mrs Jessup's impaired judgment. The bargain, he said, could be described "as unconscionable within the spirit of this branch of law" but, of course, this was entirely up to the trial Judge to decide.

The four Judges sitting on this case came up with four different pictures of the requirements of unconscionability. Prichard J saw it as made out on proof of disability, lack of independent advice and contractual imbalance. McMullin J agreed but added that overreaching could supplement an insufficiently marked contractual imbalance. Somers J held that enforcement of a bargain would be unconscionable if there existed disability on one side and knowledge of that disability on the other. Cooke P added contractual imbalance to that list and took the analysis further by suggesting that such a bargain could nevertheless be insulated from judicial intervention by the enforcer "doing more towards ensuring that the defendant received adequate independent advice" (p 12).

It is significant that, despite their lack of unanimity on what elements are necessary to establish unconscionability, all four Judges indicated to varying degrees their preference for a conclusion of unconscionability in a factually marginal case where their differences could have been expected to make a difference in the conclusion reached. It is suggested that the key lies in the gross contractual imbalance which existed in the case, for despite the Courts' claims that the adequacy of consideration is immaterial to the validity of a contract, it is contended that Courts are in fact vitally concerned about the fairness of exchange. When a disparity in exchange is serious enough to offend the Courts' sense of justice, it is easy for them to reason that something must have gone wrong in the bargaining process and to search among the facts of the case for the elements necessary to give relief. The process of inferences drawn from gross contractual imbalance referred to above exposes the fluidity of the apparently solid elements set out and shows that in terms of results, the particular legal scheme applied may not make a substantial difference.

This however, should not mean a halt to our search for clear concepts which help to focus the issue. Cooke P and Somers J take us a long way in that search. According to them an unconscionable bargain is a contract involving a gross contractual imbalance made between A, a party materially impaired in judgment due to some disability and who lacks independent advice, and B who knows or ought to know of this and who has failed to do enough to ensure that A obtained adequate advice. In practice, however, it is suggested that in the majority of cases where one or more of the necessary elements of unconscionability are unclear, gross contractual imbalance will provide the key ingredient from which they can be inferred.

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Breach of promise to marry — Domestic Actions Act 1975, s 8

Izzard v Cuthbert, Family Court, North Shore; judgment 3 December 1986; (No FP 163/86); Judge J R Aubin.

The applicant, Mrs Izzard (to whose counsel the writer is indebted for a copy of this judgment and for other information concerning the case), alleged that, in 1985, she and the respondent had agreed to marry, and that the respondent had refused to go ahead with the marriage, having called it off the day before the date fixed for it. She claimed that she had incurred various expenses both in relation to the calling off of the wedding and the costs incurred in preparing for it, and informing people that it was not going ahead. The applicant also said that she had met expenses in moving her furniture and possessions, and also in having to pay, by way of rent, sums of money greatly in excess of what she would have had to pay for the accommodation she had prior to the agreement to marry and which she gave up because of the intention — at that time — that she would be moving into the respondent's home at Snells Beach. The parties were of mature years.

The respondent did not dispute the agreement to marry or the fact it was brought to an end. There was, however, a contest whether the financial consequences outlined above could properly be the subject matter of a claim such as the applicant was making which could result in the respondent's having to make payment or, at least, a contribution.

The evidence differed in certain respects, eg, as to who proposed marriage to whom. The Court took the view, however, that little time needed to be spent on this divergence because it was clear [from s 8(4)] of the 1975 Act that the Court must not have regard to the reasons for the termination of the agreement and the responsibility therefor. There was no need, either, to consider who proposed to whom, the reality being that it was agreed that there should be a marriage and that it did not take place. It had not gone ahead because the respondent had decided, perhaps correctly in the Court's opinion, that it would be unwise for it to proceed.

There could be little argument that certain arrangements had been made which had to be called off. Certain expenditure had been incurred in preparing and providing food, and the applicant accordingly claimed $49.37 in respect of wedding reception expenses. There were, also, toll calls which, she said, had had to be made to let people know of the cancellation. They amounted to $15.53. She said she had to move out of the Snells Beach property and go to temporary accommodation, for which she paid $40.00. She said she paid a $5 deposit on some curtains to be put up at Snells Beach. She further said she had had to move her furniture and belongings from her previous home in Dargaville to Snells Beach, thence to the temporary accommodation and thence to Glenfield, where she eventually obtained an expensive flat. These removal expenses, according to her, should be paid by the respondent.

The major item claimed by the applicant, however, was rent. At Dargaville, she was living in a Masonic unit at a cheap rent. She said she gave up this accommodation, gave notice to the lessors as she was required to do, and moved to the Snells Beach property in anticipation of that henceforward being her home. When the plans collapsed, she said, she could not face returning to Dargaville and meeting again the people she had so recently left. In any event, she added, she knew there was a waiting list for units at the Masonic Village and she had no doubt in her own mind that her unit there would not have been available to her because it would have been occupied by, or at least committed to, some other person by that time. It was thus argued that it was reasonable that the respondent should have to pay for the flat that she took. It was said that, over the period November 1985 to June 1986, she had had to pay $2,457 rent over and above what she would have paid had she remained in Dargaville and had not left there on the basis of the forthcoming marriage which did not take place because of the respondent's breaking it off.

(It would seem that, since June 1986, the applicant secured accommodation in Milford at a much reduced rental compared to what she paid in Glenfield. She did not claim in respect of the Milford rent, limiting herself to the time she left the expensive Glenfield accommodation.)

Counsel for the respondent drew a distinction between items such as the costs of the caterer and, perhaps, of the toll calls, as being costs based upon the agreement to marry, and further expenditure which did not have its foundation on the promise to marry but rather on the termination of the agreement. Thus the cartage costs and the rent stemmed from the termination of the agreement and did not constitute expenditure incurred prior to the proposed marriage that was necessary for the wedding. Judge Aubin observed that it could be argued that the expenditure on cartage and rent was "expenditure which causatively derives from the agreement to marry — if there had been no such agreement [the applicant] would not have left Dargaville, given up her accommodation there and moved to Snells Beach. If there had not been an agreement to marry, her furniture would not have come too and she would not have been faced, when the agreement collapsed, with the need to remove it."

The respondent testified, apparently, that the applicant was under no obligation to move from Snells Beach immediately, as he would have been willing for her to remain at least until such time as she could have found suitable alternative accommodation or made some inquiry whether the Dargaville unit was indeed lost to her. The applicant said she did not want to stay in the respondent's home. The Court accepted this, and that her feelings in all the circumstances were reasonable.

The Court thought it proper to approach the 1975 Act "without too great a degree of refinement". The situation was not to be looked at as one where the respondent had wrongly brought the arrangement to an end and must in some way be officially penalised as a consequence. The Act required [see s 8(3)] the Court to make such orders as it thinks necessary to restore each party to the agreement to the position he or she would have been in had there not been an agreement.

The learned Judge continued:

It seems to me that particularly what should happen in this situation is that there should be some sharing of expenses which have been incurred as a result of the termination of the wedding, the marriage proposal, and that that sharing should in the normal way be equally given; that to do otherwise is really to come to some view prohibited by the section [s 8(4)] that somebody was to blame at least to a greater extent than the other for the collapse of the proposed marriage.

The Court proceeded to deal with the claims as follows:

(1) The wedding breakfast expenses of $49.37 would be borne equally. On any kind of assessment of the fairness of the situation, they should not be borne by the applicant alone.
(2) The same reasoning applied to the cost of the toll calls and to the deposit on the curtains.
(3) As to the $200 claimed in respect of the removal of the applicant's furniture out of the respondent's home to the applicant's emergency accommodation, this flowed from the cancellation of the agreement to marry. The respondent should pay $100 of these expenses.
(4) As to the cost ($40) of the applicant's first three nights at the emergency accommodation, the respondent should pay half of that. It was reasonable for the applicant to move out of the Snells Beach home of the respondent.
(5) As to the subsequent rent, the Court considered that there had to "be some limitation" on this head even if it was prepared to allow it (as it was) as something which could properly be claimed under the 1975 Act. Two matters called for comment, viz, the fact that the applicant did not make any inquiry in Dargaville as to the unit she had there to see if she could go back. In the Court's opinion it would have been reasonable for her to have made such inquiry and to have adduced evidence to confirm that her Dargaville accommodation was indeed lost and that she could not have returned. Further, November 1985 to June 1986 was "simply too long a period in the circumstances of this case to assess some contribution by [the respondent] towards what had happened". There could be no doubt that the applicant was faced with moving out of the Snells Beach property. It was reasonable that the rent that she would be called upon to pay when she did move was likely to be appreciably higher than she was paying in Dargaville. In all the circumstances, she was entitled to some award under this heading, but substantially less than the amount sought. In addition to the $20 awarded under (4) above, the Court awarded $440 in respect of additional rent. The Court reiterated that it was not its function to penalise the respondent for what he did but rather to compensate the applicant for what had happened bearing in mind the provisions of the Court's duty under s 8(3).

Judgment was accordingly given in favour of the applicant. Although she recovered a figure considerably less than she claimed, it was held that she had succeeded to an extent and should therefore be awarded $250 costs.

Comment

The Court here had to break new ground in deciding what expenses were recoverable, since *Oliver v Bradley* [1986] BCL 1474; *Lampp v Blair* [1986] NZ Recent Law 316 and *Young v New Zealand Insurance Co Ltd* [1982] 2 NZLR 684; [1982] NZ Recent Law 53 do not really assist one in ascertaining the relationship between s 8(3) and (4) of the 1975 Act.

It is noteworthy that, on the matter of additional rent, Judge Aubin remarked that, if the applicant had still been at the expensive Glenfield property, she would, or could, have "come to the Court today and said she was still incurring this kind of expenditure", so that some kind of limitation would have had to be imposed.

It is not quite clear what was the basis of the award of extra rent in the sum of $440. The applicant stated in her affidavit that extra rent was no less than $440 per month. The award could thus be one of one month's extra rent. On the other hand, could it have been one-half of two months' extra rent? Certainly the latter would accord with the equal splitting of the other expenses.

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Insolvency

A recent English VAT case, *re Unit 2 Windows Ltd* [1985] All ER 647, raises two points of relevance to insolvency law in New Zealand. The case not only provides a precedent for any set-off claimed in relation to GST refunds but also calls into question the present practice regarding a bank's set-off against a wages account.

The liquidator's bible, *Anderson & Dalglish*, states at para 307.10 that where a bank has several accounts, one being in credit, it must set the credit account balance primarily against any debit that ranks preferentially, for example a debit arising from advances for wages. *Re E. J. Morel (1934) Ltd* [1961] 1 All ER 796, [1962] Ch 21, is quoted in support.

The recent English VAT case, *re Unit 2 Windows Ltd* [1985] All ER 647, throws doubt on this proposition. *Re Unit 2 Windows Ltd* requires that any credit balance to set off pro rata against debit balances which are respectively preferential and unsecured.

Unit 2 Windows Ltd was wound up insolvent having sufficient assets to repay preferential creditors but insufficient for unsecured creditors.

The company was owed a VAT refund by the Crown. GST in New Zealand operates on similar principles to VAT in the United Kingdom. The Crown in turn was owed PAYE and national insurance contributions by the company.

The Crown was a net creditor. The Crown owed less to the company than the company owed it. The legal difficulty was in determining how the set-off was to be applied against PAYE (which ranks preferential) and national insurance (which in the United Kingdom ranks unsecured).

The Crown wished to set off the VAT refund against the national insurance contribution. This ensured that the Crown would recover both the PAYE due (since preferential creditors were paid in full) and the national insurance

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Mens rea: Stare decisis v statutory interpretation

By Don Mathias, Barrister of Auckland

In this article the author looks at the present position regarding the doctrine of Mens rea. He surveys the case law on the subject and looks in particular at the recent decisions of the House of Lords in Anderton v Ryan *and* Shivpuri. *In respect of the Shivpuri case attention is drawn to the article in this issue of of the* New Zealand Law Journal [1987] NZLJ *118.*

Introduction

The doctrine that the law should be applied consistently is perfectly reasonable and deserving of respect. So is the principle that statutes should be interpreted in accordance with the legislative intent. Ideally, stare decisis is not inconsistent with statutory interpretation. But if a leading case contains a weakness in its reasoning, stare decisis could encourage the perpetuation of that weakness to a point where the case law becomes obviously inadequate as a reflection of the legislature's intention.

A concept may be capable of subtle analysis and refinement, yet the legislative intent, and matters of policy arising from that intent, may suggest that such refinement is inappropriate in relation to one offence (eg *Howe,* infra) but appropriate for another (*Crooks,* infra).

Over-consciousness of policy considerations may cause Courts to overlook previous judicial interpretations, and to misapply stare decisis by failing to recognise grounds for distinguishing cases which have been decided in the context of different matters of policy (*Martindale,* infra).

Many of the substances listed as controlled drugs have not been heard of by most people: the legislature requires obedience to standards of behaviour which are quite technical. In crossing the line between drugs and food (as in *Metuariki,* infra), it could be argued that Parliament has forfeited the right to a rigid application of the rule that ignorance of the law is no excuse. In this area the tendency of the Courts is to apply stare decisis techniques so as to preserve, but depart from, earlier decisions, rather than to recognise that policy considerations require revision of established ideas.

The analysis of precedent can result in concepts which tend to vagueness to the point of unworkability. Examples of this are the purported distinction

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contributions due (through the set off).

The liquidator followed dicta in *re E. J. Morel* and argued that the VAT refund should be set off first against the PAYE.

Mr Justice Walton departed from *re E. J. Morel* and offered the opinion that it was an instance where for once Homer had nodded.

Re Unit 2 Windows centred on s 31 of the Bankruptcy Act 1914 (UK). The equivalent New Zealand provision regarding rights of set-off is s 93 of the Insolvency Act 1967.

Mr Justice Walton said the section is not drafted in terms of benefit to any creditor or class of creditors. It is drafted solely in terms of account.

"Given that the section is not in any way intended to benefit debtor or creditor," said His Honour, "but to be a mere accounting exercise and that the right of either side to appropriate as he or it might wish is excluded, what other solution can there possibly be than to apply the rateable approach?"

His Honour ruled that equality was equity, or in this instance proportionate was equity.

The VAT refund was to be set off pro rata against the respective claims for preferential PAYE and unsecured national insurance contributions.

The principles in this case will be directly applicable in New Zealand to future instances where there is a GST refund due from the Inland Revenue Department to an insolvent company and the Department claims a set-off for PAYE and company tax payable. PAYE is preferential. Company tax is unsecured.

If the GST refund is less than the total of both the PAYE and the company tax, the GST is to be applied rateably against the PAYE and the company tax in proportion to the respective amounts of those two debts.

The principles in *re Unit 2 Windows* also affect a bank's right of set-off in circumstances where an insolvent customer has one account in credit (for example a term deposit) and two other accounts in debit (a current account and a wages account).

It is a common practice when a business suffers a liquidity crisis for its trading bank to demand that the business open an 02 wages account in addition to its 01 current account.

Cheques for wages alone are drawn on the 02 wages account. This preserves the bank's right to prove as a preferential creditor in a liquidation as regards monies advanced to pay wages, the bank being subrogated to the rights of the employees by reason of s 308(3) of the Companies Act 1955.

Cheques for other expenses may be drawn against the 01 current account by agreement with the bank.

The business may go into liquidation with a credit in the term deposit account to be set off against the debit balances in the 01 and 02 accounts.

The rule in *re E. J. Morel Ltd* requires the credit account to be set off first against the 02 wages account since this account ranks as a preferential claim.

Re Unit 2 Windows Ltd departs from this practice and requires the credit balance to be set off pro rata against the preferential 02 wages account and the unsecured 01 account.

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between mistakes of fact and mistakes of law and the notoriously elusive legal or factual impossibility criterion for liability for an attempt.

Conflicting perceptions of policy requirements have also caused differences in judicial opinion on the need for mistaken beliefs to be reasonable before they can exculpate the defendant. In an effort to reconcile the views, a distinction has been declared by some Judges to emerge from the analysis of precedent: that between common law offences and statutory offences. Such juristic sophistry may be the result of a miscalculated desire to adhere to stare decisis, when a frank acknowledgment that the Courts are legislating in accordance with perceived policy requirements might have saved the error.

Pertinent considerations

A difficulty in ascertaining the effects of policy on judicial determinations of the meaning of mens rea in particular cases is that Judges do not always say, even if they admit to being guided by policy, what the pertinent considerations are. These have to be inferred by reading between the lines of the decision; the problem is that retrospective attribution of judicial sympathy to a particular policy does not show that it was the policy that motivated the decision. However if Courts did mitigate the dictates of stare decisis according to policy considerations which emerge from examination of the mischief at which the relevant enactment is aimed, difficulties of the kind discussed below could be avoided.

As a result of the Courts' treatment of the elements of various offences, and the judicial and legislative assignment of onus and burden of proof, it is possible to group offences into categories. Four categories have been recognised, and it is suggested that two more exist in theory. These categories employ concepts such as "mens rea", "prima facie case", "subjective" and "objective" mistake, "balance of probabilities" and "reasonable doubt". They provide a guide to the questions which are likely to come up for determination in accordance with the dictates of stare decisis and/or statutory interpretation.

Categories of offences

Professor Orchard has shown in his article "The Judicial Categorisation of Offences" [1983] 2 Canterbury Law Review 81, that there now appear to be four categories of offences. The *first* is where the words of the legislation expressly or impliedly make mens rea an ingredient of the offence. Here the prosecution bears the burden of proving mens rea at the prima facie case level and also at the end of the day beyond reasonable doubt.

The *second* category of offence is where no express or implied mens rea requirement is found in the definition, and consequently proof of mens rea is not necessary for the prosecution to establish a prima facie case. The defendant is therefore obliged to point to evidence which raises a reasonable doubt as to the existence of mens rea if he is to avoid conviction. It should be noted that where the offence is in this category, an unsuccessful no case submission must be followed by the calling of evidence if a conviction is to be avoided (except where an appeal as to a point of law rejected by the tribunal of fact is to be relied on). The distinction between category *one* and *two* will not always be easy to define, turning as it will upon whether there is any "implied" mens rea requirement in the language of the enactment.

The *third* category was established by *Civil Aviation Department v MacKenzie* [1982] 1 NZLR 238. It consists of public welfare regulatory offences where the legislation is silent, both expressly and impliedly, as to the existence of any mens rea requirement. A prima facie case, consisting merely of proof of the actus reus against the defendant, is rebutted if the defendant proves, on the balance of probability, that he was objectively without fault. As is illustrated by Gallen J's "hesitation and reservations" in *O'Neill v Ministry of Transport* [1958] 2 NZLR 513, 518, it is again not necessarily easy to determine whether an offence falls into this category.

The *fourth* category of offences is where there is no mens rea requirement or defence of absence of mens rea or absence of fault. Offences in this category are traditionally called offences of absolute liability. That is not to say that the other general defences would not apply.

As Professor Orchard notes, an offence may fall into more than one of these categories, according to which aspect of mens rea is being considered. For example, in *Howe's* case (discussed in more detail below), in relation to the elements "riotous" and "damage", the offence would appear to be in the second category, (although category *one* would apply if it is accepted that there is an implied requirement of intention in the statutory language) and the Court of Appeal seems to have decided that in relation to the element "police car" the offence is in the fourth category, or perhaps the third. It is therefore slightly misleading to refer to these groups as categories of *offences;* they are more accurately described as categories of elements of offences.

The process of classification involves consideration of onus and burden of proof in relation to various elements of a particular offence; it does not establish exactly what the mental elements of the offence are.

Additional categories

Theoretically, two more categories might be defined, varying category three by applying a different standard of proof and allowing subjective mistake. Thus, category *five* would be category three but with a subjective defence allowed (ie the defendant proves on the balance of probability that he honestly believed his conduct to be innocent).

Category *six* would be category three but applying a lower burden of proof (ie the defendant raises a reasonable doubt as to his being reasonably mistaken as to the innocence of his conduct). However, bearing in mind the undesirability of over-development of subtle distinctions, one may doubt whether the Courts should utilise categories five and six. On the other hand there is no reason why all offences should be made to conform to and fall within the four established categories.

Conduct: consequences and circumstances

In *R v Howe* [1982] 1 NZLR 618 persons were charged under section 90(c) of the Crimes Act 1961 with riotously damaging a police car. On the facts, the conduct was divisible into consequences and circumstances of the defendants' acts. The relevant consequence was the damage done to the car; the relevant circumstance was that it was a police car. The Court of Appeal had to determine what were the mens rea requirements of the offence in relation to that circumstance. Would the requirements of guilt be satisfied if the defendant had not thought of the possibility of the car being a police car? The Court observed (p 623):

> In practice the lines between deliberately taking a serious risk, deliberately shutting one's eyes to it and simply not adverting to it can be very fine . . . We think that the practical consideration just mentioned is important in interpreting a provision such as s 90, concerned as that section is with

> damage to a wide range of types of property in the heat of a riot. It is not plausible that Parliament would have meant an individual rioter's guilt to turn on whether or not he gave conscious thought to the purpose for which a given car might be used. In our view the object of the section is sufficiently achieved, and the dictates of the mens rea principle and fairness to accused persons sufficiently recognised, by a more robust and workable interpretation.

Accordingly, the mens rea requirement with respect to this circumstance under consideration was held to be either knowledge or recklessness (including giving no thought to the matter). This looks like absolute liability (category four) in relation to this circumstance, but the Court appears to withdraw from that in saying (p 624):

> It may be that an accused who honestly and reasonably believed that the vehicle was *not* used in any of these ways would have a defence. . . .

Is the Court seriously suggesting that the standard to apply here is that of the reasonable rioter? This invites comparison with the problems which s 169(2)(a) of the Crimes Act 1961 has created, but that is another story. If the determination of the state of mind of a reasonable rioter does not involve the drawing of very fine, implausible and unworkable lines, then perhaps in this respect the offence belongs to the third category, where absence of fault (already a slightly absurd notion in this context), proved by the defendant to the standard of balance of probability, is a defence; or category six might be invoked.

Intention

Analysis of intention was also undertaken by the Court of Appeal in *R v Simpson* [1978] 2 NZLR 221, where the offence alleged was that against s 192(2) of the Crimes Act 1961: assaulting a constable with intent to obstruct him in the execution of his duty. The "consequence" could be described as the obstruction, and the "circumstance" as the fact that the person obstructed was acting in the execution of his duty as a constable. The statute clearly required intent in relation to the consequence, but what was the mens rea in relation to the circumstance?

In referring to the legislative history and the need to avoid departing from the "natural and ordinary meaning of the language used", the Court stated that the subsection required "a certain intent" (p 225):

> But the intent of which the subsection speaks is an intention to obstruct the person assaulted from carrying out *his duty*, not simply to impede him in whatever he is doing. And, in order to form a view as to what that duty was, the person charged must obviously reach a conclusion as to the status of the person assaulted. In short, the intent is necessarily found on a positive assumption as to the status of the person assaulted and the duty on which he is engaged.

The Court does not stop at that, but at this point it appears to be saying that the circumstance requires intent, just as the consequence (obstruction of the person) requires intent. That indeed would be the natural and ordinary meaning of the language used. However the Court retreats from that position in the passage which immediately follows that quoted above:

> There are gradations of belief from being completely certain about a matter to thinking that an answer is probable. We use the term "assumption" to refer comprehensively to any positive state of mind in relation to these matters. In our opinion what the Crown must prove is that the defendant assumed that the person he assaulted was a constable who was acting in the execution of his duty and that he did intend to obstruct him in the performance of his duty.

The legislature, of course, did not define the offence as "assault a constable with intent to obstruct him on the assumption that he is acting in the execution of his duty", and when "assumption" is taken to be "any positive state of mind" the ordinary and natural meaning of "intent" is, with respect, widened. Apparently a line must be drawn between a belief as to a probability (which is mens rea), and a belief as to a possibility (not mens rea).

The Court went on to consider exculpatory mistake. Without entering into a discussion of whether reasonableness was relevant, the point was decided as follows (p 226):

> Evidence as to the state of mind of a defendant including evidence of any mistaken beliefs on his part, whether of fact or law, is relevant on the question of intent. And so evidence that a defendant was honestly mistaken as to the facts and therefore believed the person he struck to be a trespasser would be directly relevant to the existence of the particular intent referred to in the subsection.

Here, "belief" must be a belief as to probability, or a positive state of mind that the circumstances did not exist. In allowing a subjective mistake as to law to be the basis of an exculpatory belief the Court is recognising a fairly wide defence while avoiding any possible difficulties of the kind which are discussed below concerning the drawing of distinctions between legal and factual mistakes.

The meaning of "knowing"

Suspicion and belief were distinguished by the Court of Appeal, in a decision delivered by Mahon J, in *R v Crooks* [1981] 2 NZLR 53. The context was the meaning of "knowing" in the definition of receiving in s 258(1) of the Crimes Act 1961. After making the point that for the purposes of receiving, "knowing" that the goods have been dishonestly obtained includes "believing" they have been so obtained, the Court continued (p 57):

> Belief is the result of a subjective evaluation of evidence or information which has produced acceptance of a proposition, or of the existence of a set of facts. Where a belief is founded not upon evidence or information from other persons but is derived from intuitive assessment of a set of circumstances, then it is not in the true sense a belief at all. It is only an opinion or, in the present context, a suspicion, and the fact that a receiver merely suspects good to be stolen cannot make him liable.

This subtle distinction is vital because upon it turns not only ultimate guilt or innocence but also, as a prior step in reasoning towards the conclusion, the relevance of any failure the defendant may have made to inquire as to whether his suspicion was well-founded. The Court held that where the facts give rise to suspicion alone, the turning of a blind eye is not evidence that the defendant believed that the goods had been obtained by a crime; but where the circumstances are sufficiently compelling to create an inference that the defendant knew or believed they had been so obtained, then it can be inferred that failure to inquire was a product of that culpable state of mind.

Thus in addition to the belief/suspicion distinction, there is another line to be drawn, between circumstances which "compel" an inference of mens rea and those which do not, and the further question arises whether the strength of the circumstances is to be measured subjectively or objectively when drawing that line. *Crooks* highlights the kind of refined analysis which can be brought to bear upon mens rea requirements in relation to circumstances in the absence of authority.

Policy considerations

The cases discussed thus far illustrate the range of states of mind that can fall within the requirements of mens rea with respect to the circumstances in which the defendant's conduct occurs. How do the Courts determine the ingredients of mens rea here? In the High Court of Australia's decision in *He Kaw Teh v R* (1985) 59 ALJR 620, 642 Brennan J answers this as follows:

> Principally, by reference to the language of the statute and its subject-matter. From those sources, the mischief at which the statute is aimed is derived, and the purpose of the statute is perceived. The purpose of the statute is the surest guide to the legislature's intention as to the mental state to be implied.

That appears to be an acknowledgment that the Courts, when determining mens rea requirements, seek to apply policy considerations which conform to the perceived purpose of the legislature. Policy may require a "robust and workable" definition, or alternatively an analytically derived definition, of mens rea. By comparing the approaches in *Howe* and *Crooks*, it can be seen that considerations of policy concerning the mischief at which the offence of riotous damage to Crown property is aimed preclude the delicate and refined analysis which is applicable to a pure property offence not involving elements of public disorder. In an abstract sense the reasoning in *Crooks* could have been applied in *Howe*.

Forgetfulness: stare decisis at its worst

It is well recognised that policy considerations arising from liability to imprisonment and stigma of conviction indicate that possession of a controlled drug is an offence of which the mens rea requirements include knowledge of the fact that the substance (which is proved to be a controlled drug) is in the defendant's physical possession. Lord Scarman observed in *R v Boyesen* [1982] AC 768, 773-774 that:

> Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature: but you do not possess it unless you know you have it.

And in New Zealand the same position was recognised by Mahon J in *Police v Rowles* [1974] 2 NZLR 756, where the offence was treated in a way which would now place it in the second category described in the introduction to this article. Mahon J distinguished a decision of the Court of Appeal (Criminal Division) in England, *R v Buswell* [1972] 1 All ER 75 on the grounds that the English case concerned lawful possession and civil law as opposed to criminal law was relevant. In *Buswell* lawful possession of a drug pursuant to a prescription was held not to cease merely because the defendant had forgotten he had it or thought he had lost it when in fact it had remained in his custody.

Departure from precedent

In an unconsciously radical departure from precedent the Court of Appeal in England has held that forgetfulness is not a defence to possession of a controlled drug: *R v Martindale* [1986] 1 WLR 1042, Lord Lane CJ gave the judgment of the Court and applied *Buswell* while not following a decision of the Criminal Division of the same Court — *R v Russell* (1984) 81 Cr App R 315 — on the grounds that *Russell* would have been decided differently if *Buswell* had been cited to it. Notably, *Boyesen* was not cited to the Court in *Martindale*. Either *Martindale* is wrong, or the mental elements of drug possession have increased in complexity.

As evident from the earlier discussion, complexity would not be a novelty in the law concerning mens rea. The basis of *Martindale*, perhaps appropriate to civil law, is that someone must have possession of the drug when it remained, albeit forgotten, in the defendant's wallet for about two years. Perhaps the most charitable thing that can be said about *Martindale* is that the Court was trying to avoid the position where (p 1044) ". . . a man with a poor memory would be acquitted, he with a good memory would be convicted" by convicting them both. It would be a pointless exercise to endeavour to define the mental element that you have when you don't have a mental element.

This is an example of stare decisis at its worst because reliance was placed on irrelevant authority while a binding precedent was ignored.

Mistakes of law and mistakes of fact

When a person acts under the mistaken belief that his conduct is not a crime, he believes that his conduct is "innocent". He may even have reasonable grounds for that belief, as where he possesses, with innocent mind, one of the obscure substances scheduled as controlled drugs, which no ordinary person would be expected to know was controlled. But if his mistake is one as to what the law is, as a matter of policy that is not recognised as a defence; his belief is not legally "innocent".

Where a mistaken belief concerns the facts which constitute the circumstances it may be sufficient to negative mens rea (as in *Simpson*, above). If the defendant in *Simpson* honestly believed that the police officer was acting outside the scope of his duty, the Court of Appeal indicated that that belief would negative mens rea, even if it was a mistake of law. The significance of this is that the supposed rule "mistake of law is no defence" is seen to be no more than a rule of thumb, although the Courts do not put it that way.

Returning to controlled drug offences, a person might believe that what he has is substance X, a drug, and that (correctly) substance "X" is not listed as a controlled drug; but if the identical substance was scheduled as a controlled drug under another name, "Y", would he have mens rea for possession of the controlled drug Y? Analogous facts, in relation to an offence under s 8(1) of the Poisons Act 1960, were considered in *Police v Taggart* [1973] 1 NZLR 732, Woodhouse J held that the defendant's knowledge of the nature of the substance precluded any mistake of fact, and his ignorance of the law (that substance X was scheduled under the name Y) "could not possibly assist him". Mistake of fact seems to have been precluded by the defendant's awareness of the qualities of the substance, its use.

Subtle distinctions

If awareness of the qualities of the substance is sufficient to constitute mens rea, then the decision of the Court of

Appeal in *R v Metuariki* [1986] 2 CRNZ 116 illustrates how subtle the distinctions are that can be drawn here. The defendant in *Metuariki* supplied to an undercover police officer some mushrooms which contained a Class A controlled drug (psilocybine). He did not know that they contained a controlled drug and there was even evidence that he believed there was nothing illegal about the mushrooms. But he did know that they contained a substance which was capable of having an hallucinatory effect on the mind. The Court had to decide, in effect, whether the defendant was in the *Taggart* category or the *Strawbridge* category. In *Strawbridge* [1970] 1 NZLR 909 the defendant cultivated a plant, but she may not have known it was a prohibited plant; she may have been unaware of its qualities which made the cultivation illegal.

Metuariki was grouped with *Strawbridge* and distinguished from *Taggart*, on the basis that Taggart at least knew that he had a drug. The line was drawn between an innocent belief that a substance which has an hallucinatory effect is not a drug, and a guilty belief that a substance (whatever effects it may have) is a drug. Metuariki was said to be claiming that he did not "know" (Richardson J), or not "believe" (McMullin J), or that he was "ignorant" (Casey J) of the fact that a drug was in the mushrooms. The distinction was put by Casey J as follows (pp 126-127):

> Accepting that he cannot plead innocent intention because he did not know the law, it is open to Metauriki to rely on his ignorance of the nature of the substance as evidence indicating innocence. The accused in *Strawbridge* could say "I did not know it was the controlled plant cannabis", but she would not say "I did not know that cannabis was a controlled plant". In saying that he did not know that the mushrooms contained a substance which was a controlled drug, Metuariki was attributing his lack of guilty knowledge to something other than mere ignorance that the law proscribed the substance. He was unaware of its identity as a controlled drug, in the same way as the accused in *Strawbridge* may have been unaware of the identity of the plant as one proscribed by the Act.

Strawbridge knew that she had a plant, but not that it was a controlled plant; Metuariki knew that he had an hallucinatory substance, but not that it was a controlled drug. Taggart knew that he had a drug but not that it was scheduled. Surely, with respect, Taggart's mistake was the same as that made by the other two; he knew the effects of the substance but not that it was proscribed.

It is unhelpful to assert distinctions between mistakes of fact and mistakes of law in this context. In *R v Shivpuri* [1986] 2 All ER 334, Lord Bridge recognised none of the substances listed in Class C of the equivalent UK statute, and His Lordship acknowledged that an educated layman would recognise "no more than a handful" of any of the controlled drugs, whatever the class to which they have been statutorily assigned. Given that, a defendant's awareness of the qualities of a substance in terms of its effects on the body (*Taggart*) or the mind (*Metuariki*) should not amount to mens rea.

What should be required for culpability is absence of an honest belief that the substance is not a controlled drug. In *Metuariki* Richardson J preferred to call the defendant's mistake "a good faith mistake as to an element in the definition of the offence", having noted (p 119) that "only two of the 40 or so species of the psilocybe genus which is one of the several genera of mushrooms known for their hallucinogenic effects are prohibited plants within s 2". This surely amounts to a timely erosion of the notion that ignorance of the law is no excuse.

Mistakes — reasonable and unreasonable

In respect to offences described in the introduction to this article as belonging to category one, it is clear that the possible existence of a mistake which negatives the mens rea requirement of any particular element of the actus reus will prevent the prosecution from proving mens rea to the required standard. In such a case the mistake may not need to be a reasonable one: the criterion is the definition of the mens rea requirements of the offence.

As to category two offences, of which *Strawbridge* is an illustration, there has been a change from a requirement of reasonable mistake, which was the stated criterion in that case. After the House of Lords decision in *R v Morgan* [1971] AC 182, it was felt that an unreasonable mistake would suffice to negate mens rea. In *R v Wood* [1982] 2 NZLR 233 the Court of Appeal noted this apparent consequence of *Morgan* but did not comment further as the matter had not been argued. However in *Metuariki* the Court of Appeal accepted that *Wood* had decided the matter: [1986] 2 NZLR 116, per Richardson J at p 118, per McMullin J at p 120; only Casey J (p 125) did not refer to *Wood* as authority for this proposition. The technique of effectively deeming a matter to have been decided in an earlier case, when really it wasn't, does have the advantage of avoiding the risk of a per incuriam evaluation of the common law. Unfortunately an opportunity for a useful discussion of the relevant matters of policy was lost.

Acceptance of merely honest albeit unreasonable mistakes as negativing mens rea was not an uncontroversial decision. The law lords in *Morgan* were not unanimous, and as Dickson J of the Supreme Court of Canada observed in *Pappajohn v R* (1980) 14 CR (3d) 243, 265:

> The difference between the majority and minority decisions in *Morgan* turned upon the way in which each law lord perceived the *Tolson* precedent, as being a wide ranging and well-established principle, or as expressing a narrow rule limited in effect to bigamy and the facts at hand.

A distinction has been mooted between statutory offences, which are said to require reasonable mistake, and common law offences which are said not to require that: Lord Cross in *Morgan;* Dawson J in *He Kaw Teh* at p 649. Such a distinction was rejected by Dickson J, in *Pappajohn* at pp 265-266. It appears that now it is generally recognised in England that a mistake need not be reasonable: *Williams* (1983) 78 Cr App R 276, where a statutory offence was under consideration and the Lord Chief Justice said (p 281):

> The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent. . . .

Of course the legislature may sometimes have the purpose of punishing negligence, as seems to be the latest intention of the New Zealand legislature in relation to rape: s 128(2)(b) of the Crimes Act 1961, which came into force on 1 February 1986, requires an absence of belief on reasonable grounds that the female was consenting.

In summary it can be seen that in working out their approaches to how to accommodate into the scheme of onus of proof and burden of proof the defendant's mistaken belief in the innocence of his conduct, the Courts in various jurisdictions have evaluated the common law differently and have sought to make some unsatisfactory distinctions. There has been a change from objectivity in the New Zealand law, subject to the wording of the legislation defining the offence.

Intending the impossible

In New Zealand it does not matter whether what you intend cannot be done: you can still be liable for an attempt to commit the crime you intended. Illustrations are abundant: *Higgins v Police* (1984) 1 CRNZ 187 (cultivating cannabis, attempt proved where seedlings not proved to be cannabis); *Police v Jay* [1974] 2 NZLR 204 (receiving a narcotic, attempt proved although substance was hedgeclippings); *R v Austin* (1905) 24 NZLR 983 (supplying an abortifacient, attempt proved although substance not capable of causing a miscarriage); and so on. The conspicuously odd one out is *R v Donnelly* [1970] NZLR 980 (receiving stolen goods, attempt not proved where goods had been in law returned to their owner). While, with a bit of effort, the majority decision can be justified, practically every other case is distinguished from it. (Cp. the observations of Williams in relation to *Anderton v Ryan*, discussed below.) In *Donnelly* the Court failed to give effect to the words in s 72(1) of the Crimes Act 1961 ". . . whether in the circumstances it was possible to commit the offence or not".

Surprisingly, the House of Lords made practically the same sort of mistake in a decision which it subsequently overruled with commendable haste in the face of telling criticism contained in an article by Glanville Williams in [1986] CLJ 33. The mistake occurred in relation to legislation which for present purposes can be said to be of the same effect as that which applies to attempts in New Zealand.

The case was *Anderton v Ryan* [1958] AC 560 in which Mrs Ryan was charged with attempting to handle stolen goods. She had bought a video recorder for a very cheap price, believing it to be stolen; it had not been. The House of Lords held that there was no attempt. This gaffe was put to rest in *R v Shivpuri* [1986] 2 All ER 334 where the House, in a leading speech by Lord Bridge (who had also delivered one of the leading speeches in *Anderton v Ryan*) held that a person who dealt in a harmless substance, thinking that it was heroin, was guilty of attempting to deal in heroin. All the law lords agreed that *Anderton v Ryan* should be overruled, even though a way of distinguishing the cases on the facts was offered by Lord Hailsham, with whom Lords MacKay and Elwyn-Jones agreed. In so suggesting, they were not grasping the nettle extended to them by Glanville Williams in his article where he said ([1986] CLJ 33, 75):

> . . . I would not be astounded if the lords resolved the appeal now pending before them in *Shivpuri* by distinguishing *Anderton v Ryan*. It may be said that mistaking a harmless powder for heroin is a mistake of fact, while Ryan made a mistake of law. Ryan could then be left in possession of her victory, while practically every other case is distinguished from hers.

Just such a distinction, which Williams shows to be ill-conceived, had been drawn in *Donnelly*, and as a consequence the decision in *Jay* was longer than it needed to be. No, the distinction they did suggest, one senses rather timidly, was that between Mrs Ryan's "intention" and her "belief". But Lord Bridge, with whom Lord Scarman agreed, saw "formidable practical difficulties" in the application of this so-called distinction, and recognised that the facts of the two cases were indistinguishable.

As the dust settles after this judicial dance in the minefield of impossible attempts, the impression one is left with is how sedulously the Courts respect of the doctrine of stare decisis, preferring to distinguish cases and adhere to illusory subtleties at the expense of applying the ordinary and natural language of the relevant enactment.

Conclusion

Stare decisis may require a Court to apply to the case before it an interpretation of a statute which does not readily fit the facts. The need, in *Jay*, to consider *Donnelly* and its concepts of legal and factual impossibility, provided a diversion from the application of the statutory language to the facts of the case. Similarly, in *Anderton v Ryan* the House of Lords fell into an error, which Chilwell J in *Jay* did not, through being diverted from the plain language of the statute by consideration of the classic hypotheticals involving the stabbing of a corpse and the liability of a man who has sexual intercourse with a girl wrongly thinking that she is under 16 years of age. The facts of *Jay* did not inevitably raise a legal or factual impossibility argument, and those of *Anderton v Ryan* do not readily reconcile themselves with the distinction, ultimately accepted by three of the law lords in *Shivpuri*, between intent and belief.

In *Metuariki* it is at least arguable that it does not matter whether the defendant's mistake was one of fact or of law — the categories handed down by precedent — the question is whether considerations of policy allow recognition of his excuse.

When a Court loses sight of relevant precedent, as occurred in *Martindale* in relation to *Boyesen*, it may be susceptible to irrelevant policy considerations. The Court of Appeal (UK) in *Martindale* was, as a result, swayed by the civil law in reasoning as it did, and it denied the defendant the right to put an established defence to the jury. Precedent and policy must be considered together. Courts should be in a position to review the authorities, ascertain the applicable law, and determine the utility of the concepts so ascertained to the facts under consideration, in the light of the perceived policy of the legislature in creating the particular offence. □

After *Shivpuri* — What?

By B Duffy, Solicitor, Cambridge, England.

It is most unusual for the House of Lords to overrule one of its own decisions twelve months after the earlier one was given. That however, occurred in Shivpuri's *case. The following article is by Shivpuri's solicitor and is reprinted with permission from* The Law Society's Gazette *of 26 November 1986. This article may loosely be compared with that by Don Mathias on* Mens rea *published in this issue at* [1987] NZLJ *112.* The Law Society's Gazette *for 4 March 1987 published a reply to Mr Duffy.*

Shivpuri's case has run its English course and on 15 May at the House of Lords his appeal was finally dismissed *(R v Shivpuri* [1986] 2 WLR 988). Finally? Not quite perhaps, because Shivpuri considers that he can still take his case to Europe.

The case was a difficult one from the beginning: there have been various reports written on it in various journals but the feel of the case and the facts of the case have not really come through. Moreover, only Professor Hogan at Leeds University has fully appreciated the alarming legal change that *Shivpuri* has brought about. Up until two months ago, when defence counsel looked at his criminal law brief, if he found a House of Lords case within the last 50 or so years which was plainly in line with his own he could advise his client with some confidence on the basis of that decision. No more. The Lords have said that they were wrong a year ago in *Anderton v Ryan* [1985] AC 560, and so it is possible for counsel now to say to his client: 'the House of Lords is against you, but you need not despair as we can go along now and try and get them to change their minds'.

The Facts

I have been Shivpuri's solicitor since his arrest and have attended all the proceedings, so I can claim to speak with some knowledge of the facts. First of all, what were these?

Shivpuri was at Southall railway station one dark evening and was briefly in the company of another man. This man, for reasons which may never be known, was being trailed by some 14 customs officers, and when he and Shivpuri emerged from the railway station a little apart, both of them were arrested. Shivpuri tried to run away, which was not surprising as he had a large cash sum on him which he had drawn that day, and he feared that this was an attack of "Paki bashing" and possibly robbery. He was caught. In a bag that he was carrying was a transparent polythene bag containing about two ounces of a dark brown crumbly substance much resembling ground-up autumn leaves.

Back in Cambridge at Shivpuri's flat were a further similar 15 packets. Certain statements were made to the customs officer by Shivpuri and a voluntary statement was written by him. There are arguments about the words which were said in the "verbals". It was generally agreed that Shivpuri had been shown some items in India, which he says he knew were not drugs, and had been asked to receive similar packages at Cambridge and distribute them according to instructions. There was evidence that Shivpuri had tested this powder in India, or at least a similar powder, and it was basically a vegetable material and not drugs. There was evidence that a suitcase had been delivered in Cambridge containing 16 packets of a similar substance but there was never any evidence at all that these packages had been imported into England, nor of the origin of the substance.

Shivpuri is known to be an intelligent man and it was further known to all the parties concerned that he had a particular knowledge of drugs since he had done considerable research into them. The contents of the packages were *Lactuca Virosa* and their colour and texture would hardly have deceived a child. Why were the customs officers deceived, if they were? Why was no test made on the substances for several days? There were several opportunities to carry out field tests but none was ever taken. Is it to be supposed that these items were sent from India through Heathrow and carried up through London to Cambridge and later instructions given to deliver them back almost to Heathrow? Why would anybody do that? The other man, supposedly a buyer, who was arrested with Shivpuri, had no money on him at the time he took delivery of the package. Why not? There are few bad debts in the drugs world. Had this other man been part of a team controlled from India the easiest way to get the two-ounce package to such a person would be to put it in the post. In any case, we are supposed to be in a drugs chain, and if the packets had contained ordinary talcum powder then there might be some feasibility in the idea of some sort of continuing deception, but there seems no possibility of this here. Shivpuri himself says that he was engaged, as he had been in the past, in important investigative journalism; this is why his first statement to the Customs was less than completely frank. It is certainly as good an explanation as any other.

The law

It would be possible to spend a long time talking about the circumstances and facts of this particular case, but it is only fair to say that nobody was ever really satisfied about the basic facts in the whole affair. Now what about the law? The Criminal Attempts Act 1981, particularly in regard to ss 1 and 3, is complicated. As one of the Lords

remarked "It wins no prizes for lucidity". Section 1 of the Act would appear to deal with *mens rea* in that an intent can be construed as such even though the true facts of the case render the commission of the offence impossible. So far as *actus reus* is concerned subs (1) refers to a person doing an act more than merely preparatory to the commission of the offence. Subsection (4), however, says that the whole of this section applies to "any offence which if it were completed would be triable in England and Wales as an indictable offence . . ." with certain exceptions.

In this particular case Shivpuri could have carried on in any manner he thought proper but he could never have completed the offences charged. The wording of the Act suggests that the Act cannot apply to offences which were impossible because of reality, but offences which were impossible of commission because of a bar to completion. If this submission is wrong then why is the word "completed" used and not the word "committed".

Later in the summing-up, the jury were told that "the charge is really an attempt to be concerned knowingly with an attempt to smuggle goods into this country". It is a pity that we shall never know what the jury thought of this and whether they themselves thought, knew or believed that an attempt at an attempt might be an offence under English law. Shivpuri himself has long maintained that the Criminal Attempts Act cannot be stitched onto the Customs and Excise Management Act since the latter Act does have a specific sweep-up clause for any fraudulent attempt at evasion and it cannot be right for attempt to be tacked onto attempt as the jury were told.

Lord Bridge at Harwich referred approvingly to *Hussain's* case, in which Lord Widgery had said that "knowingly" meant knowing "that a fraudulent evasion of a prohibition in respect of goods has taken place . . . even if he does not know precisely what kind of goods are being imported. It is of course essential that he should know that the goods that are being imported are subject to a prohibition . . . it is not necessary that he should know the precise category of the prohibited goods". Lord Bridge considered that *Hussain* remains law.

The issue of "knowingly" was most ably argued by counsel for Shivpuri and appeared to be accepted by the Lords but in the event was swept aside, principally by the judgment of Lord Bridge which could certainly be challenged. In his judgment Lord Bridge tried to simplify matters and said "did the appellant intend to receive and store (harbour) and in due course pass on to third parties (deal with) packages of heroin or cannabis which he knew had been smuggled into England from India? The answer is plainly yes, he did". Now this is not quite right. Shivpuri could not "know" that packages of heroin or cannabis had been smuggled into England from India. Shivpuri had had a suitcase delivered to him in Cambridge; it was a normal suitcase of cheap quality made by the million and was not marked with any initials or other identification, so that Shivpuri could scarcely have been aware that the suitcase was the one he had seen in India. He could not "know" that the contents of that suitcase had been imported nor could he "know" that they were prohibited drugs of any sort. In this matter it was immaterial what the belief might have been, since belief and knowledge are two totally different concepts.

Lord Bridge continued, "next, did he in relation to each offence do an act which was more than merely preparatory to the commission of the offence?" "What offence?", as Professor Hogan has argued. According to the Criminal Attempts Act, s 1 on which the prosecution relied relates to "any offence which, if it were completed, would be triable in England and Wales . . .". But as the offence would never be a triable offence that section could never apply to it.

The whole difficulty here was identified early on as a doubling attempt by trying to stitch on the Criminal Attempts Act to a statutory attempt, in the hope of avoiding the real interpretation of the word "knowingly" which *Hussain* got right years ago. Knowingly, said Lord Widgery, meant knowing that there was an evasion or attempted evasion of a prohibition. If there is no prohibition you cannot attempt knowingly to avoid what is not so. All the more so perhaps, when there is no evidence that the non-prohibited goods had in fact been imported.

Of course it will be argued by many people that the drugs trade is so horrible that almost any interpretation can be justified. But this will not do. The only way to avoid the jungle is to set down a clear law. This has been done in other countries but was not done in this case. The recommendations of the Law Commission are not being properly adopted.

Lord Bridge says, "to allow the appeal in this case would, it seems to me, be tantamount to a declaration that the Act of 1981 left the law of criminal attempts unchanged . . .". Why should this surprise Lord Bridge? The Lord Chancellor has said that he thought it "a pity that the Act of 1981 departed from the draft Bill attached to the Law Commission report . . .", which might have saved a lot of trouble. It could have left the law unchanged.

In my submission the case against Shivpuri founders on two rocks, not the alternative rocks of *Scylla* and *Charybdis*, but two rocks in line. The first is the applicability of the Criminal Attempts Act to an offence which could not be completed, and the second is the interpretation of "know" and "knowingly" as has been set out in *Hussain* and in *Taafe*. The difficulty about *Shivpuri* is that the House of Lords no longer has the last word, since ultimately another bench of the House of Lords can make another decision. Also, legislation which is liable to different interpretations may be interpreted differently, and the legislation whether partly or fully ambiguous, is left to stay in the books. □

All bad precedents began as justifiable measures.

Julius Caesar
quoted in Sallust's *Conspiracy of Catiline*

We must not make a scarecrow of the law,/Setting it up to fear the birds of prey,/And let it keep one shape till custom make it/Their perch, and not their terror.

Shakespeare
Measure for Measure (1604-05)

The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.

Robert Bolt
A Man for All Seasons (1962)

Judicial review and the public domain

By A I M Tompkins, formerly of Auckland and presently of Gonville and Caius College, Cambridge

In this article the author looks at the decision of the English Court of Appeal in the Datafin *case. Although the factual situation, involving the Panel on Take-overs and Mergers is clearly distinct from any New Zealand experience, the principles at issue concerning the power of the Court to grant remedies in respect of decisions of informal, non-legal, voluntary entities are important.*

The judgment in *R v Panel on Take-Overs and Mergers, ex parte Datafin plc and Anor* (CA (UK); (1987) 3 British Company Law Cases 10) was delivered on 5 December 1986. It seems likely that the case will occupy a similarly dominant position in English administrative law for 1987 as did, for example, *O'Reilly v Mackman* [1983] 2 AC 237 in 1983 and *C.C.S.U. & Others v Minister for the Civil Service* ("*GCHQ*") [1985] AC 374 in 1985. As a result more detailed analyses will doubtless appear in due course. This note emphasises a number of matters which, removed from the procedural clogs inherent in English judicial review structures, would seem to be of some relevance to the New Zealand scene.

The Facts

The facts of this case are complex and, in some points, unique to England. There is in New Zealand no equivalent to the Take-Over Panel (characterised by Sir John Donaldson MR as "a truly remarkable body" performing its supervisory and regulatory functions "without visible means of legal support"), nor is self-regulation the political, social (and indeed moral) minefield which events in England, primarily the "Big Bang" in the City of London and, lately, the Guinness share-buying scandal, have conspired to produce. The case concerned an application for review of a decision of the City of London's Take-Over Panel. The central players were:

(a) McCorquodale plc, a printing firm
(b) Norton Opax plc, the original bidder who had put in an offer for the share capital of McCorquodale
(c) Datafin plc, a new company formed primarily to compete with Norton Opax for control of McCorquodale
(d) The Panel on Take-Overs and Mergers

The Panel is an unincorporated association with no legal personality, and "no statutory, prerogative or common law powers, and no contractual relationship with the financial market or with those who deal in that market" (Donaldson MR at 12). Its primary function, as its name suggests, is to regulate the conduct of take-overs and mergers within the City, and to that end it has promulgated the City Code on Take-Overs and Mergers. The Introduction to that Code (cited by Donaldson at p 12) states:

> The Code has not . . . the force of law, but those who wish to take advantage of the facilities of the securities markets in the United Kingdom should conduct themselves in matters relating to take-overs according to the Code.
> . . .
> The Code . . . is, primarily as a measure of self-discipline, administered and enforced by the Panel, a body representative of those using the securities markets and concerned with the observance of good business standards, rather than the enforcement of the law.

Donaldson MR (at p 12) notes that

> Lacking any authority de jure, it [the Panel] exercises immense power de facto by devising, promulgating, amending and interpreting "The City Code on Take-Overs and Mergers", by waiving or modifying the application of the Code in particular circumstances, by investigating and reporting upon alleged breaches of the Code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base.

Norton Opax had made an offer for McCorquodale, which was approved by the Monopolies and Mergers Commission. Before Norton Opax had declared its offer unconditional, Datafin made a competing offer. Norton Opax upped its bid, and Datafin duly responded by increasing its offer. Norton then declared its offer unconditional, having received acceptances amounting to 50.2% of the share capital. Datafin then complained to the Panel, alleging breaches of the Code. The Panel considered the complaint and dismissed it. Datafin sought leave to apply for judicial review of this decision, was refused by Hodgson J at first instance, and appealed to the Court of Appeal. During the course of argument leave was granted, and

the substantive application considered.

The Issues

There were three issues before the Court:

(a) Are the decisions of the Panel susceptible to judicial review? This is the "jurisdictional" issue.
(b) If so, how in principle is that jurisdiction to be exercised given the nature of the Panel's activities and the fact that it is an essential part of the machinery of a market in which time is money in a very real sense? This might be described as the "practical" issue.
(c) If the jurisdictional issue is answered favourably to the applicants, is this a case in which relief should be granted and, if so, in what form? (Donaldson MR at 19).

This note will consider primarily the first of these issues, but at the end of the note a number of matters of general interest arising from the judgments in relation to all the issues will be mentioned.

Jurisdiction

The primary question here is whether judicial review can be extended to a body not founded on any statutory or prerogative basis, which has no legal existence, no formal powers, no fixed membership[1] or constitution, and is at once a legislator, a Court, counsel, an investigator and a police force. All the judgments are unanimous that it can. Sir John Donaldson MR delivered the leading judgment, and a sketch of his reasoning is as follows.

1 Although without visible legal support, there is ample indirect and invisible legal support. Various ancillary and collateral statutory powers, such as the listing procedures and powers in The Stock Exchange (Listing) Regulations 1984, coalesce with the existence of the Panel in such a way as Donaldson MR said (at 20) that:

> The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where the EEC requirements called for statutory provisions.
>
> No one could have been in the least surprised if the Panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain.

That it was not so instituted was "a complete anomaly" and "a historical 'happenstance' to borrow a happy term from across the Atlantic". The "act of government" referred to was the decision not to include in the Licensed Dealers (Conduct of Business) Rules 1983 (S.I. 1983 No. 585) any detailed provisions as to take-overs, but to rely on the self-regulatory procedures in the Code.

2 The question could then be formulated as:

> . . . whether the historic supervisory jurisdiction of the Queen's Courts extends to such a body discharging such functions, including some which are quasi-judicial in their nature, as part of such a system (Donaldson MR at 21).

Counsel for the Panel said no: jurisdiction in judicial review is dependent on the power under review being founded in legislation or the prerogative. Counsel for the applicant said yes: pay attention not only to the source of the power but also to whether it is "public" in its character, support, sanctions and functions.

3 Citing extensively from all three judgments in *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 Donaldson MR confirms that the exact limits of certiorari are not and should not be precise, and that what really matters is the "public" nature of the power under review:

> In all the reports [viz, *ex p Lain, O'Reilly v Mackman, GCHQ,* and *Gillick v West Norfolk & Wisbech AHA* [1986] AC 112 it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction. (pp 22-23)

This conclusion is closely echoed by the two other members of the Court. (See Lloyd LJ at 29-30 and Nicholls LJ at 32, although the latter perhaps felt happier with reasoning which, by an analogy with delegation, linked the Panel more or less formally with the various statutory bodies operating in the area.)

4 Taking into account the above, Donaldson MR draws the following conclusions:

(a) The Panel is performing an important public duty.
(b) The rights of citizens are indirectly affected by its decisions and not all those affected can be said to have assented to this, though some can.
(c) The Panel has a duty to act judicially.
(d) The Panel's source of power is partly moral persuasion and consent, but also can be found in statutory powers exercised by other institutions.

Given these factors, the conclusion that the Panel is susceptible to judicial review seems to be necessary:

> In this context I should be very disappointed if the Courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted (Donaldson MR at 23).

New Zealand

Whilst the answer given by the Court to the "jurisdiction" issue in this case can be seen as a justifiable step on the road already signposted

by *Lain, O'Reilly* and others, the New Zealand Court of Appeal has already, in some ways, reached a similar conclusion. In *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 the Court of Appeal was faced with a somewhat analogous issue. Like the Take-Over Panel, the New Zealand Rugby Football Union was not statutory or prerogative-based, did not have any formal legal powers, and, in theory, derived its powers such as they were from the consent of its members. That case was not, of course, concerned with the issue of whether or not the NZRFU and its decisions were susceptible to judicial review — the remedies being sought there and the provisions of Section 3 of the Judicature Act 1972 saw to that. But in deciding whether or not the applicants had standing to bring their action, the Court listed a number of factors[2] which are noteworthy in their underlying similarity to the factors listed by Donaldson MR. The theme running through both the respective lists is close to that identified by Donaldson MR as being "a public element, which can take many different forms". Now, whilst there have been numerous authoritative warnings of the dangers of allowing too strict a public law/private law dichotomy to permeate Administrative law,[3] if such a distinction is confined only to differentiating between matters which have some element of operating in the public domain from those which are properly and exclusively within the established forms of private law, such as tort or contract, then perhaps the danger is lessened. Emboldened by Sir Robin Cooke's admonition that "fair means fair" and "reasonable means reasonable",[4] it is submitted that "public" means "affecting subjects". Applying that to Lord Parker CJ's formulation in *ex p Lain* that the

> . . . ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects . . . [1967] 2 QB at 882.

it might now be argued that the effect of the *Rugby Union* case and the *Take-Over Panel* case is that the judicial review jurisdiction extends to every case where a person or persons, be they of a public nature or of a purely private or domestic character, decide something which affects subjects. Such a formulation is, of course, quite at odds with the jurisdictional assumptions underlying a number of major judicial review cases, such as *Gouriet v Union of Post Office Workers* [1978] AC 435 and *IRC v National Federation Of Self Employed and Small Businesses Ltd* [1982] AC 617. Lord Diplock, whilst discussing the former case in the latter, stated that:

> The defendant trade union in deciding to instruct its members to take unlawful industrial action was not exercising any governmental powers; it was acting as a private citizen and could only be sued as such in a civil action under private law. It was not amenable to any remedy in public law. [1982] AC at 639.

If, as submitted, the crucial thing is now the effect of the decision rather than the nature of the decider, then such statements can no longer be taken as correct indicators of the ambit of judicial review. This is not of course to assert that the Court will always agree to exercise their powers of review — the jurisdiction is there, but whether to exercise it, and how to do so, are separate issues.

Other matters of general interest

There are a number of additional matters of general interest raised by the case. These are mentioned briefly here as prompts to further thought.

1 The Take-Over Panel is an unincorporated body. In England the lack of distinct legal personality is of course no impediment to a body being susceptible to judicial review, and indeed in *ex p Lain* itself the Criminal Injuries Compensation Board was not incorporated. All that matters is that there is a "body of persons" acting within the formula. However in New Zealand the terms of Section 3 of the Judicature Amendment Act 1972 may have a bearing should a factual situation of the kind encountered in the *Take-Over Panel* case arise. The reason for this is found in the definition of "Statutory Power", as amended in 1977. Whilst a "Person" is defined as including "a body of persons whether incorporated or not", the judicial review procedures provided by the Act are, in terms of Section 4, available where such a person exercises, refuses to exercise, or proposes to exercise a "statutory power" or a "statutory power of decision". Both these concepts are defined as a "power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate". It seems reasonably clear that the Take-Over Panel was not exercising such a power — there was no Act conferring any power or right, nor was the Panel a body corporate. While the Act does not repeal the common law as to the prerogative writs,[5] it may well be arguable that, should a New Zealand Court be faced with a body analogous to the Panel and exercising similar powers, the procedures and powers in the Judicature Amendment Act 1972 would not be available, and that an applicant would have to apply at common law for relief.

2 This case is representative of an important general trend in Administrative law. The relaxation of the rules of locus standi, and the recognition that standing cannot be realistically considered in isolation from the merits of the case[6] are both symptoms of a change in emphasis away from restricting access to judicial review procedures at the threshold stage. The other side of this coin is that the discretionary nature of the remedies available is assuming a greater importance.[7] Counsel for the Panel argued strenuously that

> . . . finality should more appropriately exist at the threshold stage, by denying the possibility of action, rather than at the subsequent stage when the Court comes to exercise its discretion since by that time there will already have been a lack of finality for a period. (p 23)

Donaldson MR rejected this argument, and, it is submitted, his reasons for so doing betray a certain sense of unreality. He stated:

> . . . the Panel and those affected

> should treat its decisions as valid and binding, unless and until they are set aside. Above all they should ignore any application for leave to apply [for judicial review] of which they become aware, since to do otherwise would enable such applications to be used as a mere ploy in take-over battles which would be a serious abuse of the process of the Court and could not be adequately penalised by awards of costs (p 24).

With respect, this reasoning denies the notorious fact that financial markets simply do not behave in such a rational and considered manner. To expect them to do so is wishful thinking.

On a wider stage the whole question of the emerging importance of the Court's discretion at the remedial stage raises important conceptual issues. Craig (*Administrative Law*, (London, 1983) 516) formulates these as follows:

> The effect of [the discretionary bars to relief] is to compromise the *ultra vires* principle, in the sense that admittedly invalid action will be allowed to remain intact. The problem cannot be circumvented by arguing that the action is still ultra vires and that it is simply the remedy which is being barred. That would be to allow form to blind one to substance. This is *not* to say that we should never indirectly compromise the *ultra vires* principle. . . . What it does mean is that whether we allow the jurisdictional principle to be indirectly balanced with the conduct of the applicant is a question of principle, *howsoever* it is expressed. The point must be openly discussed. What is so interesting about the provisions [in the United Kingdom's Supreme Court Act 1981, section 31, and Order 53] concerning delay is that a balancing act taking into account the detriment to the administration was incorporated into the reforms with little, if any, consideration for its wider implications. If we allow the balancing here, why not with acquiescence and waiver? The implications spread further than these topics. There are direct links between the balancing undertaken here and the cases on representations. If we are willing to countenance a weighing process under the rubric of delay, why do we so vigorously deny the possibility when the individual is detrimentally affected by a public body's representation?

While one can dispute Craig's assertion that the discretionary bars encompass only delay, acquiescence and waiver,[8] the points made are important. If the Court refuses to allow itself to be "used for the creation of a real-life counterpart to Chekhov's perpetual student" (see *R v Aston University, ex parte Roffey* [1969] 2 QB 538, 559) is it consistent for it to allow itself to be used for the creation of a real-life counterpart to Kafka's unaccountable, amorphous and infallible bureaucracy, (see for example *Robertson v Minister of Pensions* [1949] 1 KB 227). If the Courts are to hold themselves out as guardians of the individual's safety "here on the most lively sector of the front in the constant warfare between government and governed",[9] is it justifiable for them to deny an effective remedy on the ground that:

> it would be an altogether unwarranted step to require the machinery of the . . . [Act] now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months. *(Fitzgerald v Muldoon* [1976] 2 NZLR 615 per Wild CJ at 623.)

3 Thirdly, at p 24 whilst disposing of counsel's plea for a threshold rather than a discretionary bar, Donaldson MR stated

> I think it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the Panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a Court of competent jurisdiction.

This statement refers to the vexed question of invalidity, which was subjected to comprehensive consideration by Taggart in his paper "Rival Theories of Invalidity in Administrative Law" (*Judicial Review of Administrative Action in the 1980s* at 70. Taggart identifies two competing concepts, the first being the principle of legal relativity:

> . . . unless or until the right remedy is sought by the right person in the right proceedings, unlawful administrative action must be accepted as valid.[10]

And the second being the relative theory of invalidity:

> That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void *ab initio* so that what purports to be an act done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such a challenge being upheld it is void, not merely from the time of a decision to that effect by a Court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice the consequence is that it is deemed to have been void *ab initio*.[11]

The interesting thing to note about Donaldson MR's comment is that he commits himself to neither camp. The crucial words are "subsist and remain fully effective", and "set aside". Those phrases are capable of fitting either concept without undue strain. So this case does nothing to dispel the conceptual uncertainty so lamented by Taggart, although no doubt supporters of both camps could and will find allies for their causes within the judgments.

4 Lastly, it is interesting to note Donaldson MR's adoption, at p 26, of the triumvirate analysis of the grounds for review set out by Lord Diplock in the *GCHQ* case of illegality, irrationality and procedural impropriety, as "well established". Whilst it is clear that the triumvirate is neither exhaustive or mutually exclusive;[12] Donaldson MR admits of no such possibility.

Nothing turned on the point, however, so not much can be read into this omission. The question of whether New Zealand Courts will adopt this triumvirate, or favour Sir Robin Cooke's extra-judicial triad of "in accordance with law, fairly and reasonably" (Cooke, 5) awaits an answer.

Last thoughts

Whilst of course being important for the legal reasons set out above, this case also touches on one of the most fundamental questions in all of Administrative law: What role should the Courts play in our society? The English Court of Appeal in this case has sited itself resolutely in the "activist" corner, as has the New Zealand Court of Appeal in recent years. The audience at "the most powerful law seminar yet held in New Zealand", (Cooke, 2) and readers of the papers there presented, can be in no doubt, however, that this role is not without its coherent and trenchant critics. The papers by Sir Gerald Brennan, Dr Taylor and Mr Bouchard are instances. Other writers such as Harlow and Rawlings, McAuslan, Craig and Hutchinson have all called for a critical approach to such underlying assumptions. Whilst it is beyond the scope of this note to attempt such a critique, a consideration of this case should also involve an active questioning of the "activist" function which underpins it. □

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1 In one sense the membership is fixed in that it comprises representatives of certain bodies, but not fixed in that those representatives change from time to time.
2 *Finnigan*, 179, especially numbers 4, 5, & 7.
3 See *Davy v Spelthorne* [1984] 1 AC 262, 276 (HL). Cf Woolf "Public Law – Private Law: Why the Divide" [1986] PL 220.
4 Sir Robin Cooke "The Struggle for Simplicity in Administrative Law", 14. This paper, along with others presented at a seminar on judicial review held at Auckland in February 1986, are published in *Judicial Review of Administrative Action in the 1980s* ed. Taggart (Oxford, 1986).
5 *Re Royal Commission on the Thomas Case* [1980] 1 NZLR 602.
6 The *National Federation* case.
7 See Harlow & Rawlings, *Law and Administration* (London, 1984) Chapter 10 for an expanded discussion of this point.
8 What of "extraordinary foolish conduct" (*Ex parte Fry* [1954] 1 WLR 730); or "[an] offence . . . of a kind which merited a severe penalty according to any standards current even today" (*Glynn v Keele University* [1971] 2 All ER 89)?
9 Wade, *Administrative Law*, 1 ed, 1961.
10 Taggart, 88, citing Wade "Unlawful Administrative Action: Void or Voidable" (1967) 83 LQR 499 at 512-518, and Wade *Administrative Law* (5 ed, 1982) at 310-315.
11 Taggart, 90, citing from *Forbes v New South Wales Trotting Club Ltd* (1979) 25 ALR 1, per Aicken J at 30.
12 Lord Diplock in the *GCHQ* case at 410; Lord Roskill in *Wheeler v Leicester City Council* [1985] 2 All ER 1106, 1111; Cooke, 6.

Books

Judicial Review of Administrative Action in the 1980s: Problems and Prospects

Edited by M B Taggart

(Oxford University Press in association with Legal Research Foundation Inc. 1986 ISB No: 0 19 5581512)

Reviewed by D F Dugdale

In February 1986 there was held at Auckland a rally of administrative law enthusiasts organised by the Legal Research Foundation. The volume under review reproduces (in a physically handsome form that does the publishers credit) the papers presented at this rout or revel, together with a brief foreword by Lord Wilberforce and a perceptive introductory critique by Professor Smillie.

The other piece of new material is a note by Mr Taggart entitled "*Osmond* in the High Court of Australia : Opportunity Lost". To the reader on this side of the Tasman of the *New South Wales Law Reports* the career of Justice Kirby since his translation from the post of Chairman of the Law Reform Commission of Australia to the presidency of the New South Wales Court of Appeal would seem to have been punctuated by solitary dissents born of a difficulty in switching from statements as to what he would like the law to be to declarations as to what the law actually is. But in *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 the President carried with him one other member of his three-man Court in ruling that there was a general duty on statutory bodies charged with decision-making powers to furnish reasons for their decisions. It is this case that is the subject of the paper presented by the Judge to the conference and published in the volume under review. There are those who find it a little unbecoming that a Judge should lecture on the topic of one of his own decisions (for surely his reasons for judgment should speak for themselves). Discomfort increases when it is found that the self-exegesis is distinctly thrasonical in tone ("This essay is about the triumph of the common law over its tendency to formalize" etc etc, see p 37). Embarrassment becomes acute when, the Judge's paper having been delivered on day one of the meeting, it is learnt on day two that the Court of Appeal's approach has been roundly and unanimously rejected on appeal by the High Court of Australia (see (1986) 60 ALJR 209). Mr Taggart's postscript should be seen as the effort of a dutiful host to smooth over a very real awkwardness.

For the rest we have Sir Robin Cooke on "The Struggle for Simplicity in Administrative Law". This is vintage Cooke, relaxed and witty. I particularly admired as an elegant riposte the reference (p 17) to "those who dream of an unpolluted well of common law, lying, tranquil and changeless, precisely where no one knows but certainly far from Molesworth Street . . .". (I suspect that today the well is located somewhere near Lake Burley Griffin.) There are papers by Brennan J of the Australian High Court and Dr Taylor

of the Ombudsmen's office on both of which more anon (Dr Taylor's paper is best read in conjunction with his article at [1986] NZULR 178). Dr Barton who is always sensible is on this occasion sensible about damages. Mr Taggart is interesting on invalidity, Professor D G T Williams of Cambridge deals with justiciability and Mr Mario Bouchard presents a down-to-earth viewpoint from Canada.

There are in all this richness many themes that one is tempted to pursue. Is the jettisoning of the rules as to *locus standi* a welcome abandonment of narrow formalism, or does it exemplify an unattractive avidity on the part of the Judges for a chance to put their oars in? It is a good to be reminded by Mr Bouchard (supported on this point by Lord Wilberforce) that famous victories do not necessarily in the long run benefit successful plaintiffs. An examination of this topic would require attention to the fact that when a slow-moving legal system is coupled with a fast-moving economic or political scene delay can be an end in itself, so that in this respect the Courts (in much the same way as they are in granting interim injunctions on the basis of a mechanical application of *American Cyanamid*) are permitting themselves to be misused by those with the resources to indulge in such ploys.

But it has seemed appropriate in this review to concentrate on the two most worrying matters of all. The first is the views advanced by Sir Robin Cooke as to the basis of the jurisdiction to review. There is no difficulty in accepting the proposition that a conferment of powers carries with it an implied obligation to exercise those powers lawfully. But what if the relevant statute by its express terms excludes the possibility of any such implication?

The answer that I understand Sir Robin Cooke to give in this paper and in earlier reported decisions and extra-curial observations is something like this. There exists, precisely where no one knows but presumably in the bosoms of the Judges, an unwritten code of fundamental constitutional law which cannot be validly tinkered with by statute. If the Courts were to hold themselves bound by any attempt by Parliament so to do "they would be acquiescing *pro tanto* in a revolution" (p 10). To which Professor Smillie (not a man given to wild overstatement) responds that "it is Sir Robin who is advocating revolution by mounting an open challenge to the doctrine of absolute Parliamentary sovereignty" (p xii). Sir Robin's position is not essentially different from that of a medieval churchman asserting that his allegiance to the Crown is transcended by his allegiance to a higher authority.

Professor Smillie (p xv) takes comfort from the fact that "while Sir Robin Cooke asserts very broad *theoretical* powers of judicial review, in practice the New Zealand Court of Appeal has shown considerable restraint in the *exercise* of its powers". Let us accept that if a priest, Sir Robin Cooke is not, or not yet, a particularly turbulent one. Let us acknowledge too that but for the Judge's candour and lucidity the present discussion would not be possible. But let us also keep in mind that we are not concerned with some village Hobbes or antipodean Rousseau ruminating in his study about life, the universe and everything, but with a (now) President of the Court of Appeal who has not hesitated to promote his particular philosophy *ex cathedra*. It should surely be a matter of genuine concern that the President of what is for most New Zealand litigants de facto their Court of last resort holds and does not refrain from expressing constitutional views that are not only idiosyncratic but also subversive of the doctrine of supremacy of Parliament, a doctrine which is the cornerstone of our democratic constitution and which one would have thought Sir Robin Cooke's oath of office required him to uphold.

The second troublesome matter on which this reviewer would venture a brief comment is the claim by the English and New Zealand Courts to be entitled (whether by the route of reasonableness or fairness scarcely matters) to concern themselves with the merits of impugned decisions by which such decisions are arrived at). This is not what the Courts of law are for. Let us not use silly euphemisms like "activism". (One might just as well say that Lizzie Borden's was an activist approach to parent-child relationships.) What we are witnessing is to put it bluntly and simply a usurpation by the Courts of a power that they are neither entitled nor equipped to exercise.

One can understand men of ability persuading themselves that their talents warranted their playing a more important role in the affairs of state than has been customary in the past for Her Majesty's Judges. But in this context to understand is not to forgive. What would we think of an actor who having accepted employment as the hind legs of a pantomime elephant was so convinced that his talents equipped him to play Prince Hamlet that he persisted in holding up the show from time to time while he declaimed the "To be or not to be" soliloquy through the hole in the elephant's bottom?

Let us now return to Mr Justice Brennan and to Dr Taylor. It can I think be fairly said that the Judge senses rather than analyses in any rigorous or intellectually satisfying way the problems likely to result from the exercise by the Courts of an unbridled power to review, but his message of caution is welcome. Dr Taylor wants the grounds for review carved down and codified by statute. That may well be the answer; and if such a statute provokes the sort of constitutional crisis that Sir Robin Cooke refers to then for the sake of this country's legal institutions the sooner this occurs the better.

And that brings us I suggest to the most important point of all. There is just no room in a unitary nation state for the sort of division of fundamental powers that Sir Robin Cooke postulates. By reason of judicial overreaching in the administrative law field our legal institutions are threatened. In England the end result of the pretensions of the medieval clerics was an established church effectively under the royal thumb. In New Zealand the likely end result invited by a judicial persistence in the aspirations criticised in this review is an analogous attack on the independence of the Courts. □

Law and Order and the Violent Offences Legislation 1986

By Neil Cameron, Simon France and Glen Luther of the Faculty of Law, Victoria University of Wellington

The Ministerial Committee of Inquiry into Violent Offending (The Roper Committee) has now completed its work. Even before the Committee reported, however, the Government took steps to legislate on the issue of law and order. This article was written before the Roper Report was published. In it the authors express the view that the legislation passed in 1986 was an unnecessary response to a political problem and was largely a matter of window-dressing. They express particular concern at the greater extent of discretion that is vested in the police.

A Legislation and Moral Panics

Since the last election New Zealand politics has been much exercised with the problems of law and order. The regular release of offence statistics by the police, often accompanied by requests for more staff, more community support and more public restraint and orderliness has kept the political debate on the boil. In the lead up to the next election, with both the National Party and the Police Association signalling that they intend to make law and order a major party political issue, the debate can only become more intense.

In a public lecture in 1983 the present Minister of Justice commented that the "politics of law and order is a minefield" characterised by "strong, if often highly simplistic, views" which are "often couched in extreme language". In such a context, he added:

> The political difficulty . . . is to avoid the simplicities, stereotypes and knee-jerk reactions which surround the law and order issue. The rhetoric is so strong that it becomes an enemy of analysis. On few political issues are the pressures more intense and more divided. It certainly makes the development of policy proposals based on rationality difficult. It is especially difficult to debate such issues on the floor of the House of Representatives in a way that avoids hysteria. (G W R Palmer, "The Legislative Process and the Police", in N Cameron and W A Young (eds) *Policing at the Crossroads* (1986) 86, 90.)

The manner in which the law and order issue has developed over the last twelve months or so and the initiatives taken by the present government to develop policy in the area of violent crime, illustrate both the accuracy of these comments and the nature of the pressures that the issue can exert on even those politicians who possess a healthy scepticism about the whole process. In the last few months the government has taken two major initiatives. It has set up a Ministerial Committee of Inquiry into Violent Offending under the chairmanship of Sir Clinton Roper which is now due to report in March 1987, and it has recently passed a number of amendments to the Crimes Act 1961 and the Summary Offences Act 1981 which came into force in October 1986. These amendments, which were introduced and debated as the Violent Offences Bill 1986, are the subject of this comment.

The circumstances surrounding the introduction of this legislation have all the hallmarks of what sociologists call a "moral panic" — that is a situation where:

> reaction to a person, groups of persons or series of events is out of all proportion to the actual threat offered, when "experts", in the form of police chiefs, the judiciary, politicians and editors perceive the threat in all but identical terms, and appear to talk "with one voice" of rates, diagnoses, prognoses and solutions, when the media representations universally stress "sudden and dramatic" increases (in numbers involved in events) and "novelty". (S Hall et al, *Policing the Crisis: Mugging, The State, and Law and Order* (1978) 16.)

As a result of the high media profile given to a number of specific incidents and to garbled reports of offence statistics, violent crime is seen as having suddenly reached epidemic proportions. New types of mayhem, especially involving knives, have emerged. People are no longer safe in their houses, police officers are no longer safe on the streets and politicians are no longer secure in their seats. Urgent steps need to be taken to halt this epidemic and in the scramble which follows every politician with electoral aspirations reaches for the nearest piece of legislation.

The Parliamentary debates show this picture to be a fairly accurate representation of at least the Opposition view. Thus, the former spokesman on Justice, Mr Paul East, observed:

> The Bill should be introduced, because every weekend we read in our newspapers about events that are causing grave public concern, particularly events relating to young people who carry offensive weapons. Every Monday morning we read reports of homicides after parties, brawls, and the like. Often those offences take place because the perpetrators are carrying offensive weapons. Similarly, weekend after weekend we read of the appalling violence relating to gang activities. That violence has been growing dramatically in recent years and we in the Chamber need to take strong

> action to bring to a halt that increase. The Bill, small though it is, may go some way towards that, but it is only a part of what is needed. A much greater commitment from the Government is needed if the serious increase in violent offending is to be stemmed. (*Parliamentary Debates*, 29 May 1986, 1756)

The Government, on the other hand, was obviously somewhat constrained by the Minister's concern to approach the issue in a rational fashion and debate it on the floor of the House in a way which avoided hysteria. Government members were in the somewhat uncomfortable position of denying that there had been any significant increase in violent crime — at least during the term of the present Government — while accepting that, in the words of the Minister, the Bill was a legitimate response to "further and justifiable public demands for public action". In the circumstances it is rather difficult to see quite what the Government saw the Bill as achieving. In summarising the effect of the Bill the Minister himself said:

> Accordingly, the Bill enacts a comprehensive set of offences relating to the use of firearms, knives, and any other weapons, punishable — in some cases with severe penalties — on the basis of the act of having or using a weapon, irrespective of the actual harm caused by the act. Punitive legislation is not the whole answer to the serious problem of violent offending that now confronts us. It may be that the new offences relating to the use of a weapon will not have a readily apparent deterrent effect, but, whatever the case may be, it is clear that the new offences as they are expressed in the Bill will be easy to administer and will raise few complex issues at trial level. (*Parliamentary Debates*, 29 May, 1986, 1749-50)

This paragraph, as Mr East pointed out, nicely encapsulates the intelligent, liberal politician's dilemma when faced with this sort of issue. He or she does not really believe that the legislation will have much effect on violent offending or public safety. It is impolitic to try and justify it solely as a neat piece of political theatre designed to reassure the public and quietly remove the Opposition's clothes. Yet some consequence must be promised. Ease of administration and lack of legal complexity will not stand scrutiny for a moment outside Parliament as reasons for passing a new law or as criteria of legislative effectiveness. Yet to the inhabitants of the Debating Chamber, it seems to provide some legitimacy.

Of course the Minister's problem is a real one. If this legislation were intended to affect the incidence of violent behaviour and reduce the amount of deliberate injury inflicted upon others in our society then all the evidence we have suggests that it would be doomed to failure. Indeed, the current orthodoxy among students of crime and criminal justice holds that:

> — increased resources to the police are most unlikely to reduce the crime rate, and may quite feasibly produce an increase in what is recorded;
> — harsher sentences upon convicted offenders will have no effect in deterring them (or other potential offenders) from future crime, nor indeed will more "rehabilitative" sentences achieve greater success in changing their behaviour patterns;
> — detaining offenders in prison for long periods, on the grounds of "incapacitation", is a policy that will have only marginal effects on the general crime rate, even if the prison population were to be increased by three- or four-fold. (K Bottomley and C Coleman, "Law and Order: Crime Problem, Moral Panic, or Penal Crisis?" in P Norton (ed) *Law and Order and British Politics* (1984) 38, 55)

On the other hand there are also problems if the legislation is to be justified largely as a piece of political theatre. Moral panics of this sort often call forth symbolic responses from government, and there are very strong suggestions of this in Government members' speeches at both the first and second readings. Thus in moving the second reading the Minister described the Bill as showing that "our criminal law is capable of signalling a response to conduct causing public concern", and characterised it as a response to "a widespread public reaction that the law relating to violent offences should be stiffened". It may well be that at this level the legislation will be more successful. Boosting police protection, increasing penalties and creating new offences may be successful in the short term in convincing people that something is being done. This may in turn have some effect on what the Minister described, somewhat inaccurately, as "the seriously destabilising effect on the community at large" of the increase in "offending . . . increasingly marked by randomness, callousness, and seriousness".

However, at least three difficulties arise with this approach. In the first place it may well be that the symbolic effects of legislation of this sort are seriously overrated. The suggested "destabilising" effect of increasing crime comes, not from the fact of increased offending or changes in offending patterns — as the Minister suggests — but rather from public perceptions and fears about offending. These fears arise from media stories and editorials, from police statements and demands, and from the political arena. Only rarely do they arise from personal experience. New legislation alone will have only a relatively minor effect on such fears if the moral panic created by these agencies continues. At present there is every reason to suppose it will — at least until the next election.

Second, even if symbolic legislation of this sort is successful in convincing people that something is being done and that the problem will be or can be dealt with effectively, the fact remains that in reality nothing very much is — at least directly. As a result not only is the public reassurance likely to be short term but the problem itself may even get worse. This last effect may not be very serious in practice, since in most moral panic situations the problem itself is vastly over-emphasised to start with. However, it still produces a situation in which ineffective and ultimately unconvincing legislation substitutes for the rational consideration of effective political and social action. Perhaps the Roper Committee, when it reports on the reasons for the apparent "upsurge in violence" and on the proper measures for dealing with it, will provide this consideration. If, however, that Committee simply turns out to be a more elaborate piece of political theatre — like, for example, the Select Committee on Violent Offending in 1979 — then the problems are compounded.

A third difficulty with legislation that is primarily symbolic in intent is that it does, of course, have some actual impact on some individuals and groups. The granting of greater powers to the police, for example, while not in fact equipping them to handle the overall problem any better, may well lead to increased police activity in relation to particular target

groups and a consequential increase in the risk of police illegality and police/minority group tension. Similarly, massive increases in maximum sentences in particular areas may well lead to an increase in sentencing inconsistency and individual injustice without really addressing the problem of how to deal with serious violent crime.

Hence, even before we begin to consider the details of this legislation, there are a number of apparent problems with it. It seems unlikely that it can achieve much in relation to the problem of violent offending itself. Even assuming that the problem really exists in something like the form in which it is presented by the media, police, politicians and the occasional Judge, creating new offences and increasing penalties will not affect it. On the other hand as a symbolic exercise in the reduction of community fear and concern, and in the rescuing of political chestnuts, the effects are also problematic. Furthermore, if they do result, they are likely to be both short-term and ultimately counterproductive. Legislating in an atmosphere of hysteria is, as the Minister himself has said, almost always a bad thing. The Violent Offences Bill 1986 is no exception.

B The Legislative Framework

Prior to the Bill, offences of violence were defined and ranked in seriousness according to the nature of the harm suffered and the accompanying intent of the accused. The bulk of those offences appeared in ss 188-200 Crimes Act 1961. The types of harm covered comprise assault, injury and wounding. Within each of these classes there is a range of offences, the maximum penalty of which increases depending upon the seriousness of the intent involved. Thus, whereas common assault attracts a maximum penalty of one year's imprisonment, assault with intent to injure has a possible maximum term of three years. Similarly, injuring with intent to injure merits a maximum five years but injuring with intent to cause grievous bodily harm has a possible sentence of ten years. The most serious of the "harms" is wounding. When done with an intent to injure the offender may be sentenced to seven years' imprisonment; when accompanied by a desire to inflict grievous bodily harm or to escape arrest the maximum possible is 14 years.

Within this pattern of offences the method of inflicting harm was traditionally seen as being more relevant to sentencing than to the definition of an offence. Weapons, as such, did not play a major role and legislation concerning them was limited in the main to the Arms Act 1983. The primary focus in that Act is on any "firearm, airgun, pistol, imitation firearm, restricted weapon, ammunition or explosive". Offences range from possession without lawful, sufficient and proper purpose (three months) to any use whatsoever with intent to avoid arrest (seven years). The various offences do not fit into any easily identifiable categories but rather deal with the miscellany of situations that may arise in the use of firearms. Included amongst the firearm offences are discharging near a dwelling-house or public place to the fear or annoyance of any person (three months), possession in a public place without lawful excuse (three years), presenting at a person without lawful and sufficient purpose (three months), careless use resulting in death or injury (three years), discharging in a manner likely to injure or endanger safety (three years) and possession while committing or with intent to commit any offence carrying a possible term of three years or more (five years). Finally note should be taken of s 198(1)(a) Crimes Act 1961 which makes discharging a firearm with intent to do grievous bodily harm punishable by 14 years' imprisonment.

This structure was completed by s 202A Crimes Act 1961 which prohibits the possession of offensive weapons (one year). An offensive weapon is anything made or adapted for causing bodily injury or if not so made or adapted, then capable of causing bodily injury and posessed in circumstances that show a prima facie intention so to use it (s 202A(1)). Under s 202A(5) an accused may rebut the prima facie intention.

The Violent Offences Bill 1986 creates six new criminal offences and doubles the maximum penalty for carrying an offensive weapon (s 202A Crimes Act 1961). The new offences are as follows:

(i) Using any firearm against a law enforcement officer acting in the course of duty. S 198A(1) Crimes Act 1961 provides that:

> Every one is liable to imprisonment for a term not exceeding 14 years who uses any firearm in any manner whatever against any member of the Police, or any traffic officer, or any prison officer, acting in the course of his or her duty knowing that, or being reckless whether or not, that person is a member of the Police or a traffic officer or a prison officer so acting.

(ii) Aggravated burglary. S 240A Crimes Act 1961 provides that:

> Every one is guilty of aggravated burglary and is liable to imprisonment for a term not exceeding 14 years who, —
>
> (a) While breaking and entering, or otherwise unlawfully entering, any building or ship with intent to commit a crime therein, has any weapon with him or her; or
> (b) Having broken and entered, or otherwise unlawfully entered, any building or ship, or having entered any building or ship with intent to commit a crime therein, while still in the building or ship —
> (i) Has any weapon with him or her; or
> (ii) Uses any thing as a weapon; or
> (c) While breaking out of any building or ship either after committing a crime therein or having entered with intent to commit a crime therein, has any weapon with him or her.

These two offences are triable on indictment only.

(iii) Using any firearm to resist arrest or detention. S 198A(2) Crimes Act 1961 provides that:

> Every one is liable to imprisonment for a term not exceeding 10 years who uses any firearm in any manner whatever with intent to resist the lawful arrest or detention of himself or herself or of any other person.

(iv) Commission of a crime with a firearm. S 198B Crimes Act 1961 provides that:

> Everyone is liable to imprisonment for a term not

exceeding 10 years who, —

(a) In committing any crime, uses any firearm; or
(b) While committing any crime, has any firearm with him or her in circumstances that prima facie show an intention to use it in connection with that crime.

(v) Assault with a weapon. S 202C of the Crimes Act 1961 provides that:

Every one is liable to imprisonment for a term not exceeding 5 years who, —

(a) In assaulting any person, uses any thing as a weapon; or
(b) While assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon.

All three of these new offences are triable either summarily or on indictment.

(vi) Possession of knives. S 13A Summary Offences Act 1981 provides that:

Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $1,000 who, in any public place, without reasonable excuse, has any knife in his or her possession.

This offence is only triable summarily.

C Specific Concerns

These new offences raise a number of questions. In the discussion that follows we intend to focus on four main issues — the impact of the legislation on existing sentencing structures, the focus on "using" firearms and other articles as weapons, the criminalising of "prima facie intention" and the new offence of being in possession of a knife "without reasonable excuse".

1 Sentencing

It is the area of sentencing which perhaps best illustrates the problems with this sort of piecemeal legislative tinkering. The sentencing structure created is lacking in balance and produces a number of bizarre penalty discrepancies.

The most glaring example is that offered by a comparison of the new aggravated burglary provision with the existing s 243 Crimes Act 1961 (being armed with intent to break or enter). This latter provision makes it an offence punishable by 5 years' imprisonment to be found armed with a dangerous or offensive weapon with intent to break or enter any building. The new aggravated burglary provision (s 240A) deals with the situation two seconds later when the person has broken and entered. At this stage the offence merits a penalty of 14 years. Nine years in prison is indeed a high price to pay for being arrested inside instead of outside the door. Furthermore, once inside, your weapon need no longer be dangerous or offensive; any weapon (undefined) will do.

Similar incongruities occur with s 198A(1). This section, which seems to be a companion offence to discharging as firearm with intent to do grievous bodily harm (s 198(1)), covers the use, in any manner, of a firearm against a law enforcement officer acting in the course of duty. Its penalty, at 14 years' jail, is the same as for an offence against s 198(1) and double that for discharging a firearm with intent to injure (s 198(2)). Even in the midst of the current panic over law and order it is difficult to imagine that many people would see hitting a police officer with the butt of an unloaded or inoperative shotgun as an offence that is potentially twice as serious as actually discharging a shotgun at a civilian intending to injure.

A final example can be found in the assault area. Under the new provisions, assaulting someone while possessing a weapon in circumstances that raise a prima facie intention to use it (although by definition the accused will not have used the weapon in the assault) will merit a possible five years in prison. This situation is equated to an assault by someone intent on actually going further and injuring the victim; indeed it is rated equal in penalty to someone who has actually injured his victim. Once again the new legislation distorts well-established grades of offence; not only does it rate possession (without actual use) of any weapon as being as important as a serious intent to injure, it also breaks down the carefully developed divisions between types of harm.

2 "Uses" any firearm or "weapon"

With the exception of the provision on knives, all the new offences involve either "using" firearms or weapons or having firearms and other things with you in circumstances which indicate an intention to use them. This raises a number of problems.

The major difficulty with the firearms sections (ss 198A(1), 198A(2) and 198B Crimes Act 1961) is with the width of the phrase "uses any firearm in any manner whatever". This presumably covers everything from discharging the firearm, to threatening, using as a club, tripping up, smashing windows, using as a lever and so on. The problem is that once you get beyond discharging or threatening to discharge the firearm the essence of the offence, which must be that the thing used is a firearm, is lost. Indeed, it is difficult to see why, once these sections go beyond presentation and discharge, there is any difference between firearms and other weapons. In the modern villain's arsenal firearms may well loom large — although even this remains unproven — but they are scarcely the sole means of inflicting mayhem. In s 198A(1), for example, is it really less serious to use a knife to attack an officer? Or a molotov cocktail? Is a blow from a club less serious than one from a rifle butt?

Similar difficulties occur with the legislative use of the concept of "weapon". This word, which appears in two distinct contexts, is left undefined. First, in s 240a it is an essential feature of the new offence of aggravated burglary to "have any weapon" with you. Under s 202A Crimes Act 1961 the term "offensive weapon" is defined in terms of either adaptation for use as a weapon or by reference to the intent of the accused. Is the term "weapon" here to be defined in the same way? Presumably not. Is it then to be anything, for example, that a reasonable person would accept as a weapon? Or is it simply to be read literally as anything capable of being used in a fight? This last interpretation is very wide indeed. After all, given the will and sufficient brute force almost anything from a pair of boots to a handful of small change can be used as a weapon. If someone is to be convicted of an indictable offence directed specifically at weapon carrying and having a maximum penalty of 14 years' jail their state of mind in respect of the alleged weapon should surely be

crucial. For example, a screwdriver used to enter a warehouse ought not to be considered a weapon without evidence that the accused regarded it as such. Yet given the paucity of the drafting in this provision it is unclear whether this is the case.

The term "weapon" also appears in the context of offences involving the use or potential use of any thing "as a weapon" (ss 240A(b) and 202C(b)). Here similar problems of definition occur, although the intention or knowledge of the accused is more clearly relevant. To use something as a weapon a person presumably needs to intend to use it as such. Again though, what does that mean? Presumably the accused needs to know or at least suspect that he or she is "using" something, but when will it be "as a weapon"? If you punch someone in the face seriously cutting them with your wedding ring have you "used it as a weapon"? What if you defend yourself by using a stick to ward off a blow or if you threaten to kick someone? Have you used the stick or your shoe as a weapon?

Furthermore, the sections which impose liability on those who use articles as weapons end up espousing a rather odd legislative policy. It may well make sense to penalise those who carry weapons or who deliberately take weapons to the scene of a crime. Why, however, do we especially want to punish those who, during a burglary or in the course of a fight, simply pick up the nearest object and use it? Such legislation seems unlikely to discourage others from doing similar spontaneous acts in future. Surely the appropriate course in such cases, and the one taken by the previous law, is to punish the accused on the basis of the state of mind with which the fortuitously available iron bar was used?

3 Prima Facie Intention

Perhaps the most distinctive feature of this legislation is the creation of two offences involving the possession of firearms and weapons while committing other offences in circumstances which prima facie show an intention to make use of them (see ss 198B(b) and 202C(b)). These new offences are unique in New Zealand law in that they impose liability based only on appearances yet are ostensibly justified by reference to some supposed mental state of the accused. Thus, while s 202C(b) makes it an offence while assaulting someone to have anything "in circumstances that prima facie show an intention to use it as a weapon", it is clear that even if the accused can prove the absence of any such intention the offence will be committed.

In their submissions on the Bill both the Law Society and the authors argued that this failure to allow the accused to rebut the prima facie impression of intention raised serious problems of principle. It was submitted that a defence similar to that provided by the offensive weapons legislation (s 202A(5)) should be given. The Minister rejected this view saying:

> I want to make it clear that the offence is committed if anyone uses a firearm or a weapon when it is reasonably believed by others that it will be used. The secret intention of the user will be relevant, if at all only to the question of penalty. (*Parliamentary Debates*, 18 Sept 1986, 4432.)

While this comment makes it clear that the legislative intention is to produce an essentially objective basis for liability, with due respect to the Minister it does rather misrepresent the effect of the provision. In the first place the section is not, of course, confined to cases where people use firearms or weapons as the Minister states. It simply covers all who have firearms or anything with them in the relevant circumstances. In addition, in neither section does liability depend on the reactions of any actual or hypothetical reasonable bystander. To prima facie show an intention simply means that there is, with hindsight, some evidence on which the trier of fact could find such an intention to exist. This produces a very wide test for liability indeed and one which probably goes considerably further than the major critics of the Bill originally feared.

Contrary to the Minister's view we would still argue that, for offences of this magnitude at least, the intention of the accused should be a relevant consideration. What is gained by punishing in the absence of such intention? In the case of firearms it may make some sense to forbid their carriage while committing other offences although this is surely adequately covered by the other provisions of this Bill and by the existing law. However in the case of s 202C(b) the provision makes no sense at all. Punishing people for having something with them which they are perfectly entitled to have, and which they can show they had no intention to use as a weapon simply on the basis that it looks as if they might have intended to so use it, is an exercise in sheer futility. It will not deter people from getting into similar scrapes in the future and it scarcely seems to be justifiable on retributive or denunciatory grounds. Ideally the prosecution should have to prove an intent to use; at the very least it should be open to the accused to show the lack of such a state of mind. The fact that we are reduced to arguing that a reverse onus provision of this sort would improve this position serves simply to underline the undesirability of the present formulation.

4 Knives

The new s 13A Summary Offences Act 1981 makes it an offence to be in possession of a knife in public "without reasonable excuse". The first point to note about this provision is that unlike some related Arms Act provisions it does not expressly place the burden of proving reasonable excuse on the accused. However, it is clear that s 67(8) Summary Proceedings Act 1958 will operate to shift it to the accused on the balance of probabilities (see *Stewart v Police* [1961] NZLR 680). This produces the rather paradoxical picture of a Minister who is advocating the adoption of a Bill of Rights simultaneously sponsoring legislation which makes use of a section which, at least on the basis of the applicable Canadian jurisprudence, would be contrary to that Bill. (See *Oakes* (1986) 24 CCC (3d)321 (SCC).)

That aside, it is the meaning of the phrase "reasonable excuse" which concerns us most about this provision. "Reasonable excuse" could mean that only those with a specific and justifiable purpose for possession at that moment are excused, such as the butcher carrying a knife to work. Alternatively, it could also excuse those with a more general justification such as one who carries a knife because it's "handy". Some might go further and argue that the excuse could extend to a traveller who carries a knife for self-protection or even to those who carry knives only to impress others.

The Minister of Justice stated in his speech to the House that:

> The Government remains committed to the concept of that offence and the reason for it is very simple. It is to counter what is obviously now the widespread carrying of knives by certain sectors of the community coupled with an unfortunately increasing willingness to use them. (*Parliamentary Debates*, 18 Sept 1986, 4433.)

This demonstrates that the Government's

intention is to strike at those sections of the public who carry and are willing to use knives for criminal purposes. If this is so, then surely the legislation should be drafted so that it catches only such individuals. As it stands it simply bans the possession of any knife in public, subject only to a rather uncertain "reasonable excuse" test which may well fail to isolate the intended group. Thus in terms of the examples given above it may well be that in law only the honest butcher escapes.

When the fact that knives are articles in everyday, lawful use, is coupled with the uncertainties of the reasonable excuse defence, a premium is placed on the use of police discretion. This in turn provides the opportunity for widespread abuse and further uncertainty. The Government seems to have recognised this danger and has endeavoured to deal with it by refusing to create any new search powers relating to knives. As the Minister explained:

> I want to put beyond doubt that while on the face of it such a provision will inculpate many who carry knives in a public place innocently there can be no search for such a weapon other than a search based on the law relating to offensive weapons and the fact of ordinary and accepted police discretion, and the legal checks on that will ensure that the provision is not abused. (*Parliamentary Debates*, 18 Sept 1986, 4433.)

This explanation is both revealing and inadequate. It is revealing in that it seems the refusal to create the search power that logic dictates should accompany a new possession offence is founded on the recognition that many who carry knives "quite innocently" will nevertheless be "without reasonable excuse". Such people are to escape liability not because they are legally innocent but because Parliament has deliberately refrained from giving the police the power to discover them. This is scarcely a satisfactory basis on which to legislate a new offence. Indeed it comes perilously close to abrogating the legislative function altogether.

Furthermore the mere fact that the police do not have a formal power to search for knives will not prevent abuse of this provision. In practice it will constitute an enormously useful tool for the oversight of those groups and individuals defined by the police as problematic — street kids, party-going youths, minority groups, etc. Searches for knives and arrests for knife carrying will be used as general control devices largely unrelated to the knife using potential of the people concerned. In such a context, where the police are dealing highly informally with the obviously "unrespectable", it is difficult to see that the "legal checks" on police discretion relied on by the Minister can have much effect.

Finally, the decision to single out one item for legislation on the basis that it is being used more frequently as an instrument of aggression must be questioned. It may well be — although it is far from established by the available data — that the use of knives is on the increase. However, once one moves beyond general concepts such as "offensive weapons" which are based at least loosely on the state of mind of the user, and begins to single out specific objects defined only by their physical characteristics, it must be asked where it will end. What is to be the next step if gangs, having read their Statute Books, proceed to abandon their knives in favour of scissors? Will we then need to grapple with the Public Carrying of Scissors Act? The Bicycle Chains Act? Perhaps we can even look forward with expectation and some apprehension to the Belts and Braces Act of 1990.

In addition to the four main areas just discussed there are a number of other significant issues both of substance and of drafting raised by this legislation. One in particular concerns whether the new aggravated offence of using a firearm while committing a crime (s 198B) is intended to be charged in tandem with the basic crime committed. For example, can an accused who robs a bank with a gun be convicted of aggravated robbery under s 235(1) Crimes Act 1961 and also of using a firearm under the new s 198B? Similar Canadian provisions have given rise to substantial litigation. (See *Krug* (1986) 48 CR (3d) 98 (SCC) and the cases discussed therein.) Whether such multiple charging breaches the doctrines of *autrefois convict* and *res judicata* will depend on the actual facts of the case and on the Court's view of the parliamentary intention in passing the new provision. The Canadian counterpart to s 198B (s 83 Criminal Code) carries a minimum penalty of one year's imprisonment, such penalty to run consecutive to any sentence for any other offence "arising out of the same event or series of events". With some hesitation the Canadian Courts have generally held that Parliament's intention was to allow multiple charging. Under this legislation the position is much less clear. Much will depend on the charging practice adopted by the police but if multiple charges are laid in such cases an area of considerable legal uncertainty will be opened up.

Conclusion

Our objections to this legislation are two fold. On the more general level we believe it is an unnecessary, ineffective and potentially harmful political response to the existence of a perceived but unproven "crime wave". More specifically, the actual offences created constitute, without argument or merit, serious departures from hitherto accepted principles of criminal liability. Such steps are always to be criticised but when they come about as the result of political window-dressing, they are doubly to be condemned. □

The Bill of Rights and the Canadian experience

By Professor R G Hammond, University of Alberta, Canada

The writer of the following comment, Professor R G Hammond, is Director of the Institute of Law Research and Reform at the University of Alberta, Edmonton, Canada. He is a New Zealander who was at one time in practice in Hamilton. He has previously contributed articles to the New Zealand Law Journal, *see [1983] NZLJ 152 and [1984] NZLJ 26. In his covering letter with the comment on the proposed Bill of Rights issue Professor Hammond regrets that his professional duties preclude his writing a formal article at this time, and what he had to offer was more by way of a comment to the debate. He wrote: "Obviously, given the importance of this subject to New Zealand, I would have liked to have done something in much greater depth but the comment may point to some information or raise some points that may interest your readers."*

Coincidentally I recently received simultaneously two items from New Zealand. One was the September, 1986 issue of this Journal with the *In Memoriam* to the late Mr Justice Mahon. The second was a private letter from a politician in New Zealand asking for my impressions of the operation of the Charter of Rights in Canada to date. It was Peter Mahon who once observed to me in the course of a civil trial before him in New Zealand that "there is nothing worse, Mr Hammond, than the murder of a beautiful theory by a gang of brutal facts".

That sage observation, which ought to be tacked firmly in front of the eyes of every lawyer and politician, could usefully be applied to the current constitutional debate in New Zealand. Hence, I do not propose to speculate hereafter about whether politicians or Judges ought to be making New Zealand's laws, or political ideologies or grand constitutional theories or what have you.

Recent studies

What I do propose to do is to draw attention — I have not seen them adverted to anywhere in New Zealand — to several recent studies which have been undertaken in Canada and which do appear to reveal some interesting facts about life under the new Canadian Charter of Rights.

Because this piece takes the form of a comment, rather than an academic article, I am not able to document everything here, but I should acknowledge that a good deal that I have to say hereafter is drawn from studies by two well repected political scientists from Alberta universities (Professors F Morton and T Withey) some from students of mine, some material from computerised data banks being maintained by several faculty members at the University of Alberta, and some from my own research.

As of late 1986 there are just under 2,000 reported charter cases in the law reports in Canada. I think most lawyers would agree that that is quite a lot of reported case law over roughly a five year period and shows how rapidly "charter litigation" has come to have a significant — even overwhelming — role in Canadian legal life. Of those reported cases, individual litigants have won approximately 31%. The individual success rate on reported cases has risen steadily from 25% five years ago to close to 35% last year. This is a remarkably high success rate for litigation of this kind, particularly when one bears in mind that the Supreme Court (the final Court of appeal for Canada) did not begin handing down decisions until 1984.

Activity patterns

Some interesting patterns are emerging as amongst the various levels of Courts. The Supreme Court, at the top of the tree, has been remarkably activist. Ten of fifteen litigants have won their cases there. Curiously enough, the next level of Courts below the Supreme Court — the provincial Courts of Appeal — have been found to be (in statistical terms at least), rather more conservative. The success rate for plaintiffs in those Courts is around 23%, and out of 105 cases in which provincial Appeal Courts reversed lower Court constitutional rulings, the Crown won 63% or almost two out of three. One of the other things which is of concern in Canada is that distinct regional variations in rulings are now becoming apparent. Moreover the Courts in some parts of the country are rather more obviously conservative than other parts of the country. For instance there is statistically less than a 20% chance of winning a charter case in Nova Scotia, whereas in Ontario the odds of success are significantly better — close to 33%. Looked at as a whole however, it is clear that Canadian Courts have been much more "activist" than many commentators thought they would be.

Another question which had troubled many of us was, who in fact would make Charter challenges, and what kinds of cases were most likely to succeed? The present statistical results here are of genuine interest. For instance, 25 minority language cases have been fought under the Charter to date, and in all but two plaintiffs were successful. It has been noted that many of these cases were decided by Judges appointed by the last Liberal administration in Canada (that of Pierre Trudeau), and hence were bilingual Judges. On the other hand all 19 aboriginal rights claims have failed in the Courts. The male rights movement seems to be an "in" thing — eight of the nine successful challenges to Canadian

legislation on the grounds of discrimination have been mounted by men, rather than women.

Striking down statutes

There had also been a fundamental concern as to how many federal and provincial statutes might be struck down either in whole or in part as being unconstitutional under the new Charter. This of course is a matter of no little consequence — in theory at least most of the legislation in force in Canada could have disappeared overnight. The raw statistics are interesting. Charter challenges to provincial statutes have been successful in 60 of 192 cases, or 31% of the time. In cases involving federal statutes, litigants have won 114 of 438 reported cases, or 26%. The immediate practical consequence of this has not been the dissolution of orderly civilised conduct in Canada as legislation falls to the ground around us. But one of the things that it has done is to place an extraordinarily heavy burden on government and government departments who have the very difficult task of trying to ascertain what is presently in conformity with the Charter and what is not. And governance has, on a day to day basis, been rendered much more difficult. The ability of a government to deal with "urgent" situations is much more restricted. (New Zealand could not (I think) have attempted without a great many legal challenges much of its recent economic adjustments had the Canadian Charter been in place in New Zealand.)

Further, Canadian governments (whether at the federal or provincial level) had been confident that judicial review would not reach as far as truly "political" decisions, or cabinet matters. In that they were wrong. For instance in the cruise missile case, from my jurisdiction, the Supreme Court of Canada resolved that even a governmental (cabinet) decision to allow cruise missile testing over Canadian territory could be tested in Court. Hence there is no government decision — even on a matter of national security — which now enjoys automatic exemption from the reach of the new Charter in Canada.

Criminal justice

Most of us had also thought that there would be some significant impact upon the administration of criminal justice, and the statistics show that this has indeed proved to be the case. Cases involving criminal law or the administration of criminal justice have accounted for over three quarters of all charter litigation. Indeed it is a commonplace to hear appellate Judges complaining that they are simply not able to get time to decide "ordinary" civil appeals and important administrative law appeals. The Justices of the Alberta Court of Appeal suggested to me in an informal discussion recently, that close to three quarters of all of their time as judicial officers is being taken up on these criminal law type constitutional law challenges, routinely in Breathalyzer cases.

One complication here has been the unforeseen willingness of Canadian judges to exclude evidence from the Courts because it was improperly obtained. Prior to the Charter, the Canadian legal system had routinely allowed improperly obtained evidence to be admissible, but under the Charter they have done a complete about face. So far there have been 450 reported instances of arguments to exclude evidence and 177 (or 39%) of those have been successful. Needless to say, Canadian law enforcement agencies are far from satisfied with the new position. The steady stream of applications to exclude evidence on the basis of alleged unreasonable search and seizure, denial of the right to counsel and so forth and so on are literally bedevilling the day to day administration of the criminal justice system (whilst at the same time delighting civil rights activists).

Equality provisions

One of the most difficult problems — and the provision that takes the present Canadian regime beyond anything else in the western world to date — is the so called equality section of the Charter. As might have been anticipated, this provision is giving the Courts monumental headaches and the Supreme Court of Canada has just released its decision on the first case under this head to reach it. This concerned the issue of Sunday shopping. Given the considerable ethnic mix in Canada today, many religious denominations had contended that laws requiring Sunday closing were unconstitutional and discriminatory. The decision of the Supreme Court has said that an enforced holiday is a "good thing" and can be justified as a reasonable legislative limitation on personal action but in effect has pushed the issue back to the legislative level (and on a locality basis at that) for resolution.

The equality provision is also producing some startling and idiosyncratic results in long established areas of the law. For instance an Ontario High Court Judge has ruled that the 700-year-old legal tradition (which also applies to New Zealand) embedded in bankruptcy laws and providing for Crown priority is unconstitutional. Revenue Canada is understandably perplexed. For even greater idiosyncrasy, one might refer to the decision of a Queen's Bench Division Judge in my own jurisdiction — and a former Rhodes Scholar to boot — who recently held that the traditional rule (in very much the form that it exists in New Zealand law) that says that a plaintiff can, in certain circumstances, get security for costs, is unconstitutional because at least in its existing form, it discriminates between classes of litigants.

Again from my own jurisdiction, one might point to the unlikely impact of constitutional law upon mortgage law. In Alberta, the personal covenant on a mortgage cannot be enforced (at least as against an individual homeowner). This is not unimportant in a jurisdiction in which foreclosures are running at the rate of about 1,000 per month. The Crown lending agencies on the other hand have long had the right to enforce the covenant (on thesis that public money is involved). Now the Queen's Bench Division has said that this is unlawful discrimination. The net result is that the Crown is threatening not to lend to homeowners, at least to persons without a *very* respectable equity, which of course simply engenders another kind of discrimination — this time against persons in lower socio-economic and income brackets and who need help the most! The net result of all this constitutional litigation is that Judges are now dictating the home lending policy to be observed in this jurisdiction. Then there is the superior court Judge in eastern Canada who recently decided that special time limitation periods in statutes to protect municipalities in particular kinds of cases are discriminatory, and who hence has raised the whole spectre of whether *any* differing limitation periods as between different kinds of industries, causes of action and so forth and so on are unconstitutional!

Fundamental legal discontinuity

There could be, and is, room for much debate about new constitutional regimes, and space alone precludes entering that debate here. But this much is clear. Anybody who thinks that dropping a Charter or Bill of Rights into a

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Canadian decision on Sunday closing

By Philip G Kopparath, a practising lawyer of Ontario, Canada

The decision of the Supreme Court of Canada in the Big M Drug Mart *case was dealt with at length in the report on it by D Brillinger published at [1985] NZLJ 231. The case decided the Canadian federal statute* Lord's Day Act *was invalid. This Act required shops and certain other businesses to be closed on Sundays in observance of the day of the Lord. The Supreme Court, agreeing with the Alberta Court of Appeal, held that the* Lord's Day Act *violated the freedom of religion guarantee in the recently adopted* Charter of Rights. *This was on two grounds. The first was that it was not justifiable to compel all Canadians to observe the Christian sabbath. This was held to be an infringement of s 2(a) of the Charter. Secondly it was said to be inconsistent with s 27 of the Charter relating to "the multicultural inheritance of Canadians". This decision has caused some controversy. The following critical comment is republished from the* Ontario Lawyers Weekly *of 12 July 1985. For the sake of clarity it needs to be borne in mind that Canada has a long-standing* Bill of Rights *statute, as well as the newly enacted and much more comprehensive and compelling* Charter of Rights.

There has recently been a spate of litigation concerning the constitutional validity of the federal *Lord's Day Act,* and of the provincial statutes in some of the province's regulating business activities on Sundays. One of the most important of these is *R v Big M Mart Ltd,* (1985) 3 WWR 481 (SCC). There, both the Alberta Court of Appeal and the Supreme Court of Canada were of the view that the *Lord's Day Act* was for the religious purpose of enforcing Sunday observance. The Act, said Chief Justice Dickson, must be characterised as a law whose primary purpose "is to compel the observance of the Christian sabbath" and therefore it constituted an infringement on "the freedom of conscience and religion guaranteed in s 2(a) of the Charter".

Chief Justice Dickson also held that both purposes and effect were relevant in determining constitutionality. But he did not specifically consider the *effect* of the Act as he was of the view that the unconstitutional *purpose* of the Act was sufficient to invalidate the Act.

His Lordship held:

> If the acknowledged purpose of the *Lord's Day Act,* namely, the compulsion of sabbatical observance, offends freedom of religion, it is then unnecessary to consider the actual impact of Sunday closing upon religious freedom. . . In any event, I would find it difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional.

Madame Justice Wilson considered the effect, not the purpose to be the determining factor. Her Ladyship said:

> The Act infringes upon the freedom of conscience and religion guaranteed in s 2(a) of the Charter. This is not however because the statute was enacted for this purpose but because it has this effect. . . In the case at

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Commonwealth legal system today is merely a strengthening of individual liberties (however necessary or desirable that may be) is hopelessly wrong. Such an exercise is a fundamental legal discontinuity. It alters completely the dimensions of legal and political life, both the form and the terms of the decision making, cuts across generations of legal development, and the results are quite unpredictable and, on occasion, perverse. That is not to say that such a new regime might not eventually be found to achieve a better solution to the problem of power (for that is what constitutions really address) than the existing politico-legal arrangements. Yet I cannot help feeling that New Zealanders have not given the matter any more thought than Canadians did.

It is useful to recall the words of Lord Radcliffe in his brilliant 1954 Reith Lectures:

> Constitutional regimes are all very well, but their shapes can be seen to be performing the strangest dances unless those inside them have a very real idea of the purposes to which they were intended to be put.

Does New Zealand *really,* in the late twentieth century, want nineteenth century small "l" liberalism from a small group of Judges? Or does it want to actually think, and try to create something that might have some hope of leading to a better balanced, more open and civilised form of governance in the twenty-first century, and one which reflects more truly New Zealand's unique history and heritage? □

> Bar, the effect of the *Lord's Day Act* is to compel adherence to the Christian sabbath by requiring the uniform observance of the day chosen by the Christian religion as a day of rest. It is this effect which infringes upon the freedom of conscience and religion guaranteed by the Charter.

It appears that the source of the *Lord's Day Act* has been equated with its purpose. Chief Justice Dickson traced the history of the Act and concluded that the Act had a religious purpose.

With the greatest respect it is submitted the history of the Act would show that the Christian observance of Sunday was the source of the Act rather than its purpose since religious customs and practices are an acknowledged source of law. In the absence of a preamble setting out the objectives of the statute any conclusion as to the purpose of the statute can only be in the nature of an inference, or an assumption.

While the Court held the Act had a religious purpose, it is equally possible to infer from the wording of the Act that the purpose of the Act was secular in that it provided for a national holiday. From the fact that Sunday observance of the majority religion became the source of the Act it cannot be concluded Parliament was motivated by an improper purpose in choosing Sunday as a day of rest for all Canadians.

Since Canadians always had complete freedom of religion, it would be more reasonable to say that Parliament could not have intended to curtail or infringe religious worship or compel religious observance. This view is buttressed by the fact that Canada has no established church and all religions are on an equal footing.

The finding on the effect of the *Lord's Day Act* would appear to be based on the "remote" effect of the Act, whereas only the "direct" effect ought to have been considered. As, the Supreme Court held in *Robertson and Rosetanni v The Queen,* [1964] 1 CCC 1, the direct effect of the Act is only secular, namely the closure of certain businesses on Sundays by adherents of all religions including Christians who would have otherwise opened their businesses on Sundays.

It is submitted that Madame Justice Wilson has stressed the indirect effect of the Act namely, the compulsion of the religious observance of Sunday. With respect, it is submitted that in order to find a statute unconstitutional on the basis of bad purpose and/or bad effect, the purpose should be clear and the effect direct.

There has also been a broadening of the meaning of freedom of religion. As Mr Justice Martland said in *Walter v Attorney General of Alberta* [1969] SCR 383, 393:

> Religion involved matters of faith and worship and freedom of religion involved freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship.

Defined thus, it is difficult to find that the *Lord's Day Act* infringes anybody's freedom of religion. It is doubtful whether a broadening of the meaning of freedom of religion beyond this definition would be warranted. However according to Chief Justice Dickson, even an "appearance of discrimination" against non-Christian Canadians would violate the freedom of religion guaranteed by the Charter.

On the basis of Chief Justice Dickson's reasoning, it can be argued that s 254 of the *Criminal Code* making bigamy a criminal offence violates the freedom of religion of a Muslim whose personal law allows him to marry more than one wife. A Roman Catholic Christian can argue that the *Divorce Act* violates his right to practice his religion as that Act allows dissolution of marriage contrary to the teaching of his religion.

Big M Mart also raises questions on whether the Supreme Court is bound by its earlier decisions and whether lower Courts are bound by its decisions. Though the issue in *Big M Mart* case was identical to the *Robertson* case, the Court arrived at an opposite conclusion.

The Provincial Court and the Court of Appeal of Alberta declined to follow the decision of the Supreme Court of Canada in the *Robertson* case on the ground that the *Robertson* case being based on the *Canadian Bill of Rights* was not applicable to Charter cases.

It is submitted that this distinction cannot be maintained in view of the fact that the *Bill of Rights* is as much a part of the constitution as the Charter itself. In *Singh et al v Minister of Employment and Immigration* (1985), 58 NR1, Madame Justice Wilson observed:

> . . . there can be no doubt this statute [the *Canadian Bill of Rights*] continues in full force and effect and that the rights conferred in it are expressly preserved by s 26 of the Charter.
> If the *Canadian Bill of Rights* is a part of the constitution, the freedom of religion guaranteed by the *Bill of Rights* and that guaranteed by the Charter should be defined in the same manner. □

Judicial independence

It is vital that the general public feels confident in the integrity and impartiality of the Courts. For this reason the Judiciary must be secure from the influence of politicians. Judges must never be seen to be acting in response to pressure from the Executive. If, for example, Courts increase their sentences at the invitation of politicians speaking through the media, the appearance of independence is imperilled. What is worse, the next offenders who come before the Courts for sentencing may well wonder about the influences at work upon their sentences. It is the Government's firm policy not to interfere with the independence of the Judiciary. The Government's role is in the making of the legislation.

Hon G Palmer
Address to Probation Officers Conference 2.11.84

A bad idea to give judges wide Charter powers

By Rob Martin, a Canadian lawyer

This article is reprinted with permission from the Canadian publication The Lawyers Weekly *for 26 September 1986. The author takes a critical view of the practical working of the* Canadian Charter of Rights and Freedoms. *He sees an activist judiciary as a backward step. This is to be compared with the article by Professor Don Stuart published in this issue* [1987] NZLJ *138.*

Our legal system has stumbled into a time warp. Many of our judges seem to believe they are living in the United States in the 1880s. At least that's the way they've been acting.

The problem, of course, is the Charter. For decades Canadian judges slumbered along in deference to Parliament and the legislatures. They were wakened in 1982. They should be put back to sleep.

One hundred years ago the US was in the grasp of unfettered individualism. Robber-baron capitalism had hit its stride; greed was incarnate in the land. Slowly, fitfully opposition developed. Despite corruption and thuggery, the people made inroads. Legislation was enacted to limit child labour and fix minimum wages and maximum hours of work.

But the courts would have none of these "mere meddlesome interferences with the rights of the individual". The judges discovered that the Constitution had entrenched *laissez-faire* capitalism. For 50 years they defended freedom of contract against all comers. Finally in 1937, a depression plus direct threats from Franklin Roosevelt induced the US Supreme Court to change its ways.

I don't think many Canadians appreciated what the effect of the Charter on our judges would be. The cheerleaders were enthusiastic. Professor Tarnopolsky (as he then was) opined that it would "have major repercussions in the years to come". Less restrained, Jean Chretien observed in his memoirs that the Charter was "one of the best in the world . . . now changing our legal system for the better". We were, it seemed, about to enter an era of unbridled wonderfulness.

Others, including me, were not impressed. We thought the judges would make short work of the Charter and deposit it on the constitutional rubbish heap alongside John Diefenbaker's *Bill of Rights*. We were wrong.

The judges became activists. They decided they were now the guardians of the Constitution, clothed with the authority to strike down the deliberate choices of elected legislators. In the process they have begun taking away hard-won rights which ordinary Canadian men and women once enjoyed.

In 1982 the Trudeau government put out a piece of propaganda called *The Constitution and You*. This pamphlet stated that the Charter was adopted to protect *"human* rights and freedoms" and to "limit the power of both provincial and federal governments in favour of the right of individual citizens". But our judges have not restricted the enjoyment of Charter rights to human beings. Corporations, too, are to have fundamental rights.

The idea that a corporation could enjoy freedom of religion seems preposterous. But the Supreme Court of Canada has held that it can.

Big M Drug Mart of Calgary, no doubt impelled by a profound concern for constitutional principle, went to court to challenge the restrictions on Sunday shopping in the federal *Lord's Day Act*. The judges didn't say exactly how a corporation might exercise its religious freedom, but they did uphold Big M's commercial freedom.

The courts have also protected corporate freedom of speech. The National Citizens Coalition (NCC) set up a corporation for the purpose of litigation and after some careful forum-shopping used an Alberta court to challenge the *Canada Elections Act* controls on campaign spending. The court obliged the NCC by removing limits on corporate political activity which had been supported in Parliament by all three political parties.

Recognizing the human rights of corporations is only part of the problem. The courts have been supporting individualistic attacks on popular and collective rights. Take the *Big M* and *NCC* cases.

A law called the *Lord's Day Act* is an absurdity in 1986. The principle that we should have one day in the week free from some of the excesses of commercialism is not. But the Supreme Court believed Big M's freedom to peddle its wares seven days a week was more important.

The NCC attacked spending limits designed to ensure that electoral politics didn't become the private preserve of the rich as in the US. The right of the many — the average non-rich Canadian voter — gave way to the rights of the few — those with pots of money to spend on elections.

The Charter assault on collective rights goes on. The rights of Canadian women were enhanced by 1982 amendments to the *Criminal Code*. Two guarantees were given to victims of sexual assault. If the

victim asked the trial judge for an order banning publication of her name, the judge had to comply. Also, the likelihood of the victim being subjected to a humiliating cross-examination about her sexual history was reduced, although not eliminated. Charter attacks on both these rights have succeeded in the courts.

The labour movement has not escaped. The NCC, encouraged by its Alberta victory, assisted Mervyn Lavigne in challenging trade union rights in Ontario. The right of a union to spend its money as it pleased was found to offend the Charter. Other labour rights, like the compulsory payment of union dues by all employees in a unionized workplace, will be coming under judicial scrutiny.

Newly-won rights of native people will soon be questioned. Parliament made long overdue changes to the *Indian Act* in 1985. Bill C-31 ended discrimination between Indian men and women who married non-Indians. It also restored Indian status to thousands who had been denied it as a result of discrimination. Chief Walter Twin of Alberta is going to court to argue that C-31 offends Charter rights and aboriginal rights.

Regulatory legislation protects Canadians in the workplace and in the marketplace. Our national record on industrial health is abysmal, but we do at least have some sort of legislative regime to ensure minimum safety standards on the job. This legislation is being questioned. And there were strong hints in the Supreme Court of Canada's decision in *Reference re s 94(2) of the BC Motor Vehicle Act* that many regulatory laws may not survive Charter-based attacks.

If the trends now emerging in the courts continued, we will have taken a giant leap backwards. We will have put aside one hundred years of our own history and returned to the nineteenth century. Canadians have relied on our political democracy to enact laws to protect themselves from the worst excesses of free-market individualism. But with the *BC Motor Vehicle Act* decision, the courts now have the power to strike down any law they don't like. And they have been using that power to tear away crucial elements of our social fabric.

In that 1982 pamphlet I quoted earlier, the Government of Canada said, "The Charter transfers power to all Canadians". Wrong. The Charter has transferred power to the courts. Unless we want to keep on moving back in time, the people had better reclaim it. □

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Now for the positive impact of judges' Charter decisions

By Don Stuart, Professor of Law at Queen's University, Kingston, Ontario

Professor Stuart is a supporter of the Canadian Charter of Rights and Freedoms. *He illustrates his argument by citing different cases to those referred to in the critical article by Rob Martin published in this issue at* [1987] NZLJ *136. This article is reprinted by permission from the Canadian publication* The Lawyers Weekly *for 7 November 1986.*

It is becoming increasingly fashionable to denigrate the *Canadian Charter of Rights and Freedoms* and the judges who interpret it. Some of my fellow law teachers have recently voiced dramatic concerns in your columns. Professor Rob Martin, "A Bad Idea to Give Judges Wide Charter Powers" *(Lawyers Weekly,* September 26, 1986), writes:

> The judges became activists. They decided they are now the guardians of the Constitution, clothed with the authority to strike down the deliberate choices of elected legislators. In the process, they have begun taking away hard-won rights which ordinary Canadian men and women once enjoyed.

His particular thesis is that the courts are wrong to recognise that corporations too can have fundamental rights and that they are single-mindedly bent on "supporting individualistic attacks on popular and collective rights". In an earlier article, "Charter Misapplied. Misunderstood by Judges, Profs say "(*Lawyers Weekly,* June 27, 1986), Professor Jamie Cameron is reported as complaining that as a result of the decision of the Supreme Court of Canada in the *Motor Vehicle Act Reference* case, "many reasonable and necessary regulatory laws could well be unenforceable".

In the same piece, Professor David Fraser argues that the courts don't always know what to make of the protection against unreasonable search or seizure under s 8, and that it would be "nonsensical" to afford this protection to corporations.

Good scholarship must be critical and transcend the level of the descriptive. However, criticism must be fair. In the context of the criminal justice system the above views are misdirected and are also unfortunate.

Even though reform of the criminal law was, to say the least, not uppermost in the minds of the politicans who achieved the passage of the Charter, the criminal law system would seem thus far to have been the main beneficiary.

At this point criminal courts have had by far the most experience in litigating the Charter. In my view, the Charter has produced the most positive changes in our penal law system in the last 15 years.

Overall the performance of the Canadian judiciary, particularly but not only at the Supreme Court of Canada level, has been most impressive. Clearly, the courts have taken very seriously their Charter mandate to be guardians of the Constitution.

To suggest, as does Professor Martin, that this is something that they chose rather than had to do is quite unfair.

The primacy given to individual rights in criminal law is, of course, not new. The state's interest in punishment must always be weighed against the rights and freedoms of the individual.

The results of the endeavours of judges to interpret our new constitution has not been mayhem. Accused are not being regularly acquitted because of the Charter.

It has become the vehicle for searching re-examination of whether platitudes that we have always expressed about the criminal law are empty or meaningful. What is emerging is a set of rejuvenated principles and remedies by which justice can be done in an appropriate case.

This is not to suggest that all is rosy. There are often very sharp and pointed debates between various members of the judiciary and also among academics as to particular Charter interpretations.

The impetus that the Charter has given to this substantial, although not radical, re-thinking of our criminal law may result in legislators and the legal profession being less resistant to pleas for more fundamental reform.

The Law Reform Commission of Canada has had depressingly little impact in its repeated calls for a return to fundamental principles of justice, and the need for restraint.

It would be unfortunate if shrill critics of the Charter would blunt this fillip to the Commission's efforts towards a fully revised, more coherent and just *Criminal Code.*

My optimism for the Charter in criminal law may be supported by brief reference to four major springboards already put in place by the Supreme Court of Canada.

Since *Hunter v Southam* (1984), 41 CR (3d) 97 (SCC), police and prosecutors take search powers and procedures much more seriously. It is no longer sufficient that there was some legal authorization for the particular search.

The Court insists that, generally speaking, there be a requirement of prior authorization by a neutral and impartial reviewer before a search can be constitutional. This throws into sharp focus the true effectiveness of our present system of authorization by justices of the peace.

There are also a host of other difficult questions. It is not surprising they are difficult. *Hunter* did result in protection for a large newspaper conglomerate, but its principle is now being applied on a daily basis to protect the privacy

interest of individual Canadians.

Since *R v Therens* (1985), 45 CR (3d) 97 (SCC), it is quite clear that the right to counsel and the right to be advised of the right to counsel must be taken seriously by the police in respect of those subjected to a breathalyzer demand.

Given the well-established dangers of drinking and driving, it is not surprising that some have complained that drunken drivers are getting off on technicalities. The point is rather that, once the police adjust to their "new" responsibilities, few such acquittals should occur.

In the meantime, the protection of the right to counsel has been expanded to contexts in which the presence of counsel is far more important and was, up until the Charter, a hollow sham.

There are still far more searching questions and problems associated with making the right to counsel truly operating and effective. Until the Charter these were not being addressed.

The Charter never intended an automatic exclusion for evidence obtained in violation of the Charter. Section 24(2) is a Canadian compromise between the general United States position of excluding all illegally obtained evidence and the traditional common law view that all evidence should be received however it has been obtained.

In *Therens*, the majority of the court excluded the breathalyzer evidence obtained following a violation of the right to counsel, even though this violation was a result of good faith reliance on the existing jurisprudence in the Supreme Court of Canada.

The better interpretation is that this does not amount to a rule of automatic exclusion of evidence but rather an encouragement to trial courts to use the remedy of excluding evidence where there have been serious Charter violations.

There is considerable room for better direction from the Supreme Court as to the criteria to be exercised by trial courts, but the message is unmistakable.

Pre-trial procedures are now important and there might be consequences if they are not followed. Exclusion of evidence should become rarer as police and prosecution practices improve.

What about the maligned judgment of Mr Justice Lamer in the *Motor Vehicle Act Reference* case, (1986) 48 CR (3d) 289 (SCC)?

Prior to the Charter in their pivotal ruling in *R v. Sault Ste. Marie* (1978), 3CR (3d) 30 (SCC), the Supreme Court did its best within the confines of a system of parliamentary supremacy to do away with absolute reponsibility for any type of penal law.

It saw little point in penalizing blameless conduct. It was held that for public welfare offences, courts should normally insist as a matter of fundamental principle on a reduced fault requirement in the form of objective negligence, with the persuasive burden reversed.

As a result of the *Sault Ste. Marie* ruling, there have not been an unacceptable number of acquittals in the case of public welfare offences. The *Motor Vehicle Act Reference* case is not a new departure for criminal law, but simply an elevation of the *Sault Ste. Marie* standard to a constitutional imperative.

The court holds that a law enacting an absolute liability offence violates s 7 of the Charter only if and to the extent that it has the potential of depriving life, liberty or the security of the person.

It strikes down a provincial offence that a person who drives a motor vehicle while prohibited or suspended from driving is automatically guilty and liable to a mandatory penalty of seven days' imprisonment.

Surely this provision was overkill and potentially unjust. Whenever a criminal theorist or a court asserts that the notion of fault is fundamental in a just criminal law system, one hears arguments of administrative unenforceability as a result.

Fortunately the Supreme Court is not sympathetic. In the area of drug offences, our courts insist on the highest and most difficult to prove standard of fault known – that of an actual awareness by the accused. Our drug laws have not proved unenforceable.

My final example of a positive Charter influence on the criminal law is the decision of the Supreme Court in *R v Oakes* (1986), 50 CR (3d) (SCC).

In one type of drug offence, possession for the purposes of trafficking, there has been an anomalous two-staged trial whereby, after the Crown has proved possession, the accused must prove innocent intent.

This has been a very clear violation of the presumption of innocence, yet it survived previous court challenges under the Bill of Rights and no initiative came from the Department of Justice or anywhere else to change it.

The Supreme Court of Canada, following the example of courts across the land, decided that this violation of the presumption of innocence could not withstand Charter scrutiny.

We now have a clear determination that requiring the accused prove any important element of the offence will normally be unconstitutional. This will not mean that many more accused will be acquitted.

There is surely room for confidence in our triers of fact. However, in borderline cases – the acid test of all legal principles – a few accused may be acquitted because it will now be clear that the state, with all its resources, has not been able to prove guilt beyond reasonable doubt.

The *Criminal Code* has long been characterized by a conspicuous overuse of reverse onus clauses. The Charter has given the necessary impetus to re-thinking.

It is not irresponsible or far-fetched to imagine a criminal law system where the cornerstone precept of the presumption of innocence is taken seriously in that the accused will never have to prove anything.

The reality that the accused may well bear an evidentiary or tactical burden should be a satisfactory retort to those who argue enforcement expediency in suggesting that reverse onus clauses are necessary.

Perhaps the major contribution of *Oakes* is its careful blueprint for the proper approach to the inquiry as to whether a reasonable limit to a Charter right or freedom can be justified under s 1 of the Charter.

It is designed to preclude easy resort to s 1 to dilute Charter protections. At least in the area of the criminal law where, as a matter of statistical truth, it is easy to verify that we still have very high conviction rates, this is good news. □

Reform and the legal profession

The following article appeared as an editorial comment in the New Law Journal *for 7 November 1986 at p 1049. It is reprinted with permission to indicate the atmosphere of change in the legal profession in England at present; and because some, although not all, of the issues have relevance to the currents affecting the New Zealand profession and that are likely to become particularly noticeable during 1987.*

The burning issue of the day, as evidenced by the welter of published matter and public oratory, is "The State of the Profession". The Law Society, Bar Council and individual lawyers everywhere spend many anxious and unremunerative hours in this particular form of self-examination. No conference is complete without its share of discussion of the future, fusion or what have you. We therefore make no apology for passing further general comment on the issue here.

Despite constant detailed attention since well before Benson reported, despite powerful arguments from gifted wordsmiths and rhetoricians of differing persuasions, with a touch of vitriol too from those intent on demolishing the lawyers' alleged ivory tower, we aren't really so far forward. Questions of privilege, rights of audience, training, maintenance of standards, money (of course) and the requirements of a democratic society (whatever those noble needs might be) are all important, certainly. But they are all subsidiary to two principal questions which surely have to be answered with a resounding "Yes" if there is to be any virtue in fusion, fission or the legal equivalent of the Big Bang. These are, firstly, would change lead to greater speed and efficiency and secondly, would it thereby really give the client better value for money? No one could or should reasonably expect downright *cheapness* of the law, but the pursuit of better value should be unrelenting. Cheap and cheerful is fine for crockery from street markets and tinsel from Taiwan, but not, spare us, for the law.

It is trite but true that the majority of us are inherently conservative, regardless of politics. The lawyer is no exception, but by the same token is no worse than many another.

Being naturally conservative, the lawyer has come slowly to agree that much needs examination, but he needs the nearest thing to solid proof of the pudding's – that is radical change's – edibility before he sinks his teeth and his livelihood into it. As ever, proof in advance that the prescribed or suggested panaceas are not poisonous is not available. Hence we have seen much floundering and confusion, which has made the lawyer of the '80s the object of his own self-criticism and self-doubt as well as keeping him the continuing target of those sectors of the public for whom the law is always fair game. Today's lawyer does not enjoy his forebears' inner confidence in his position and role in society, and while he should not expect to be allowed to be complacent, it will do nobody any good (least of all the client), if the profession's identity crisis deepens much further.

Resolving the issues blocking the route to reform has to be the number one priority if both branches of the profession, in whatever refitted guise, are to resume their principal function of providing legal services to their clients full time. Who has what rights to do or not to do anything is something which obviously requires resolution, but the whole question of structure and privileges has to be handled as a package. And the package has to offer something to everyone in return for the sacrifices it will entail. The Benson Report can frankly be seen not to have measured up, and the Law Society, Bar Council and other groups of lawyers are now doing a much better job.

One such attempt to produce a package which concedes something to tradition and more to each branch of the profession is the Social Democratic Lawyers' Association report "Divided we Stand" published this week. Under the chairmanship of William Goodhart QC, an SDLA working party has made a considerable and creditable effort to balance the conflicting interest within the profession and still maintain a level of service sufficient to meet public needs. Their principle recommendations include giving solicitors rights of audience in all Courts (probably the most controversial proposal), making experience of advocacy in the lower Courts a prerequisite of appearing in the higher ones, ending the appointment of QCs, allowing barristers to practise in partnerships, introducing a new uniform qualifying examination for all law students, opening the High Court bench to suitable ex-solicitor circuit Judges, and allowing conveyancing to be undertaken by building societies and other institutions in parts of the country where this would not threaten the provision or availability of legal services.

On their face these proposals have merit. Obviously the working party argued long and hard over certain aspects of their proposals, especially over rights of audience for solicitors. But it seems to us that they have faced facts. With the conveyancing monopoly gone, solicitors must inevitably branch out and market forces must be allowed to operate across the whole spectrum of legal services. Solicitors will *inevitably* gain rights of audience, and this simply must be faced. Restrictive practices in the law, whether they work for or against the public interest, will eventually go out of the window as they have elsewhere and the best, indeed only, approach will be to swallow the pill (when its exact composition can be determined) and direct energy currently being used to defend, criticise or extol the merits and demerits of change to the real job of providing good quality, fairly priced and speedy legal service. □