THE NEW ZEALAND
LAW JOURNAL
21 JUNE 1987

Professional Privilege

A recent decision of the High Court of Australia is as interesting for what it does not say as for what it does say on the subject of legal professional privilege. The case is *Attorney-General for the Northern Territory v Maurice and Others* (1987) 69 ALR 31.

The essential issue in the case is succinctly stated in the judgment of Mason and Brennan JJ at p 36 as follows:

> The issue in these appeals is whether a litigant waives legal professional privilege attaching to research materials accumulated in the preparation of a "claim book" setting out the basis of an Aboriginal land claim when that claim book has been circulated as required by Practice Directions. The Aboriginal Land Commissioner (Maurice J) hearing the claim held that the Aboriginal claimants had not waived the privilege to the underlying research materials. On appeal, the Full Court of the Federal Court found no error in the Commissioner's decision and dismissed the appeals. The Attorney-General for the Northern Territory now appeals, pursuant to the grant of special leave . . .

As explained in the judgment of Gibbs CJ at p 32 the matter related in part to a procedural question. A Practice Direction had been issued to the effect that no fixture would be made except in special circumstances for the hearing of an application under the relevant statute until a claim book relating to that application had been lodged. The claim book gives particulars of the claim and may also go into considerable detail in support of the claim. Apparently the Practice Direction does not make clear what the claim book is to contain nor its specific purpose. In this particular case a very substantial claim book of some 447 pages was lodged.

The case essentially turned on a question of waiver. The claim book in issue was compiled in part from field notes and working records which were not themselves specifically mentioned in the book nor were passages from the documents set out in the book. What was sought was information concerning these earlier documents. At the original hearing the Aboriginal Land Commissioner had held that the documents were the subject of legal professional privilege and that the privilege had not been waived. This was upheld by the Full Court of the Federal Court. In turn this was upheld by the High Court of Australia in a unanimous decision. The appeal was accordingly dismissed.

Deane J, in his separate judgment, held that where a party did no more than make use of privileged material in order to formulate the details of the case proposed to be made then legal professional privilege in relation to such material was not waived. The judgment of the Chief Justice and the joint judgment of Mason and Brennan JJ both referred to the question of unfairness as to whether or not the privilege should be maintained. There are certainly substantial differences of emphasis in the judgments although the same conclusion was reached.

The decision of Deane J is particularly noteworthy for its statement of the reason and justification for professional privilege. At p 40 he states:

> It is a substantive general principle of the common law and not a mere rule of evidence that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings: see, generally, *Baker v Campbell* (1983) 153 CLR 52; 49 ALR 385. That general principle is of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law in that it advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person before the Courts and Tribunals of the land. Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any Court or to any Tribunal or person with authority to require the giving of information or the production of documents or other materials: see *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-9; 63 ER 950 at 957; *Baker v Campbell* (CLR) at pp 115-16. The right of confidentiality which the principle enshrines has recently, and correctly, been described in the European Court of Justice as a "practical guarantee" and "a necessary corollary" of "fundamental, constitutional or human rights: see *A M & S Europe Ltd v Commission of European Communities* [1983] 1 QB 878 at 941, 947; *Baker v Campbell* (CLR) at p 85. Indeed, the plain basis of the decision of the majority of this Court in *Baker v Campbell* was the acceptance of the principles as a fundamental principle of our judicial system: see Murphy J (CLR) at p 88; Wilson J (CLR) at pp 95-6; Deane J (CLR) at pp 116-17; Dawson J (CLR) at pp 131-132. Like other traditional common law rights, it is not to be abolished or cut down otherwise than by clear statutory provision. Nor should it be narrowly construed or artificially confined.

This case deals essentially with the question of waiver. The emphasis seems to be on flexibility. In the decisions of Gibbs CJ and of Mason and Brennan JJ the concept of fairness is given considerable emphasis. The Chief Justice goes so far as to decline to follow, as being too strict, the judgment of Hobhouse J in the English case of *General*

Accident Assurance v Tanter [1984] 1 All ER 35. Gibbs CJ says at page 35:

> If Hobhouse J was correct in saying that there is no waiver of associated material until that material is adduced in evidence it follows in the present case that privilege in the source material has not been waived. In my opinion, however, the rule is not so inflexible; the question is whether the disclosure or use of material that has been made renders it unfair to uphold the privilege in the associated material . . .

The statement of legal professional privilege by Deane J is a firm and clear one which is more consistent with the attitude of the New Zealand Courts than are the statements in the other judgments which certainly seem to be prepared to consider a more flexible view of the issue of privilege. The *Maurice* case is admittedly dealing with waiver as an exception to the general rule; but nevertheless the impression given by expressions used in some of the judgments seems to imply that legal professional privilege is a matter of convenience rather than a basic jurisprudential principle.

On a quite different aspect of the law relating to legal professional privilege it is interesting to consider the judgment of Davison CJ in the New Zealand case of *Rosenberg v Jaine* [1983] NZLR 1. In that case the Chief Justice analyses the difference that has developed between English and Australian decisions on the one hand, and New Zealand and Canadian decisions on the other. He makes particular reference to the different approaches taken in the cases of *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 and the Australian case of *Crowley v Murphy* (1981) 34 ALR 496. The Canadian case that appears to support the view taken by the New Zealand Court of Appeal in the *West-Walker* decision is *Descôteaux v Mierzwinski* (1982) 70 CCC (2d) 385. In the *Rosenberg* case the Chief Justice says at p 11:

> I am bound by the decision of our Court of Appeal in *Commissioner of Inland Revenue v West-Walker* so far as the basis of the privilege is concerned, and I am pleased to find that the decision has the support of the Supreme Court of Canada, a decision arrived at apparently quite independently of any reference to the conflicting views between the English and Australian authorities, on the one hand, and the New Zealand Court of Appeal on the other. The privilege rests on a matter of public policy and not on the alleged privileged communications being dependent on their being related to judicial proceedings or upon any contractual duty created by the solicitor-client relationship.
>
> It is worthy of note that the New Zealand approach, too, has been preferred by two writers who have recently written articles on the question of privilege. Mr A F Smith in his article "The Erosion of the Doctrine of Privilege" (1982) 56 Law Institute Journal 460 concluded his article by saying:
>
> > In the ultimate, I remain persuaded that the view taken by the New Zealand Court of Appeal in *West-Walker* is the view to be preferred. In none of the other decisions discussed was there the same detailed consideration given to the relevant principles relating to the construction of statutes. This aspect of the matter is fundamental and is, perhaps, the only question to be resolved.
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> Mr C L Pannam QC in an article also written in (1982) 56 Law Institute Journal at p 467 headed "Search Warrants – Validity and lawful execution" referring to the decision in *Crowley v Murphy* commented:
>
> > They failed to refer to the only relevant Canadian authority which contradicted their view and only cited other irrelevant Canadian authority. . . . I can see no basis for suggesting that there is any conflict between that case and *Parry-Jones v Law Society.*

A general statement of the situation in New Zealand is to be found in the judgment of Cooke J in the criminal law case of *R v Uljee* [1982] 1 NZLR 561. This was a case in which a policeman happened to overhear a discussion between the accused and a solicitor. The judgment of Cooke J is noteworthy for the analysis of the historical development of the concept of legal professional privilege. Although accepting that the case of *Calcraft v Guest* [1898] 1 QB 759 distinguishing between oral and documentary communications was still the law in England Cooke J implied that it might sometime be reconsidered there. In any event he took the view that *Calcraft v Guest* could only be "of limited cogency in New Zealand in 1982". In *Uljee's* case at pp 568-569 Cooke J stated:

> The privilege between client and solicitor or barrister is firmly established in New Zealand, its value recognised both by the Courts and by Parliament. In *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 it was held in this Court to prevail over the statutory power to require information from "every person". The Court left open in that case precisely what kind of information or documents were protected from disclosure when demanded from a solicitor. The subsequent statutory provisions, now s 20 of the Inland Revenue Department Act 1974, draw a line distinguishing broadly between communications for obtaining or giving advice and trust account records, receipts and the like. This is really an endorsement by Parliament of the basic principle . . .
>
> There are several reasons why, on balance, it has been seen to be in the public interest to allow consultations with a legal adviser to be uninhibited by fear of disclosure in evidence. They include more efficient administration of justice; bringing to light and better presentation of defences; encouragement of lawful conduct; avoidance of litigation; possibilities of guilty pleas or co-operation with the police. In criminal matters there is also, notwithstanding Bentham's black-and-white argument to the contrary, a strong sense that any person charged or in peril of a charge has a fundamental human right to professional advice – which may not be effectively given if facts are withheld.

One must be cautious about reading too much by way of general attitude into any one case, and also be cautious about comparing decisions of cases in different legal categories. Nevertheless it has to be recognised that there may well be developing a difference of approach or emphasis between Australia and New Zealand on the topic of legal professional privilege.

P J Downey

Case and Comment

Administrative means commercial ends

Unilever New Zealand Ltd v The Broadcasting Corporation of New Zealand Ltd and Colgate-Palmolive Ltd [1987] BCL 5

There is a steadily growing school of thought which holds that administrative law need not and should not be viewed as an isolated and self-contained branch of the law. Rather, it can be of practical and complementary effect when introduced to, and applied in, other, traditionally insular, branches. Accordingly, as an increasing number of tax lawyers, commercial lawyers, company lawyers and other specialists come to recognise the role of administrative law in their respective spheres of interest, we can expect to see more cases like *Unilever New Zealand Ltd v The Broadcasting Corporation of New Zealand Ltd and Colgate-Palmolive Ltd. Unilever* illustrates the use of the administrative law, in particular the Judicature Amendment Act 1972, for private commercial, rather than purely public law, purposes. In that respect, it is likely to be of relevance to many practitioners.

In August 1986, Colgate-Palmolive ran the first of two blocks of a television advertisement for its product, Dynamo. The advertisement, to which Unilever took exception, contained the following voice-over:

> Why pay for more expensive laundry powders when you can get a good clean wash with Dynamo? Dynamo effectively cleans your whole wash for less cost than the leading powder.
>
> We washed these clothes according to the manufacturer's instructions. Dynamo thoroughly cleaned the same number of wash loads in hot or cold water but cost much less. And Dynamo leaves everything smelling . . . clean and fresh. Next time try Dynamo. Why pay more for a good clean wash?

The visuals of the advertisement showed a woman between two rows of washing machines, with laundry alongside.

Unilever's objection was not that the advertisement made a comparison, but that the comparison made was deceptive. Prior to the commencement of the Fair Trading Act 1986 (1 March 1987), a common approach to this problem was to bring an action for slander of goods. That approach was not taken. As one of the requirements for such an action is that a false statement be made about a competitor's goods, it may be that problems were foreseen in the *Unilever* situation: the statements complained of related to the advertiser's, not to a competitor's, goods. In any event, the applicants elected to pursue a different, and ultimately successful, tack. That different tack lay in the review provisions of the Judicature Amendment Act 1972, and, more specifically, with the provision in s 8 for interim orders.

The Broadcasting Corporation, a statutory body, is bound by s 26 of the Broadcasting Act 1976 to establish a committee to make rules. These rules must comply with s 24. Section 24 requires the Corporation to maintain in its programmes (and advertisements) standards which will be acceptable to the community. Accordingly, the Corporation had established a Rules Committee which made the required rules, including the following:

> **1.7.1.** Advertisements comparing products or services
> (a) should be factual and informative;
> (b) should explicitly or by implication make clear what comparison is being made;
> (c) should not mislead the audience about other products or services with which comparisons might be made.
>
> **1.7.2.** Notwithstanding Rule 1.7.1. advertisements should not attack or discredit other products, advertisers or advertisements directly or by implication.

During the screening of the first block of the Dynamo advertisements, Unilever's solicitors wrote to the Broadcasting Corporation. They informed the Corporation that they considered the advertisement to be a breach of the Corporation's rules. The Corporation disagreed and declined to take the advertisement off the air. Although it is not entirely clear from the judgment, it can be inferred that it was in respect of that decision, the decision to keep the advertisement running, that the substantive review proceedings were commenced. The interim relief was sought to restrict the broadcasting of the advertisement.

The argument that the advertisement breached the rules was based on a possible inference which, the applicant argued, might be taken from the advertisement. That possible inference was that Dynamo would wash *as well* as leading powders *for less cost*. While the advertisement did not say that expressly — it merely said that Dynamo would "get a good clean wash", Dynamo "effectively cleans your whole wash", and Dynamo "thoroughly" cleans — the applicant contended that it was a possible inference to draw. Furthermore, the applicant claimed that that inference, that Dynamo was more cost effective than leading powders, was a wrong inference: tests conducted by the applicant showed that its product gave a greater standard of cleanliness when used in the same dosage as Dynamo. Put another way, more Dynamo was necessary if the same standard was to be achieved. The basic premise in

the comparison, that the two products would give the *same* cleaning job, was missing. The comparison raised in the advertisement was, the appellant claimed, unclear and therefore in breach of Rule 1.7.1.(b).

Heron J accepted that the inference put forward by the applicant was one which could possibly be drawn from the advertisement. He also accepted that there was evidence to show that that inference may be wrong. There was, then, a prima facie suggestion that the advertisement was inaccurate. (It should be noted in fairness to the respondents, that matters of fact were not resolved at this stage. Indeed, it was never decided whether or not the advertisement was in fact inaccurate.)

Heron J then dealt with three further matters before considering whether or not to exercise his discretion to grant the interim relief sought.

First, he held that the applicant's correspondence to the Corporation amounted to a formal complaint which, by s 95B of the Broadcasting Act, the Corporation had a duty to consider.

Second, he considered that a failure by the applicant to go to the Broadcasting Tribunal with its complaint before coming to Court was not fatal to the application. While he strongly recommended that that course be taken, as the Corporation probably had the machinery and guidelines for hearing complaints on comparative advertising, Heron J recognised that this application was merely for interim relief, to protect the applicant's position pending a final decision.

Third, he addressed the privative provisions of ss 3(2) and 24(4) of the Broadcasting Act. Section 3(2) provides that no exercise by the Corporation of any power shall be challenged in Court on any grounds of failure to be guided by the purposes of s 3(1) (purposes by which the Corporation is to be guided in the exercise of its powers: "to develop broadcasting to serve the people of New Zealand", "to ensure that programmes reflect New Zealand culture", "to produce balanced, accurate programmes", and suchlike). Heron J found s 3(2) to be not applicable: the challenge was not based on any ground of "failure to be guided by the purposes of s 3(1)". Section 24(4) provides that the Corporation shall be under no civil liability in respect of any failure to comply any of the provisions of s 24. Heron J found s 24(4) to be not applicable: rather than complaining about any failure by the Corporation to comply with s 24, the applicant was complaining about the Corporation's failure to apply rules which had been made in compliance with s 24.

Finally, Heron J referred to *Brewers' Association of New Zealand Inc v Carlton and United Breweries Ltd & Others* (14 March 1986. CA 34/86) in considering whether to exercise his descretion to grant relief. Concluding that this applicant for relief need only satisfy the Court that the relief was necessary to preserve the applicant's position, Heron J granted the order sought. There was, he observed, sufficient evidence, based on a market research survey, to show a likelihood of interference with the applicant's rights and a likelihood of loss if the order was refused.

The order was granted. The advertisements ceased and were replaced by new advertisements, apparently acceptable to all.

Two points of this case should be noted:

(i) The question of likely damage caused by the advertisement was based on a market research survey.
(ii) The applicant contended that "by its own testing standards (. . .) the necessary dosage of Dynamo does not give a standard of cleanliness achieved by its product". The question of the possible (wrong) inference was based in part on those tests.

Heron J acknowledged the admissibility question in the first of those points, and the substantial factual dispute in the second. The interlocutory nature of the application, however, prevailed. For the purposes of that interlocutory application, certain facts were readily assumed or accepted, or both. That, normally speaking, is as it should be — unless the true intent or effect of the application is more permanent than temporary. What was the true intent or effect? Was it to protect the applicant's position pending a final decision on the review proceeding? Or was it to scuttle, once and for all, a competitor's advertisement, with no intention of the review proceedings ever seeing the light of day? This is not to suggest an abuse or a misuse, but simpy a use — a shrewd use — of the administrative review provisions. The case involved, as Heron J indicated, "a contest between multi-nationals engaged in contest over market share". While the Fair Trading Act 1986 would cater for problems closely similar to this in future, it is nonetheless interesting to note those extended purposes to which the administrative review provisions can be put. As a body of law, it has application in several fields for those with the vision to see it.

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Transport Act 1962 — deviation en route to place of evidential breath test

Auckland City Council v Larsen, [1987] BCL 493.

It has been previously argued in this journal that it is rare for considerations of civil liberties to affect the judicial interpretation of the provisions of the Transport Act 1962 on drink-driving offences [1983 NZLJ 286]. However the recent judgment of Smellie J in *Larsen's* case provides a valuable reminder that the Courts will not willingly allow considerations of pragmatism and convenience to prevail over considerations of civil liberties.

Facts

The facts of this case were straightforward. After a positive breath screening result the testing traffic officer, acting pursuant to s 58A(3)(a) of the Transport Act 1962, required the respondent to accompany him to the Auckland Civic Administration Building for the purposes of an evidential breath test or blood test. The respondent agreed to the requirement. Whilst driving to the Building the traffic officer received an "urgent" radio message for assistance from a fellow

officer. The traffic officer, without consulting Mr Larsen who remained silent, proceeded to ". . . give flashing lights and sirens at high speed", and deviated some two kilometres from the direct route to the Civic Administration Building. On arrival at the scene it was apparent the traffic officer's assistance was not needed, and so he continued on his way without leaving his patrol car. It was common ground that the extra time involved in this deviation was only a matter of minutes.

Judgment

In the District Court Judge Kerr ruled that the deviation was unjustifiable and declined to admit the results of the blood test against the respondent. The matter came to the High Court by way of Case Stated.

As a matter of principle Smellie J would have clearly liked to declare that *any* unauthorised deviation would invalidate the subsequent testing procedures on the grounds that it involved ". . . an involuntary restraint on the liberty of the subject". Had he been free to do so, His Honour would have held that in a case such as this the enforcement officer was obliged to elect whether to pursue the objective of testing or the objective of rendering assistance. However His Honour readily conceded that this "high ground" had already been lost because of the judgment of the Court of Appeal in *Lawrence v Ministry of Transport* [1982] 1 NZLR 219.

In *Lawrence's* case a traffic officer had deviated one and a half kilometres from the direct route to the place of testing, so that he could uplift a Departmental motorcycle. In its judgment the Court of Appeal specifically rejected the argument that it was the pursuit of an unauthorised purpose, rather than the distance or time involved, which could render the deviation illegal. In the circumstances of *Lawrence's* case the Court of Appeal indicated that it could not find the "slightest element" of injustice or improper restraint.

But in *Larsen's* case Smellie J had no difficulty in finding injustice to the respondent arising from "[t]he off-hand disregard of his rights". The learned Judge instanced the way in which the respondent had been subjected to a potentially dangerous journey, causing anxiety, without having been consulted or being in a position to object.

Finally Smellie J ruled that s 58E, the "reasonable compliance" section did not save the traffic officer's actions. Citing the dicta of Moller J in *Cook v Police* (unreported, Auckland Registry, M 1363/83, 3 February 1984), His Honour argued that before s 58E could apply in these circumstances the Courts would first have to confer upon enforcement officers a specific and separate power to deviate from the direct route even in circumstances which involved potential danger. Smellie J obviously felt that *Lawrence's* case had not gone that far.

Comment

One possible explanation for the tolerance displayed by the Court of Appeal in *Lawrence's* case towards deviations en route may lie in the argument, which has been judicially advanced, that the power to require a person to accompany to a place of testing under s 58A(3)A of the Transport Act 1962 is "less drastic" than the power of arrest (see *Auckland City Council v Dixon* [1985] 2 NZLR 489, 492 per Cooke J). Thus it might be argued that with a less drastic power the Courts can allow more elasticity in its exercise.

However such an explanation is not really satisfactory for it fails to recognise that the power of requirement under s 58A(3)A of the Transport Act 1962 is backed by the sanction of the power of arrest under s 58A(5)(b) of the same Act. Moreover the law of police powers of arrest seems to tolerate considerable delay in taking an arrested person to the police station if, after the arrest, the arresting constables continue to pursue their normal policing duties with the intention of taking the arrested person to the station as soon as is reasonably possible: *Duffy v Attorney-General* (1985) 1 CRNZ 599. Thus the true explanation for the judicial approach must lie in the Courts' reluctance to interfere with the perceived practicalities of police and traffic enforcement.

The judgment of Smellie J is therefore timely. For whilst the legal system certainly has a keen interest in effective policing and traffic enforcement, it has an even greater interest in providing protection for individual liberties. Indeed it might well be arguable on policy grounds that in the circumstances discussed above a deviation without consent (and the ensuing detention) could only be justifiable if human life were endangered. This policy would be consistent with what Smellie J described as the ". . . common law's jealous regard for civil rights", and would cohere neatly with the reasoning of the Court of Appeal in the decision that has been a beacon for many District Court lawyers, *Blundell v Police* [1968] NZLR 341. Certainly such a policy would accord with the view that the cessation of some individual liberties by virtue of a valid arrest or requirement to accompany does not involve the loss of all such liberties.

Thus if, post *Lawrence*, the validity of a deviation from a direct route is to be determined on a case by case basis, Smellie J's judgment in *Larsen's* case will at least ensure that in each case the argument of civil rights is directly addressed. And if in the future enforcement officers seek to deviate from the most direct practical route to the testing place, they would be well advised to seek the tested driver's consent.

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Vendor and purchaser — settlement notices and specific performance

In *Ciochetto v Ward* [1987] BCL 231 it is submitted that a number of confusing statements were made with respect to settlement notices and specific performance. (Although a number of other issues arose in the case, the writer wishes to concentrate on this narrow issue.)

The defendant owned a property consisting of two sections: lots 47 and 48. Lot 48 had an area of 1,012 square metres. For reasons which need not concern us, the defendant intended to resubdivide the two lots and thereby reduce the area of lot 48. The plaintiff wished to buy lot 48 and again, for reasons which need not concern us, it was established that the area of the lot was of considerable importance to the plaintiff. The learned Judge considered that the plaintiff had been

advised on a number of occasions by the defendant's agent that the area of the lot was a quarter acre more or less (1,012 square metres) and when the agent completed the Agreement for Sale and Purchase, the agent inserted that area into the Agreement. This was notwithstanding that the agent was aware of his principal's resubdivision and that the area of the lot would in fact be reduced.

A contract was executed and the defendant, on discovering that the area of lot 48 was mis-stated in the Agreement, refused to complete. The plaintiff sought specific performance (and damages) and the defendant pleaded rectification or for relief on the basis of mistake in terms of the Contractual Mistakes Act 1977.

In short, Gallen J decided that no ground for rectification had been made out because the agent's actions in completing the Agreement for Sale and Purchase were deliberate and for the same reason, there was no mistake. The principal was bound by the actions of his agent and all things being equal, the plaintiff was entitled to a decree of specific performance. It was in that regard that the issue of settlement notices arose.

The defendant's Counsel argued that because the plaintiff had not issued a settlement notice in terms of cl 8.1 of the Agreement (presumably, the standard form of agreement approved by the Real Estate Institute of New Zealand and the New Zealand Law Society), the plaintiff had breached the contract and specific performance should not be ordered. Gallen J resolved this issue by ascertaining whether the plaintiff's breach in failing to issue a settlement notice was an essential breach so as to deprive him of his contractual right to obtain specific performance. Gallen J did not think that the breach was essential.

It is submitted that there is some confusion here. The common law position is that a party did not have to give notice making "time of the essence" before suing for specific performance. The question then is what effect cl 8.1 of the standard form agreement has on the common law position. Clause 8.1 provides that:

> If the sale is not settled on the settlement date either party *may* at any time thereafter . . . serve on the other party notice in writing . . . to settle . . . (The emphasis is of course the writer's.)

Clause 8.5 provides that:

> If the vendor does not comply with the terms of a settlement notice served by the purchaser then the purchaser without prejudice to any other rights or remedies available to him at law or in equity may:
>
> (1) Sue the vendor for specific performance . . .

Somers J, in *Hurrell V Townend* [1982] 1 NZLR 536, 548 stated that the effect of such a provision was to prevent the purchaser for suing for specific performance until a settlement notice had been served and had expired.

With respect, one wonders whether that should be right. Did the draftsman of the standard form agreement really intend that the purchaser could not sue for specific performance unless a settlement notice had been issued? There is no apparent reason why a purchaser, who can establish that he was ready and willing to perform on the due date, should have to serve a settlement notice if all that he wants to do is obtain specific performance. There seems to be no justification for changing the law (by contract) in this regard. In normal circumstances, purely as a matter of common sense, the purchaser will allow the vendor some leeway before seeking specific performance. Obviously, there would be no point in immediately commencing an action after the vendor's failure to settle because the vendor's delay might only be temporary.

However, what Somers J said accords with a literal interpretation of cl 8 of the standard form agreement. Assuming therefore, for the moment, that Somers J was right, the next question is whether Gallen J was right in asserting that the purchaser was in breach of contract in not issuing a settlement notice. With respect, it is submitted that the learned Judge was not right. Clause 8.1 of the standard form agreement gives the innocent party the right to issue a settlement notice. It does not oblige the innocent party to do so (except, perhaps, as a condition precedent to obtaining or exercising certain remedies and rights) – there is no promise by the innocent party to issue a settlement notice. Accordingly, it is submitted, at the most, the failure to issue a settlement notice can only be regarded as being a non-fulfilment of a condition precedent to the exercise of certain rights – there can surely be no question of breach of promise.

Even in the context of breach of promise, it is submitted that what the learned Judge had to say was confusing. Gallen J said:

> Whether or not the breach of such a condition should bar specific performance, depends upon a categorisation of the condition as to whether or not it is to be regarded as essential.

In "sales of goods-type" terminology, of course, a condition is an essential promise. Yet the learned Judge went on to consider whether or not the "condition" was essential. With respect, the writer would have thought that the distinction between conditions and promises would be clear by now. It is unfortunate that British and Commonwealth lawyers have depended so heavily on shorthand terminology and metaphor to describe the operation of the law of contracts. So far as the writer is aware, the Americans have not been as lazy and for example, the Americans have never had any difficulty in distinguishing, not only conceptually, but also in their writings and judgments, between conditions and promises.

In summary, it is submitted that by no stretch of the imagination can cl 8.1 of the standard form agreement be considered to contain a promise by the innocent party to issue a settlement notice. At most, the provision constitutes a condition precedent to the exercise of certain rights including, if Somers J is correct, the right to specific performance. That of course brings us back to the question as to whether it was really intended by cl 8.1 that a purchaser should have to issue a settlement notice in order to obtain a decree of specific performance. The writer doubts whether this was the intention of the draftsman of the standard form agreement or if it was, whether it should have been the intention. Unfortunately however, it seems likely that this is the effect of cl 8.1.

S Dukeson
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The Fiji Constitutional Crisis of May 1987:

A legal assessment

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The recent coup d'état in Fiji has caused ripples far beyond that island state's shores. For lawyers, the challenge is to explore the context of the coup in Fiji's constitutional history and to examine constitutional possibilities for resolving the present impasse. Campbell McLachlan is a New Zealand lawyer, currently a Commonwealth Scholar in the University of London, completing his doctorate on "State Recognition of Customary Law in the South Pacific". In this note, he looks at the legal background to the events of 14 May and proposes some tentative future directions.

1 Introduction

Fiji is in the grip of a constitutional crisis on which its survival as a multiracial nation, and the peace and security of the Pacific region, are hanging. This paper, based on the facts as at Thursday, 28 May 1987, outlines briefly the essential legal background, and suggests some possible ways forward. It falls into four parts:

I The Domestic Situation: Constitutional Government and the Protection of the Native Fijians

II The Coup and the Role of the Governor-General

III The International Situation: the Destabilisation of the South Pacific

IV The Way Ahead

I The Domestic Situation: Constitutional Government and the Protection of the Native Fijians

2 Background

Ever since Fiji became, at its own request, the first British colony in the Pacific Islands in 1874, government of the territory has been characterised by a full-blooded and continuous policy of protecting the interests of the native Fijians. The British, and the Fijians themselves, had seen with deep concern the fate of Native races elsewhere in the Empire, including Australia and New Zealand, and were determined to prevent a similar scenario in Fiji. The original Treaty of Cession was, admittedly, less than wholehearted in its espousal of this policy. Fijian land rights were only preserved in respect of land "in actual use or occupation of some chief or tribe". The rights of the Chiefs, as ceding parties, were only to be recognised "so far as is consistent with British Sovereignty and the colonial form of government". Nevertheless, the first Governor, Sir Arthur Gordon, developed a blueprint for administration, which was dedicated to preserving the land rights and chiefly authority of the native Fijians, a blueprint which even today shapes law and government in Fiji.

The irony of Gordon's policies was that, in order to vouchsafe to the Fijians their traditional way of life, but at the same time placate the European planters, Gordon initiated an immigration programme for indentured labourers from India. Initially, there was no expectation that these labourers would remain in Fiji, and they had almost no civil or political rights. They were there on suffrance.

Meanwhile the Fijians were given every encouragement to maintain their separate identity. Land was their major guarantee of this. However Gordon's earnest efforts to bolster the traditional system in effect eroded the position of the commoners, focused power on the chiefs and weakened the obligations they owed to their people. A powerful, and often wealthy chiefly élite was thus created.

The Indians, on the other hand, stood little opportunity of survival once their Indenture contracts expired, without moving into small-scale commerce and contract sugar-farming on short-term small leasehold estates. The Salisbury despatch of 1875 on the civil and political rights of Indians elsewhere in the Empire, provided some support in the search of the Indo-Fijian community for legitimacy in Fiji.

Big business in Fiji was, and is, owned largely by Australian, British and New Zealand companies.

Racial tension and conflict has a history as long as the colony and nation of Fiji itself. There are very real divides of language, religion, culture, education, and sources of livelihood. Yet the races mix freely and often amicably. Moreover, neither racial group is united. On both sides, there are subdivisions along ethnic and socio-economic lines, and it is possible for substantial cross-cultural communities of interest to develop. Most significant in this regard has been the recent formation of the Fiji Labour Party.

3 The 1970 Constitution

Fiji was the first British colony in the Pacific, and the first such colony

(*pace* the UN trust territories) to gain its Independence.

The British were eager to foster early Independence. As long ago as the 1930s they had foreseen the constitutional difficulties which would be caused by the native Fijians becoming a minority in their own country, an event which had occurred in 1946. Put uncharitably, they did not wish to remain responsible for a situation which they had created but which could only make a peaceful transition to Independence ever less likely. The native Fijians, on the other hand, had no particular wish to rush into Independence, and would have been happy with a slower transition to self-government, perhaps via "associated state" status – then in vogue in the Commonwealth Caribbean. The Fiji-Indian community, which had maintained close links with India and with Mahatma Gandhi in earlier decades, were keen to see an Independent, and republican Fiji.

In the event, the Constitution of the modern Independent state of Fiji was adopted by UK Statute in 1970. The basis of it was thrashed out by a meeting behind closed doors between the main Fiji political parties, endorsed by a visit of the then UK Minister for Foreign and Commonwealth Affairs, Lord Shepherd, and finalised at a constitutional conference, also in camera, in London. Under the Constitution, Fiji became a Dominion, retaining its link with the Queen through a Governor-General. Its terms substantially favour native Fijian interests. It is in no real sense a document developed and adopted by the people of Fiji as a whole, and was never put to a plebiscite.

4 The parliamentary system

Chapter 5 of the Constitution establishes a unique electoral system for Parliament, designed to safeguard the group interests of both ethnic groups. It is weighted in favour of Fijian control. It was accepted by the Indo-Fijians on the basis that it would be a temporary half-way house to a common roll, and that a Royal Commission would thoroughly examine the system. The Commission did prepare its report in the early seventies but its recommendations were never implemented. The system found in the 1970 Constitution is thus still in force.

Parliament consists of three parts: the Governor-General, the House of Representatives and the Senate. Additionally the Great Council of Chiefs, a traditional native Fijian body, has certain constitutional functions.

4.1 The House of Representatives

Section 32 establishes three group rolls and one national roll for elections. Everyone is registered on the national roll and on one group roll: Fijian, Indian and General (for Europeans, Chinese etc.). The electors thus vote in a group and a national constituency. Each elector registers four votes: one for a group representative, and one for each of the three group representatives (Fijian, Indian, General) in a national constituency. The House has 52 members, divided along ethnic lines: 22 Fijians, 22 Indians, and 8 "General" members. Of each group of 22, 12 are elected by the relevant group roll and 10 by the national roll. The eight general members are elected on the basis of three by the General roll and five by the national roll. This ensures equal representation of both major racial groups, although the Indians are numerically the majority of electors. The General members, who hold the balance of power, have typically voted with the native Fijians.

4.2 The Senate

The Senate has similar functions to the House of Lords in the United Kingdom: It may discuss, amend, delay, but it may not finally prevent altogether the passage of a Bill approved by the House of Representatives. Money bills and urgent bills are subject to a streamlined procedure which minimises the Senate's role. Nevertheless, the Senate is very much a living part of Parliament. Its members are appointed for six year terms, and their tenure is not disturbed by a dissolution of Parliament (section 47).

There are 22 members appointed in the following manner by the Governor-General:

- 8 on the advice of the Great Council of Chiefs
- 7 on the advice of the Prime Minister
- 6 on the advice of the Leader of the Opposition
- One on the advice of the Council of Rotuma (an island with a distinct geographical, cultural, and constitutional place in Fiji).

This arrangement effectively ensures that, whatever party or ethnic group might command the majority in the House of Representatives, the native Fijian chiefs will hold sway in the Senate. This is reinforced by a special veto power given to the Representatives of the Council of Chiefs in the Senate in relation to amendments to a set of legislation governing vital Fijian Interests entrenched in the Constitution under section 68 (discussed further below). On matters in the listed statutes affecting Fijian land, customs or customary rights there must not only be a three-quarters majority in favour of amendment in each House, but also six of the eight chiefly members in the Senate must register their support.

4.3 The Governor-General

The third element in Parliament is Her Majesty the Queen. Her authority in Fiji may be exercised on her behalf by the Governor-General (s 72(2)). A critical question in relation to the coup, and it will be discussed under that heading, is the extent of the reserve powers of the Governor-General. In the present context, it is significant that the Constitution (s 53(4)) preserves the power of the Governor-General to either assent or to withhold assent to legislation. This amounts, potentially, to a legislative veto. The position of Governor-General has always been held by a native Fijian, of high-ranking chiefly status within the traditional polity.

5 Reserved Native Fijian Rights

Section 68 entrenches, in the manner described above, certain key statutes dealing with the rights of the native Fijians as *Taukei ni qele* (people of the land, analogous to the Maori concept of *Tangata whenua*).

These are:

(a) the Fijian Affairs Act
(b) the Fijian Development Fund Act
(c) the Native Lands Act
(d) the Native Land Trust Act
(e) the Rotuma Act
(f) the Rotuma Lands Act
(g) the Agricultural Landlord and Tenant Act

(h) the Banaban Lands Act
(i) the Banaban Settlement Act

These Acts cover, in patchwork fashion, the statutory recognition of customary land rights, local government and chiefly authority. They were drafted, and many times amended, during the colonial period. They were never intended to receive the quasi-constitutional status subsequently bestowed on them. They have not necessarily operated in the best interests of any sector of the Fijian population (except, possibly, the native chiefs). They do not accurately reflect past or present customary law and practice. They are unclear in many places. Nevertheless they do operate as a partial guarantee of important indigenous rights. They also safeguard Fijian-Indian rights. The Landlord and Tenant Act protects lessees of customary land. It has been possible to achieve some recent beneficial reform of that Act, giving greater security of tenure to lessees, although this has been undermined by the practice of the controlling authority, the Native Land Trust Board.

An important function of the Fijian Affairs Act is to constitute the Great Council of Chiefs, a periodic meeting of the native chiefs of Fiji. The Council has a direct power to appoint members to the Senate. It also discusses all matters of relevance to the native Fijian people. It meets in a traditional way, and is attended and assisted in its deliberations by Ministers of the Crown. Advisory Councils like this are common enough in the Pacific, and typically receive express recognition by the Constitution. However the Fiji Council has perhaps played a more active and decisive role than elsewhere. As early as 1933, the Council had entered a resolution that "the Immigrant Indian population should neither directly nor indirectly have any part in the control or direction of matters affecting the control of the Fijian race". This mood has, as will be seen, again been expressed in the 1980s.

In other respects, however, the traditional polity has been eroded, especially since Independence. There is minimal recognition of customary law, despite the widespread factual adherence to it by many native Fijians. The judicial functions formerly exercised by the customary authorities have been in abeyance, replaced by a Western style judicial hierarchy. The local autonomy of the Fijian village, formerly a bastion of self-reliance, has been undermined by increasing centralisation and changes in the structure of provincial administration. This has all had deleterious effects on the Fijian social order.

A most disadvantaged group in these changes has been untitled native Fijian commoners. The lands legislation gives the chiefs control over rents from customary lands, and a disproportionate share of the profits is retained by the chiefs.

6 Constitutional Development 1970-1987

Since Independence, Fiji has seen only one Prime Minister, Ratu Sir Kamisese Mara; one governing party, the Alliance; and two Governors-General, Cakobau and Ganilau. The electoral provisions have remained in force, despite the recommendations of the Royal Commission and the wishes of (at least) the Indo-Fijian National Federation Party. These provisions have resulted in elections continuously characterised by racial conflict, exacerbating an otherwise improvable position in ethnic relations.

In 1974, the Fijian Nationalist Party was formed by Sakiasi Butadroka. That Party espoused constitutional reform which would have guaranteed at least three-quarters of the seats in the House of Representatives and most ministerial posts to the *Taukei*. Butadroka forced a debate in the House in 1975 on a motion that the Fijian-Indian community should be repatriated to India at Britain's expense. Although the motion was lost, Butadroka's party split the Fijian vote in the 1977 elections.

Events in 1977 provide a close precedent for the present crisis. The National Federation Party won 26 of the 52 seats, and was the largest party in the House. The Governor-General did invite the NFP to form a government. The party then elected a leader who made an appointment to be sworn in as Prime Minister, but before this occurred, the Governor-General appointed the retiring Prime Minister, Ratu Mara, leader of the second largest party holding 24 seats, to office on a caretaker basis. When the legislature resumed, the Government introduced a confidence motion, which was defeated by the passing by 26 to 23 of an amendment calling on the Governor-General to invite the leader of the NFP to form a government. The Governor-General refused, dissolved Parliament, and the NFP was defeated in the subsequent election. Although the NFP was a deeply divided party, it had demonstrated that it was best able to command the support of the majority of the members of the House of Representatives (s 73(2)), and therefore ought to have been appointed. It seems at least arguable, therefore, that in 1977 the Governor-General exercised his discretion unconstitutionally.

Splinter parties disappeared in the 1982 election, which was bitterly fought along ethnic lines. Although the Alliance was successful, the Great Council of Chiefs insisted on passing its resolution that the Constitution be amended to reserve two-thirds of seats in the House for the native Fijians, and to ensure that the Prime Minister and the Governor-General should always be *Taukei*.

The most notable development since 1982 has been the emergence as a political force of the Fiji Labour Party. This Party is genuinely multi-racial and represents many elements in both ethnic groups which find a common purpose in their disaffection with the existing economic status quo. Research, in particular on the urban proletariat in Fiji, suggests that racial barriers are breaking down, as workers challenge the established oligarchy. The coalition which was elected in April 1987, is headed by Dr Timoci Bavadra (himself a native Fijian), and represents both the NFP and the Labour Party (returning 19 and 9 members respectively). It is thus incorrect to characterise the Bavadra Government as Indian, and the Alliance Party as holding the monopoly on native Fijian views.

Finally, on pre-coup developments, there had been recent calls for a complete overhaul of the Fijian provincial administration. This question has its own, tortuous, history, but the most recent

discussion was initiated by the independent report commissioned by the Government, the *Cole Report 1985*. This Report was badly researched, hastily put together, and left many issues, including the position of the Indians, unresolved. It did however recommend greater decentralisation, the empowerment of customary authorities and recognition of customary law. It has been discussed by the Great Council of Chiefs. Draft legislation has been prepared, but nothing more as yet has emerged.

II The Coup and the Role of the Governor-General

7 Causes and Events

On Thursday, 14 May 1987, Lieutenant Colonel Sitiveni Rabuka, third in command of the Fiji armed forces, interrupted Parliament by military force, carried off the Prime Minister and the Government MPs, and announced a coup d'état.

While events have not yet revealed the full extent of advance planning, the coup seems likely to have been supported by the Council of Chiefs and Fijian Nationalist elements.

In the month between the election of the Bavadra coalition Government and the coup, and despite a moderate and cautious approach taken by the Government, there was a sustained, and organised, programme of protest. A news report in the *New Zealand Herald* of 27 April reports boatloads of Fijians being brought from other Islands to picket the first sitting of Parliament on 7 May. Officials of what is described as "the Fijian Movement" said that this was the third stage of a seven-stage plan to force a change in the constitution restoring the country to Fijian leadership. Other stages listed included:

- Escalating confrontation with the coalition Government of the Prime Minister, Dr Bavadra, to destabilise it.
- Using Fijian control of the Senate to block money supplies for the new Government.
- Petitioning the Governor-General, Ratu Sir Penaia Ganilau, for a constitutional change to put control of the Government and indigenous affairs into Fijian hands forever.

The coup may also have been at least tacitly approved by the United States, which was disturbed by Dr Bavadra's anti-nuclear, non-aligned stance, and wished to see a return to Ratu Mara's courtship of the American alliance.

There was undoubtedly a complex interplay of factors. One must not lose sight, however, of a genuine and significant element in the native Fijian community, gravely worried about their rights and position, whatever the legitimacy of the coup itself.

It is in the nature of coups d'etat that they are unconstitutional seizures of power, yet Rabuka's coup has, to date, been a most extraordinary coup in its striving to establish constitutional legitimacy. The coup was bloodless. Although press freedom has been curtailed, and the Government initially held under arrest, there have been no killings and little unrest. Messages from Dr Bavadra have been received by the outside world. However the most striking aspect of Rabuka's conduct has been his attempts to gain the approval of the Governor-General.

Rabuka repeatedly visited the Governor-General, Ratu Sir Penaia Ganilau, to obtain his co-operation with the coup. His need to gain the Governor-General's support stems from the basis of his own support within the traditional native Fijian polity. Ratu Sir Penaia Ganilau is himself a High Chief, and from the same island, Taveuni, as Rabuka. It was the Fijian Alliance Party which, in 1970, insisted that Fiji assume Dominion status within the Commonwealth with the Queen as Head of State. The Indians preferred a Republican form of government. The Fijians as a people have a close identification with the Queen. The Council of Chiefs has repeatedly declared its loyalty to Her Majesty. These are not empty words. Hence the need to obtain the ratification of the Governor-General.

Ratu Ganilau has been fortified in his personal stand by communication with Her Majesty and by unanimous support of the (multi-racial) Judiciary under the Chief Justice, Sir Timoci Tuivaga and of the (New Zealand based) Court of Appeal for a return to constitutional government.

As at Thursday, 28 May, the Governor-General seems to have secured limited success in quashing the coup. Dr Bavadra has been released. He has appointed an Interim Council of Advisors and is pledged to call a fresh General Election. He has also suggested a review of the 1970 Constitution. Meanwhile he has dissolved Parliament. Dr Bavadra, on the other hand, has contended that his Government was validly elected, that he is still the Prime Minister and that the Governor-General is bound to act on his advice, which is that there will be no election and no Council of Advisors. He has refused to join the Council of Advisors. This constitutionally-phrased turn of events raises in acute form the reserve powers of the Crown in constitutional crises.

8 The reserve powers of the Crown in Constitutional crises

When may the Governor-General, in a time of crisis, act on his own independent and deliberate judgment? This is an issue which has been the subject of growing experience in the modern Commonwealth.

It seems clear that, at least where the Constitution itself does not closely circumscribe the reserve powers of the Crown (but possibly even in that case), the Governor-General of a Commonwealth country does retain a power of action, independent of the advice of his Ministers, in a constitutional crisis. A recent, and notorious, example from the region is Sir John Kerr's dismissal of the Whitlam Government in 1975. Suggestions were made in 1984 in New Zealand, that the Governor-General had a reserve power to appoint his new Ministry immediately after the General Election despite the operation of section 9(1) of the Civil List Act 1979.

A more extreme example is Pakistan in 1954, where the Governor-General had acted independently to resolve a constitutional crisis by assuming executive and legislative power personally, and eventually succeeded in the Courts on the grounds of State necessity: *Reference by H E The Governor-General No 1 of 1955* PLR 1955 FC 435.

The events in Grenada of 1983 are still fresh in Commonwealth memory. Following military intervention, the Governor-General

assumed executive control and issued a number of proclamations, there being no Ministers to advise him. He subsequently established an Advisory Council which guided the country until elections were held a year later. This, too, has been approved by the Courts under the doctrine of necessity: *Mitchell v DPP* [1986] LRC (Const) 35 (Grenada, Court of Appeal).

In Fiji, many of the reserve powers of the Crown, which are a matter of constitutional convention in Britain and elsewhere (including Australia and New Zealand) are codified in Chapter VI of the Constitution. Section 78(1) sets the limits of the Governor-General's Independent action:

> In exercise of his functions under this Constitution or any other law, the Governor-General shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution to act in consultation with any person or authority other than the Cabinet or in his own deliberate judgment.

This section thus contemplates that the limits of his independent sphere of action are set by the Constitution itself.

Section 18, at the conclusion of the Human Rights Chapter, allows certain limited derogations of the fundamental rights in periods of public emergency which are defined as either when Fiji is engaged in any war or when "there is in force a proclamation by the Governor-General declaring that a state of public emergency exists". The Governor-General must act on this matter, and in making subsequent regulations allowed under the Public Safety Act, on the advice of his Ministers. The latter Act relates to natural disasters or to "a state of civil commotion which threatens the public safety".

Does the Governor-General have an independent deliberative power to dissolve Parliament? In the ordinary case, section 70 provides that any dissolution before the elapse of the five-year term of the House of Representatives must be carried out by the Governor-General *acting in accordance with the advice of the Prime Minister.* Only two exceptions are contemplated:

(a) If the House of Representatives passed a resolution that it has no confidence in the Government and the Prime Minister does not within three days either resign from his office or advise the Governor-General to dissolve Parliament within seven days or at such later time as the Governor-General, acting in his own deliberate judgment, may consider reasonable, the Governor-General acting in his own deliberate judgment, may dissolve Parliament;
(b) If the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament.

While the Constitution thus circumscribes and defines the Governor-General's power of independent decision, it is doubtful whether reference to the written text alone, however clear, is sufficient where the Governor-General is seeking to deal with a coup d'etat, which is by definition an unconstitutional usurpation of power.

Under such circumstances, the Governor-General may have no choice but to act outside the Constitution itself. But this does not mean that his actions are unregulated by legal principle. Commonwealth jurisprudence has evolved a "doctrine of necessity" which provides a guiding thread. Nevertheless cases from other jurisdictions have to be examined with care, not only because the facts and social context may be different, but also because the context in which the doctrine is raised may itself differ. Frequently the question is one of the legitimacy of the Courts, or of some legislation passed by a revolutionary regime, once a coup d'etat has been successfully carried out.

The position of the Governor-General during a coup is of course different. His position, and the restrictions which the common law imposes on it, are usefully summarised by Haynes P in *Mitchell* (88-9), drawing upon the *1955 Reference* case; *Madzimbamuto v Lardner-Burke* 1968 (2)SA 254 AD (Rhodesia); *A-G of Cyprus v Ibrahim* (1964) CLR 195; and *Bhutto v Chief of Staff and Federation of Pakistan* PLD 1977 SC 670:

> I would lay down the requisite conditions to be that:
>
> (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the State;
> (ii) there must be no other course of action reasonably available;
> (iii) any such action must be reasonably necessary in the interests of peace, order and good government; but it must not do more than is necessary or legislate beyond that;
> (iv) it must not impair the just rights of citizens under the Constitution;
> (v) it must not be one, the sole effect and intention of which is to consolidate or strengthen the revolution as such.

These principles embody the need for the Governor-General's actions to display a clear commitment to a return to constitutional government; to be in strict proportion to the perceived necessity; to be guided where possible by the advice of the Government duly elected by the people; and not in any way to support the coup. It is these principles which, it is respectfully submitted, ought to guide Ratu Sir Penaia Ganilau, the Governor-General of Fiji, in the present crisis.

What, then, is the constitutional position of the Prime Minister, Dr Bavadra, once released? He has been duly elected and appointed, and has demonstrated an ability to command the confidence of the House. He must therefore continue to be regarded as the legitimate Prime Minister. The Governor-General ought thus, so far as the crisis admits, to be guided by the advice of the Bavadra Ministry. This

is so despite the dissolution of Parliament by the Governor-General acting independently. Sections 73 and 74 preserve, as they must, the right of the existing Ministry to rule between dissolution and fresh elections.

III The International Situation: The Destabilisation of the South Pacific

9 The role of Fiji in the Pacific
Fiji occupies a unique, and pivotal, role in the South Pacific region. It has participated actively in the work of the South Pacific Forum, and its servant the South Pacific Economic Commission. It has the most highly developed economy and administrative infrastructure of any Pacific Island state. It has participated, in contrast to other Pacific Island states, in the wider international multilateral system and is a member of the United Nations. It enjoys moreover, a buoyant economic situation, based on sugar and tourism. It is a transit point on major carriage routes in the Pacific.

10 The rift in ANZUS and the subsequent vacuum
The exclusion of New Zealand from the tripartite ANZUS alliance has been perhaps the single most important factor amongst a number of factors which are tending to destabilise the fragile defence position of the South Pacific. Other background factors are:

- the activities of the French, in particular their programme of nuclear testing at Mururoa; their sinking of the Greenpeace vessel *The Rainbow Warrior* in Auckland harbour; and their active repression of the native Kanak people of New Caledonia;
- the competition between the Island states and outside powers, notably Japan, the United States and the USSR, for the fisheries resources of the South Pacific, in the light of the 1982 Law of the Sea Convention and the non-observance of it by the United States;
- increased military activity in the Indian Ocean by the super-powers;
- the recent courtship of Libya by the Government of Vanuatu.

However the ANZUS affray overshadows all of these in its importance, and its relevance to Fiji. ANZUS was part of the global network of military alliances entered into by the United States within the framework of the United Nations Charter. (See the author's "Anzus: The Treaty Reappraised" [1985] NZLJ 271.) It was undertaken at the instance of Australia and New Zealand. No Island states participated for the simple reason that, in 1951, none, with the limited exception of Tonga, was independent. Yet the Treaty covered the entire South Pacific region. Its broad pledges of assistance and co-operation were drafted before the new global environment of nuclear weapons had evolved. The ANZUS partners valued their alliance, which had not really ever been put to the test, and they refused to allow for island state participation.

All of this changed in 1984 with the nuclear-free New Zealand policy adopted by the new Labour government under David Lange. The attitude adopted by the Reagan Administration in the US on this policy as it affected the visits of US nuclear-powered or armed naval vessels was uncompromising. In the event New Zealand was excluded from participation in the ANZUS Alliance. The Treaty, at least as a tripartite agreement, thus seems in a state of suspension.

Meanwhile the South Pacific Forum realised a long-held ambition in drawing up the Rarotonga Treaty establishing a South Pacific Nuclear-Free Zone, adopted in August 1985. The Treaty expressly did not cover port visits, but signified a major policy commitment by all the independent countries of the South Pacific. It was the first move by the Forum into the realm of a regional treaty on a strategic matter. The United States, the United Kingdom and France all refused to sign the protocols to the Treaty.

11 Fiji and the Nuclear Alliance
In Fiji, Ratu Mara's Government has welcomed ship visits by US forces since 1983 and received substantial assistance in return. The US was thus able to begin to see Fiji as its new base in the South Pacific.

The election of the Bavadra Government changed all that. Dr Bavadra announced an anti-nuclear non-aligned policy. Recently, General Vernon Walters, US Ambassador to the UN, visited Fiji and held discussions with Ratu Mara at a meeting of "Pacific Democrats".

These factors, taken together with the effect of the coup on the stability of constitutional government in other nations in the region, amount, it is submitted, to a background of growing instability in the South Pacific. This situation may merit a regional initiative, which could be reflected in treaty form.

IV The Way Ahead

12 Immediate
While Colonel Rabuka's coup d'état should be condemned, as it has been, as a violation of fundamental principles of democratic representation and constitutional government, the important challenge now for the people of Fiji, and for the peoples of the region, is to find peaceful and lasting solutions, and to translate those solutions into a fair and workable Constitution.

The most proper course in constitutional terms would be to return Dr Bavadra and his coalition Government to office. They were validly elected, have commanded the confidence of the House, and thus ought to be reinstated without revisions or re-elections. Nevertheless, given the unsettled state of the country, and the need for the Governor-General to find a solution within the limits imposed by Colonel Rabuka, who is in de facto control of the armed forces, the next least worst altenative would be to ensure the holding of fresh elections. It is submitted that a full-scale constitutional review ought to be undertaken, but that it should not happen until after such an election.

13 Long-term: Internal
(i) *Constitutional Review*
This must in any event occur, but the way in which it occurs is of vital importance to the future of Fiji. Fiji has never had a fully autochthonous constitution in the sense of a document, drafted openly by a convention fairly representing all

sectors of the Fijian people (and not merely a cabal of the dominant politicians in the racially organised political parties), and adopted by a plebiscite of the people. Contrast Western Samoa. This has to happen. A Royal Commission is not enough, nor is reform by Parliament or through the executive actions of a Council of Advisors. Fiji like any nation, must for its future welfare, build a commonality of purpose in the constitution-making process itself. Tuvalu has recently "autochthonised" its Constitution in precisely this way.

(ii) *Parliamentary System*
As outlined in para 4 above, the existing parliamentary system is already heavily weighted in the Fijians' favour, and in favour of perpetuating representation based on racial lines. The emergence of the Fiji Labour Party suggests that new multi-racial elements may be coming into play in the Fijian polity. Nevertheless there may be little alternative in the medium term than to retain the existing system in some form.

Lieutenant Colonel Rabuka's policy, in so far as it appears to relate to the electoral system, could not equitably be put into operation. The existing system is so heavily in favour of the native Fijians that anything more would be impossible within a democratic framework. Longer term solutions would be either a system of proportional representation (which would hopefully break down racial politics) or a simplified proposal of a single National roll with each constituency returning an Indian and a Fijian member. The recent Report of the New Zealand *Royal Commission on the Electoral system* recommends proportional representation. Further, it argues that the electoral system is an ineffective and insufficient way of protecting the rights of an indigenous people. At least, the focus should be shifted to take in a wider range of constitutional protections and processes than simply the electoral system.

(iii) *Reserved Native Fijian Rights*
Electoral systems are not the only way to protect the legitimate rights of the indigenous people of Fiji as *Taukei ni qele*. It is in the area of the reserved rights that many adjustments can and should be made. The whole apparatus of the entrenched legislation should thus be within the mandate of any review body.

It is beyond question that the rights of the native Fijians as *Taukei ni qele* are entitled to constitutional respect and protection. One need not look far afield in the region to see current examples of the repression or inadequate protection of the rights and laws of indigenous peoples. The plight of the native Hawaiians, the Kanaks of New Caledonia, the Papuan peoples of Irian Jaya, and the current struggles of the Torres Strait Islanders, the Australian Aboriginal people and the New Zealand Maori must be as evident to the modern Fijian, as the earlier victims of colonial expansion in the Pacific were to his predecesors in 1874. The question is not that such rights exist and are worthy of protection, it is rather how best that is to be achieved.

The rights of indigenous peoples are receiving increasing recognition at the international level, and in the other countries of the region, including Australia and New Zealand as well as the Island states. This can be a positive and creative process of recognising the continuing validity and importance of traditional cultures, the value of cultural diversity, and the autonomy of indigenous groups. It need not be discriminatory. It rather involves the enhancement of human rights.

Fiji is a party to the International Convention on the Elimination of all Forms of Racial Discrimination 1966 (though it is not a party to the other major human rights conventions). This Convention is an important international law standard, which must be a benchmark for subsequent arrangements. Fiji has however entered the following reservation to the Convention:

> To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in article 5(c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5(d)(v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3 or 5(e)(v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

Recent clarifications of the law in Australia, following the decision of the High Court of Australia in *Gerhardy v Brown* and the authoritative Report of the Australian Law Reform Commission on the *Recognition of Aboriginal Customary Laws*, suggest that legal provisions which take account of actual and legitimate cultural differences and which give effect to indigenous rights, are not discriminatory unless in their effect they substantially and unfairly prejudice the ambient population. This is the test which will be applicable in Fiji.

The time is ripe for a reworking of the law on indigenous rights in Fiji. In so doing particular account should be taken of the 1985 Cole Report recommendations with regard to:

- indigenising the legal system
- recognition of customary law
- decentralisation; greater autonomy at village level
- land reform; for the benefit of the majority of native Fijians.

A review might also consider economic matters, in particular:

- participation by native Fijians in commerce
- role of the multinationals
- encouragement of multiracial endeavours.

14 Long-term: Regional
The coup and the general situation in the Pacific highlight the need for a regional defence pact between the independent nations of the South Pacific. This should be concluded by the South Pacific Forum, as the regional body, and should tie in with the United Nations and with the Rarotonga Treaty. The need for such an arrangement has been brought out by the Commonwealth Secretariat in its report *Vulnerability: Small States in a Global Society* and follow-up meetings.

In this matter, and in building its future society, Fiji will be a touchstone for the Pacific region and beyond. □

Law Conference '87

The Conference Organising Committee has now made available the details of the business programme which is published herewith in brief form for the information of the profession. The programme comprises some 44 sessions, with four sessions generally running concurrently on the Friday, Saturday and Monday. There will also be breakfast sessions and conference luncheons each day. Most will be addressed by an overseas guest speaker. The Conference Closing on the evening of Monday, 5th October, will include an address by the Rt. Hon. Sir Ronald Davison, Chief Justice of New Zealand. Speakers will come from New Zealand, Australia, United Kingdom, United States, Canada, India and Western Samoa. All are distinguished in their particular fields. Care has been taken in compiling a business programme with a wide range of currently relevant topics both general and specialised. The date and time and further particulars of each session will be found in the centre pages of the registration brochure — Abbreviated Conference Programme.

Conference opening principal address

Professor Irving Younger

On the evening of Thursday, 1 October, at the Conference Opening the principal address will be given by *Professor Irving Younger* on *The Art of Persuasion* — "how to use a sledgehammer gently". An address on the art, techniques and objectives of persuasion and communication in the law, the Courts, the profession and the public arena. An enormously popular speaker in the United States and elsewhere, Irving Younger has a particular interest in this field. He also speaks in Session 14, *The Art of Cross Examination* — "playing your cards right". How to cross-examine effectively; impeaching credibility; the importance of relevance and brevity. And in Session 43, *Expert Witnesses* — "horses for courses". Evidence-in-chief and the different techniques required for cross-examination. Professor Younger may also present his very interesting and popular address on the *Trial of Alger Hiss*, which will appeal to practitioners and accompanying persons alike.

Dr Jerome Murray

Dr Jerome Murray — will conduct three sessions. Session 1: *Living With a Lawyer* — "Welcome to Fantasyland — the happiest Kingdom of them all?" Session 25: referred to below under Risk Management in Legal Practice, and Session 29: *"Who Do You Think You Are Anyway?"*. He is expected to be very entertaining for all registrants and accompanying persons.

Legal practice

Evolution and Revolution in Legal Practice:

Session 3 *An Outsider's View* — "do lawyers measure up?"

Commerce looks at the profession, followed by *Overseas Trends — "a business profession or a professional business?"*

Session 7 *Mixed Practices* — "inevitable or unacceptable?"

Risk Management in Legal Practice:

Session 25 *Coping with Professional Stress* — "from uptight to all right" (Dr Jerome Murray);

Session 39 *Professional Indemnity Insurance and Limitation of Liability* — "a looming crisis?" What are the problems and the alternatives?

New Technology in Legal Practice

Session 11 *A Workshop on Computer and Other Modern Office Technology* — "essential tools or expensive toys?"

Marketing in Legal Practice

Session 33 *Marketing — Why and How?* — "the image is the message?"

Session 37 Further case studies continue. *An Alternative Approach* — "the Lawlink way"; *Building a Practice* — "the Corban approach"; *Advertising Legal Services* — "why I chose the two page spread".

Session 24 *Marketing, Public Relations and the Law Society.* A panel discussion on the proper role of a law society and bar association.

Civil litigation procedure

Session 10 *Alternative Dispute Resolution* — "an expanding industry?"

Session 31 *Reform of Civil Procedure in the Courts* — "major changes or minor tinkering?"

Bill of Rights

Session 2 *A Bill of Rights* — "from Ottawa to Otorohanga".

Session 6 A panel discussion on particular issues, including politicising the judiciary, whether a Bill of Rights can be entrenched, the role of the Privy Council, the status of the Treaty of Waitangi.

Commercial law

Session 9 *The Harmonisation of New Zealand and Australian Commercial Law* — "where to from here?"

Session 13 *Fair Trading* — "is the likely impact under-estimated?"

Session 22 *Insider Trading and Market Manipulation* — "fraud or fair play?

Session 30 *Deregulation* — "finesse or folly?"

Session 44 *Restrictive Trade Practices* – "competition unleashed?"
Session 35 *Sponsorship and Franchising* – First a discussion on sponsorship generally, and in particular, the legal considerations and the lawyer's role followed by *International Franchising* (Warren Pengilley). The relevant legal and other considerations.

Legal education

Session 18 *A Workshop on Practical Skills, Legal Training* – "how do you do?"
Session 20 *Future Developments* – "quo vadis?"

Criminal law

Session 28 *Criminal Discovery* – "a fair cop?"
Session 34 *Victims, Violence and the Criminal Process* – "is there a solution?"

Medico-legal and bioethics

Session 4 *Life and Death Decisions* – "can the law decide?"
An examination of the legal and ethical restraints on the control of life, death and disease. This will be the first part of a seminar jointly arranged with the Christchurch School of Medicine. The seminar will continue at the School of Medicine on the Friday afternoon and Saturday morning dealing in greater depth with the relevant topics, including informed consent, the control of AIDS and the allocation of health resources. Conference registrants will be welcome to attend. Please complete the box in the registration form.

News media law

Session 5 *The Responsibility and Role of the News Media* – "publish or perish?"
Session 21 *Defamation* – "public interest or interested public?"

Administrative law

Session 27 *Current Developments in Administrative Law* – "is NZ marching to the beat of a different drum?"
Session 36 *Lawyers and Administrative Tribunals* – "incompatible bedfellows?"

Justice and human rights

Sessions 12-16 *Access to Justice* – "a cultural agenda" – A panel discussion and consideration of the way in which a substantially mono-cultural profession and judiciary can best serve a multi-cultural society; specific issues currently being debated in this general field.
Session 41 *Affirmative Action* – "minority rules – OK?"

Women in the law

Session 15 *Women in the Law* – "painful progress or progressive pains?" – A panel discussion on the experiences of a number of women lawyers in the law and the profession.

Family law

Session 8 *Economic Consequences of Equal Sharing Property Regimes* – "how unequal can equal be?"
Session 32 *Children in the Adversary System* – "are children in Court children caught?"

Taxation law

Session 26 *Taxation Concepts* – "the dream and the reality"
Session 40 *Tax Avoidance* – "avoiding evasion and evading avoidance"

Industrial law

Session 23 *The New Labour Court* – "window dressing or substantive change?"

General sessions

Sessions 38 and 42 *The New Zealand National Legal Identity* – "has the colonial tie been cut?". NZ's post colonial legal development, past, present and future; whether there is a distinctive NZ legal identity and what are its characteristics? – the present significance of the imperial connection and that of other common law countries; the justification of a final right of appeal to the Privy Council in this context.

Sessions 17 and 19 *The Adversary Trial System Under Review* – "a case of the tail wagging the dogma?" Whether it meets the needs of justice; its defects; whether the system is an expensive time-consuming luxury or an essential ingredient of the rule of law and the right to a fair hearing; a comparison with the inquisitorial system; the potential for miscarriages of justice; how important is the search for the truth? (Lord Griffiths; Ludovic Kennedy; Gerry Spence; Mr Justice Hardie Boys. Chaired by Robert Alexander QC.)

Extension seminar

A short *conference extension seminar* will be held in Queenstown on Wednesday, 7 October, if there is sufficient demand. There will be one or two eminent speakers, including those from overseas, speaking on topics of wide appeal. This seminar would appeal to those from outside Christchurch in particular. Queenstown is New Zealand's premier tourist resort, with outstanding lakeside scenery and charm. Please complete the box in the registration form if you are interested in attending.

The Accident Compensation Act and damages claims (II)

By John Miller of Victoria University of Wellington

This is the second part of Mr Miller's article. The first part was published at [1987] NZLJ 159. In this part the author continues his examination of the limitations the Courts have imposed to prevent the Accident Compensation Act barring claims. In the first part he considered four such limitations, namely whether damages arise directly or indirectly, the definition of mental consequences, the definition of accident, and the interests affected by the Act. In this part he looks at the limitations on causes of action affected by the Act, when a question of personal injury by accident arises, and the availability of compensation under the Act. He concludes that although the Accident Compensation Act has now been in existence for about 15 years, its relationship with intentional torts remains unclear.

4 Interests affected

Another limit on the effect of the Accident Compensation Act on damages claims can be drawn by dividing up a cause of action into personal injury components and invasion of rights components. In *Re Firmstone* (1983) 4 NZAR 62 the plaintiff was thought by the police to be a dangerous criminal and was arrested by them accordingly. This caused him thereafter to suffer from a severe anxiety state. This was considered by the Accident Compensation Appeal Authority to be mental consequences and therefore a personal injury from the wrongful arrest which they classified as the accident. However they still considered that his claim for damages against the police for the unlawful arrest should be allowed to proceed.

They drew a distinction between Firmstone's right to sue for the invasion of his personal rights and his right to sue for the personal injury he had suffered. It was only the latter that was barred by the Accident Compensation Act – the former could still proceed (p 67).

In *Blundell* Vautier J was also prepared to allow a somewhat similar division to that suggested in *Firmstone*. He considered that the plaintiff could claim damages for those aspects of the torts which resulted in injury to the dignity and the personal feelings of the plaintiff so long as no element was referrable to personal injury by accident (p 15).

There are problems with this approach however. If a separate claim can be made for the invasion of personal rights or injury to dignity in a false imprisonment action this should be so in the other torts where there is an interference with the person such as assault and battery. Often these cases are more serious than false imprisonment cases. Contrast *G v The Auckland Hospital Board* where a woman was raped but her action was barred by the Accident Compensation Act and *Duffy v Attorney-General* [1985] BCL 1213, where a woman was wrongfully arrested by the police and kept in a police van and custody for over two hours. Her action was not barred; indeed the Accident Compensation Act was not even mentioned in the judgment and she was awarded $60,000 damages. A new trial was, however, ordered on the grounds that they were excessive [1986] BCL 331 but the matter was finally settled for approximately $35,000. While such an arrest was certainly a serious invasion of her personal rights most would agree that *G* had suffered a far greater and more offensive invasion.

This leads onto the second problem with separate actions being allowed for invasion of personal rights or injury to dignity. The damages claimed in these situations will often include aggravated damages for humiliation, embarrasssment etc. In *Duffy* aggravated damages were awarded for humiliation, embarrassment, indignity, upset, pain and suffering but these are mental consequences and we are therefore back at the same arguments that she is claiming damages for a personal injury.

5 Causes of action

Another limit on the effect of the Act on damages claims can be achieved by simply denying that *various causes of action* are affected by the Accident Compensation Act. As indicated above while it is arguable that defamation can be considered a personal injury by accident the Courts would give short shrift to such an argument; "an absurdity" according to Vautier J in *Blundell* (p 22).

The Court of Appeal in *Blundell's* case (p 13) have categorically denied that *conspiracy* and *malicious prosecution* have anything to do with personal injury by accident and therefore claims for compensatory including aggravated damages as well as exemplary damages may be made for those torts. They have not, however, indicated on what grounds malicious prosecution and conspiracy have nothing to do with personal injury by accident. They have simply said that they are not claims for damages arising directly or indirectly out of any personal injury (p 13).

On the other hand the Court of Appeal in *Donselaar* and *Blundell* have said that proceedings for damages for compensatory and aggravated damages for all *assaults* and *batteries* clearly arise out of personal injury by accident and therefore are barred. Although again the Court of Appeal has not indicated precisely why all assaults and batteries are considered to be personal injuries by accident.

In the High Court decision of *Blundell* Vautier J declined to strike

out a claim for compensatory and aggravated damages for assault and battery. He considered (p 13) that all that was said by the Court of Appeal in *Donselaar* on the limitation of the types of damages recoverable was obiter but with respect this is not so. It is true that what the Court of Appeal had to say on *exemplary damages* was obiter but its decision that compensatory and aggravated damages were barred by the Act in cases of assault and battery was part of the ratio. Vautier J gives as the ratio what was, with respect, only a secondary reason namely that the plaintiff had not made out any case for exemplary damages apparently as there was evidence of a family feud and provocation. The true grounds for the decision in *Donselaar* were that although the damages being claimed were called exemplary damages by the plaintiff they were in fact really compensatory and aggravated damages and those were clearly barred by the Accident Compensation Act. This ratio therefore should still have led Vautier J to strike out the claim for compensatory and aggravated damages at least for the assault and battery.

Having the Court of Appeal simply declaring that proceedings for damages for certain causes of action are or are not barred by the Accident Compensation Act does seem to be the easiest way to handle this particular area. The whole area can be reduced to a few simple propositions namely:

a *Assault, Battery*
Exemplary damages not barred
Compensatory and aggravated damages barred –
Authority – *Donselaar, Blundell*

b *Malicious Prosecution, Conspiracy* –
Exemplary damages not barred
Compensatory and aggravated damages not barred –
Authority – *Blundell, Stowers*

It is helpful to have the line drawn at malicious prosecution and conspiracy by the Court of Appeal. If the line is drawn at this level for torts which deal with interference to the person, it is obvious that other causes of action further removed from this, such as trespass to goods – *Howley* (p 2) and defamation are clearly not barred by the Accident Compensation Act. This just leaves for decision two torts more connected with interference to the person – false imprisonment and intentional infliction of nervous shock (*Wilkinson v Downton* (1897) 2 QB 57). There is still some doubt as to the effect of the Accident Compenation Act on the latter tort but it would seem that it is so closely related in effect to assault and battery that the Court of Appeal would probably follow the same approach and bar proceedings for compensatory including aggravated damages but not for exemplary damages.

This just leaves the action for false imprisonment/unlawful arrest. The simplest decision for the Court of Appeal would be to declare that like assault and battery, claims for compensatory and aggravated damages are barred by the Accident Compensation Act. This would then mean that only the new form of exemplary damages could be claimed for false imprisonment/unlawful arrest. This is in effect what is happening at the Court of Appeal level anyway. In *Stowers* and *Blundell* the plaintiffs restricted their claim to exemplary damages. Nothing is really lost by this. If there are aspects of the arrest that call for compensation the ACC is the proper authority for that. If there are aspects of the arrest that call for condemnation the Courts through awards of exemplary damages are the proper authority.

6 Question of PIBA arising

Another limit can be placed on the effect of the Accident Compensation Act by the Courts denying that any question of piba arises. This then enables them to allow claims for false imprisonment/arrest to proceed. The Accident Compensation Corporation is given exclusive jurisdiction by s 27(3) of the Accident Compensation Act 1982 to determine whether or not any person has suffered personal injury by accident and if this *question arises* in any proceedings before a Court it must be referred to the Corporation. In *Howley* Chilwell J said that he could not usurp the function of the ACC to determine whether the plaintiff suffered piba but he did have the jurisdiction to determine whether such a question arose (p 5). He denied that it did so because he considered that the humiliation and embarrassment suffered in a case of false imprisonment were not mental consequences and therefore not personal injuries (p 6). With respect such a decision clearly usurps the jurisdiction of the ACC to determine what is piba. In *Craig* Tompkins J agreed with the approach of Chilwell J that no question arose under the Act and allowed a claim for compensatory and aggravated damages to proceed (p 15). However the plaintiff had in that case referred this question to the ACC who had determined that he had not suffered piba (p 18).

While it is true that the Courts must have power to declare that no question of piba arises and should exercise it in obvious cases there are difficulties when the cause of action is closely linked with interference with the person. There, as we have seen, the words "mental consequences" raise a real question of whether there is personal injury by accident. In that case the matter must be referred to the Accident Compensation Corporation if the Courts are not to usurp the exclusive jurisdiction of the ACC. It is true that the ACC have taken years to give decisions on this matter in the past but the position is much clearer for them now. There is also an advantage in referring such matters to the ACC and the appeal process in the Act in that one obtains a consistent approach. This is preferable to various viewpoints being expressed on the matter by different Judges throughout the country. It should be noted that it is the specialised administrative division of the High Court which hears these matters if they go on appeal. This consistent expert approach was considered to be a significant feature of the legislation by the majority in *L v M.*

Many of the other methods used by the Courts to limit the effect of the Accident Compensation Act mentioned above also involve decisions by them on what is meant by personal injury by accident. For example dividing a claim into personal injury aspects and invasion of personal rights raises the very question of what is meant by personal injury by accident and should be referred to the

Corporation.

In *Blundell* and in *Wise* it was considered that a pleading by the plaintiff that he did not claim to recover damages arising directly or indirectly out of personal injury by accident was effective to allow a claim for compensatory and aggravated damages to proceed. But with respect this also raises a question of what is meant by personal injury by accident. The plaintiff has obviously decided that there are certain aspects of assault and battery that are not personal injuries by accident but as we have seen this is highly debatable. Again this should be referred to the ACC for determination.

7 Availability of Compensation

In the High Court decision of *Blundell* Vautier J considered that if compensation was not available from the ACC then an action for compensatory and aggravated damages was not barred (p 17). He came to this view from considering the definition of the word "cover" in the Act. This is defined in s 2 as meaning:

> . . . the entitlement which he, or his dependants would have to rehabilitation assistance and compensation under this Act if he suffers personal injury by accident . . .

Vautier J considered that a plaintiff seeking damages for humiliation, injury to dignity and personal feelings could only look to the non-economic loss ss 78 and 79 of the Act and that the wording of those sections was quite inappropriate to deal with such claims. Therefore there was no entitlement to compensation and if there was no such entitlement there was no cover and if there was no cover the action for damages was not barred by the Act.

However with respect this is not so and appears to have come about from a misreading of s 27(1) of the Accident Compensation Act. It will be noted from the words of the sub-section that "cover" is only mentioned when the piba occurs overseas. If piba is suffered outside New Zealand proceedings for damages are only barred if the person has cover. If piba is suffered in New Zealand proceedings for damages are barred whether the person has cover or not. In *Craig* Tompkins J confirmed that the issue was not whether the plaintiff had cover but whether the plaintiff had suffered personal injury by accident (p 15).

Furthermore it is submitted that s 79 of the Act would compensate for humiliation, injury to the dignity and feelings and the like in certain situations. That section provides a lump sum of up to $10,000 for loss of amenities for enjoying life, including loss from disfigurement and pain and mental suffering including nervous shock and neurosis. Awards have been made under this section for embarrassment particularly in disfigurement cases eg *Re Van Elk* (1986) 5 NZAR 467 though it is conceded that it would have to be something of a substantial nature before the ACC made an award. The point is that embarrassment is not mentioned in the wording of the section but it still features as ground for an award. In *Blundell* Vautier J thought that the lack of mention of matters such as embarrassment meant that no award would be made. The editors of Kemp & Kemp *The Quantum of Damages* 1982, Vol 1, at p 1009, consider that "suffering" relates to the "mental element of anxiety, fear, embarrassment and the like".

Furthermore the learned Judge does not appear to have considered that the definition of "compensation" in the Act includes medical and other expenses and even if there may not be any compensation awarded there may still be rehabilitation assistance given. Entitlement to all of this is included in the definition of "cover".

More importantly it is submitted the mere fact that no compensation is payable in a particular case does not mean that a person does not have entitlement to compensation. It merely means that their entitlement is zero but they are nevertheless still entitled and therefore still have cover. In *L v M* the Court of Appeal recognised that there may be entitlement to a benefit yet no award may actually be made (pp 523, 525). It is agreed that the language used by the Court of Appeal could give rise to some confusion given that they were considering the different meaning of "cover" in the Act at that time. Nevertheless it is submitted that the stages of assessment of a benefit are:

1 Establish eligibility by suffering personal injury by accident
2 This provides entitlement to compensation and rehabilitation assistance under the Act ie cover
3 Assessment of actual benefits payable. This may range from nothing to several thousand dollars in compensation and rehabilitation assistance.

While Vautier J's view that a claim was not barred if there was no compensation payable appeared to come from a misreading of s 27(1), Heron J in *Wise* who was counsel for the plaintiffs in *L v M* approached the matter from ss 26 and 27(3). He was actually considering whether a question of piba arose in an unlawful arrest claim and therefore whether the matter should be referred to the ACC. His reasoning involved consideration of a number of subsections in the Act which led him to the view that it was only where there was an entitlement to compensation that a question of piba arose and if there was no entitlement then there was no need to refer this matter to the ACC (p 6). However with respect, like Vautier J, Heron J also fails to consider entitlement to the other assistance that comes within the definition of "compensation" in the Act and also of the provision of rehabilitation assistance. He is also of the same opinion as Vautier J that entitlement means that an actual award has to be made whereas it is submitted that a person can be entitled to compensation and still not receive anything.

To hold otherwise would mean that whenever a person failed to receive any compensation from the ACC that person could sue at common law. That is clearly not so. He also considered that there was no entitlement under the only relevant section – s 79 for embarrassment (p 8) although as we have seen above this is debatable.

Conclusion

Despite the Accident Compensation legislation now being in existence for nearly 15 years its relationship

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Books

Government Liability and Disaster Mitigation — A Comparative Study

By James Huffman

University of America, 1986 ISBN *0-8191-5322-2*

Reviewed by T A Roberts, Executive Director of the Insurance Council of New Zealand

The prospect or, more accurately, the probability of major natural disaster is something we have learned to live with in New Zealand. We tend to ignore the inevitability of natural disaster, especially earthquake, partly I suspect on the basis that if we don't think about it it won't happen. However, we do have the occasional attack of foresight, and to a limited and probably inadequate extent, our vulnerability receives recognition in our laws and institutions. As our society has developed, risk tends to be larger and more concentrated. At a simple level, we might think back 25 years and consider a loss arising from a fire in the average legal office. The office equipment probably consisted of manual typewriters and, if the office was sophisticated, a duplicator and a simple accounting machine. Nowadays the computing and word processing equipment alone may be worth well in excess of $500,000. Risk accumulation has become a quite important economic and social phenomenon. As our social, economic and political life becomes more vulnerable to major disaster, we begin to think more creatively about how our legal and social institutions ought to recognise and deal with disaster when it arises. For that reason we should welcome a comparative study contrasting the New Zealand situation with other similar and dissimilar systems. Mr James Huffman's comparison of China, Japan, New Zealand, Peru, the Soviet Union, the United States, and his attempt to produce a consistent philosophy and jurisprudence in respect of disaster mitigation legislation could have made a valuable contribution to debate upon our developing law and institutions. Unfortunately Mr Huffman's book represents an opportunity largely missed.

The principal difficulty appears to be that Mr Huffman assumes a consistent philosophy behind legislation where none in fact exists. Mr Huffman advances a theory of government liability law derived essentially from a desire to achieve social goals, and I suspect commits the error of explaining his observations to fit a theory. That certainly seems to be the case with regard to his study of New Zealand law. His assessment lacks realism, especially economic realism. The author's basic thesis is that laws and institutions dealing with mitigation of disaster are essentially reactive to social goals and spring from a combination of history, social custom and a desire on the part of

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with the intentional torts is still unclear. This has been brought about by a combination of Courts simply ignoring the Act or denying that it has any application or by plaintiffs finding it easier to forgo compensatory and aggravated damages in doubtful cases and to seek exemplary damages only.

We have seen that where the Courts have denied the applicability of the Accident Compensation Act they have done so for a number of different reasons but the clearest approach is that adopted by the Court of Appeal thus far which is to simply say that proceedings for damages for some causes of action are and are not barred by the Accident Compensation Act. Thus proceedings for damages other than for exemplary damages for assault and battery are barred but proceedings for all damages are still obtainable for malicious prosecution and conspiracy and presumably all other causes of action further removed than these two for interference with the person.

This leaves those causes of action more connected with trespass to the person such as false imprisonment/unlawful arrest and *Wilkinson v Downton*. It is argued for simplicity that they be treated in a similar manner to assault and battery namely that proceedings for other than exemplary damages be barred. With the Court of Appeal ready to carve out a new role for exemplary damages in New Zealand it is the most sensible course to take and it does avoid argument on whether the whole matter must be referred to the ACC for a decision in accordance with s 27(4) and (5) of the Accident Compensation Act 1982.

While drawing limits in this manner may seem too simple an approach to take it has to be remembered that the Court of Appeal has already done this with other intentional torts and that in other areas of tort law such as negligence the Court of Appeal has pointed out that one of the features of our New Zealand approach is "a certain simplicity". *Christchurch Drainage Board v Brown* [1986] BCL 1021.

Nevertheless it will be very interesting to see how the Court of Appeal deals with the next case of false imprisonment/arrest where the plaintiff insists on seeking compensatory and aggravated damages as well as exemplary damages. The Court of Appeal will then have the power to make this area of the law very simple indeed with compensatory and aggravated damages being barred for certain causes of action but not for others; or horrendously complicated with fine and unjust distinctions being drawn within and between the various intentional torts. □

those who hold power within existing institutions to retain that power. New Zealand is used to support that thesis through a somewhat strained analysis of the Earthquake and War Damage Act 1944, the Accident Compensation Act 1976, and the Crown Proceedings Act 1950. A consistent philosophy and approach is seen where none exists and regrettably the economic motivation, particularly in respect of the Earthquake and War Damage Act, is largely ignored.

Earthquake and War Damage cover is provided by the Crown largely as a result of a perceived need to provide additional insurance capacity and to ration available insurance capacity. The blunt fact of the matter is that there is not and never has been, on world insurance markets, sufficient earthquake insurance capacity. What is available needs to be extended to meet New Zealand needs and that extended capacity, if still insufficient, needs to be rationed in the public interest. That the Earthquake and War Damage Fund is inadequate in itself to meet a maximum probable loss can hardly be doubted. That the premium levels are insufficient must also be acknowledged, as that there may be reason to criticise the investment policies to which the Fund is subjected. It is also widely acknowledged, by the Abbotsford Commission of Inquiry amongst others, that the original concept of the Fund tends to have been lost in the desire to achieve perceived equity by extending the purposes and the range of disasters in respect of which access to the Fund is available.

One way or another Government will be forced to meet the economic cost of a major natural disaster in New Zealand. Government's capacity to do so is heavily dependent on its ability to borrow. That fact is recognised in the Earthquake and War Damage Act 1944 wherein the Fund has unlimited access to the Government's borrowing power, and the Fund is backed by what amounts to an unlimited right to borrow.

Those are the New Zealand realities. They may not fit comfortably with the author's political and economic preconceptions but nevertheless this is the way things are.

A further and associated defect of the study is the assumption that the Accident Compensation legislation has, as a major underlying motive, a desire to provide a system of compensation for personal injury arising from circumstances of natural disaster. That would be news to Sir Owen Woodhouse and those who followed him. A reading of the original Woodhouse Report, and a consideration of the debate that followed it and the legislation, indicates that compensation in times of natural disaster is one of the last things that influenced those involved in the legislation. It was at best a minor side issue.

The author further postulates that a principal motive of all governments in formulating disaster mitigation legislation is a desire to escape liability in tort. That is said to be the New Zealand experience and motivation. It is very clearly not. The Earthquake and War Damage Act 1944 sprang from a desire to increase effective insurance capacity and access. The Accident Compendation Act simply does not fit Mr Huffman's thesis at all. Mr Huffman has a "thing" about sovereign immunity. Whatever the motivation elsewhere in the world, New Zealand's disaster mitigation procedures are not designed simply to extend sovereign immunity. In fact, to the contrary, they place the Crown in a position where in some respects it is recognised as an insurer of last resort.

Another problem arises from failure to consider the effect and importance of the Civil Defence Act and to look at the Public Safety Conservation Act. There is a great deal of recent writing and commentary on post-disaster recovery following a major natural disaster and the role of Government and other authorities in the process of recovery. It is clear that if recovery is to be swift and social dislocation minimised, then institutions and social policies must be sensitive to the need to acquire and allocate resources quickly according to need and real social and economic priorities. Those objectives underlie our Civil Defence legislation and are an important consideration in respect of the way in which the Earthquake and War Damage Act 1944 was framed.

The way in which Australia dealt with the after-effects of Cyclone Tracy upon the City of Darwin contains many valuable lessons for New Zealand. There it was realised that rapid, efficient and fair recovery from a disaster necessitates a systematic and total mobilisation and organisation of a community's social and economic resources. The needs and problems are much broader than Mr Huffman recognises.

It would no doubt appeal to the orderly of mind if our law touching post-disaster administration was dependent upon a consistent principle or philosophy but the reality is that it grew from a combination of demand and perceived need in a quite unsystematic and unstructured way.

The common United States perception that one of the main functions of government is to avoid its responsibilities and maximise its power is not necessarily the New Zealand experience. Exercises in comparative law run the risk of becoming merely a means to systematise and philosophise a set of prejudices.

The hard reality is that our disaster mitigation laws and practices have grown in an "ad hoc" and reactive way to a variety of perceived needs and actual situations. They just grew in the fashion attributed to the immortal Topsy.

Our legal processes and systems are better understood if we view them from a hard headed and historical perspective. That approach may not be attractive to social scientists but it is more likely to produce an accurate appraisal.

This work then considers some interesting and important philosophical and practical questions and might encourage some lively debate on a narrow range of public policy issues. There is however unlikely to be a lengthy queue of prospective purchasers and its value to New Zealanders interested in what we should do in terms of our law and institutions to meet the probability of major natural disaster, is limited by its lack of real insight into our law and institutions and their history. ☐

Books

Cross On Evidence (3 Australian ed)

Edited by D M Byrne QC and J D Heydon.

Butterworths Pty Limited, 1986. Pages i-cxii and 1-1088 (including Table of Cases and Index). Australian price $A79.00 (hardcover) $A59.00 (softcover). ISBN Nos 0 409 49139 X and 0 409 49148 g (pbk).

Reviewed by D L Mathieson, QC.

This review of the latest Australian edition of Cross on Evidence *has been written by D L Mathieson QC of Wellington. Mr Mathieson is the editor of the New Zealand edition of* Cross on Evidence. *A new edition for New Zealand is expected to be published before the end of this year.*

The sixth edition of the English work, prepared by Mr Colin Tapper who assisted the late Sir Rupert Cross in the preparation of the fifth edition, departed in many respects from the style and order of its predecessors. His new chapter headings, and the rearrangement of chapter content, have in general been adopted by Byrne and Heydon (who on this occasion have had to labour without the help of Mr Justice Gobbo).

Many developments in the law have occurred since the previous Australian edition, notably in the areas of no case submissions in criminal cases, identification evidence, the sufficiency of evidence, similar fact evidence, business records, estoppel, and the discretion to exclude illegally obtained evidence. These developments are fully reflected in this present edition under review.

Much of the new material is relevant in New Zealand, although the discretion of a New Zealand Court to exclude illegally obtained evidence remains problematic in scope due to the absence of an express adoption or rejection by our Court of Appeal of the sophisticated guiding principles enunciated by the High Court of Australia in *Bunning v Cross* (1978) 141 CLR 54. Only where the evidence tendered by the prosecution in a criminal trial was unfairly obtained (whether with or without illegality) is the existence of a discretion clear: see *Police v Lavalle* [1979] 1 NZLR 45.

Messrs Byrne and Heydon have usefully added sections on problems which frequently recur in practice but which Professor Cross elected not to include in the first five English editions. There is, for example, an extended discussion of the duty to "put one's case" in cross-examination, sometimes known as the "rule in *Browne v Dunn*" (1894) 6 R 67 (HL), the report of which cannot be located in most libraries. The vagueness of that rule is attributable to the paucity of firm judicial pronouncements, and the editors understandably felt obliged to leave unelaborated the exception which applies when the witness is "on notice that his version is in contest". How must that notice be given? What if the witness could not have failed to be aware that his evidence would be contested in particular respects? And does the rule apply to expert opinion evidence? There are competing considerations in favour of and against applying the rule in *Browne v Dunn* in a literal way to expressions of opinion.

Other topics newly incorporated into the present edition include the status of evidence which has not been objected to, and the scope of the Court's power to order witnesses out of Court. There is an illuminating discussion of the meaning of "probative force" as that phrase is used in the law governing similar fact evidence. The section dealing with legal professional privilege has been extensively rewritten, but New Zealand lawyers must remind themselves that our Court of Appeal in *Guardian Royal Exchange Assurance Co of NZ Ltd v Stuart* [1985] 1 NZLR 596 accepted the test of "dominant purpose" rather than the test of sole purpose which the majority of the High Court preferred in *Grant v Downs* (1976) 135 CLR 674. There are some comments on the law of evidence in "other tribunals" but they are necessarily rather inconclusive because so much depends on the nature of the tribunal and its jurisdiction, and the only judicial development of note deals with the question whether a right of cross-examination must always be accorded.

Messrs Byrne and Heydon completed most of their work for this edition before obtaining access to the Australian Law Commission's recent report on the law of evidence. But they had that Commission's discussion papers. I venture to suggest that a New Zealand lawyer faced with a really difficult problem in the law of evidence should not hesitate to consult those discussion papers which contain a wealth of painstaking research. To say that is not in any way to detract from the work of Byrne and Heydon whose exposition of principle and policy is lucid and at times masterly. □

Commercial List

As from 1 April 1987 a Commercial List has been instituted at the High Court in Auckland. This experiment is expected to be followed at other centres later and is therefore a matter of general interest. The Judge in charge of that List, Barker J, has issued a Practice Note. Copies of this can be obtained from Mr P H Milward, Deputy Registrar, High Court, PO Box 60, Auckland for $7.00 (inclusive of GST).

Attached to the Practice Note is an Explanatory Note. This is published in full for the information of the profession. The Explanatory Note is not, of course, anything more than that, and practitioners using the Commercial List will need to obtain their own copy of the Practice Note accordingly.

Explanatory Note

In order to achieve the purposes of the Commercial List, and to satisfy the legitimate needs of the commercial community, all concerned are required to focus on the formulation of the procedures in each case which will most effectively minimise cost and reduce delay.

In England, Megaw J published a Practice Note [(1962) 3 AER 527] expressing the purpose of a Commercial Court:

> The purpose of the Commercial Court, as it is commonly called, is to provide a service to the commercial community by enabling commercial disputes to be decided as quickly and as cheaply as circumstances allow.
>
> It was the intention, when the Commercial Court was created, that, either on the summons to transfer a case to the commercial list or at an early stage thereafter, the Court should be apprised by the representatives of the parties of the real issues which were likely to arise and of all matters which could usefully by discussed at that stage with a view to obtaining the directions of the Court, by consent if possible, as to the future conduct of the action. *The purpose was to seek to confine the action from the outset to those issues which were really in dispute, possibly to eliminate the necessity for pleadings, to see to what extent discovery of documents was necessary and whether the proceedings could be expedited and cheapened in respect of evidence, documents and similar matters* (emphasis added).

This Practice Note is designed to give effect to the same philosophy.

Generally, the advantage of a speedy hearing should be reserved for those disputes which are expeditiously brought before the Court. The corollary is that, where there is delay in bringing or prosecuting proceedings in the Commercial List, it is unlikely that the action will be permitted to remain there. Of course, the Court will always encourage attempts to compromise disputes. Delay caused by bona fide attempts to resolve the differences between the parties will not, as a general rule, prejudice the entitlement of the parties to conduct the proceedings in the commercial list.

The most important requirement is the early identification of the real dispute between the parties. Experience overseas has shown that often a Statement of Claim fails adequately to reveal and define the dispute. The party seeking entry to the List is specifically required at the outset to set out the issues as perceived by that party.

At the first Directions Hearing, the Court will require the other party or parties to identify what it or they perceive to be the issues. It will be in the light of the issues stated by the parties that a course will be plotted for the progress of the case. Consequently, it is vital that senior counsel become involved at an early stage. Counsel appearing at directions hearings will need to be fully briefed, even although they may not ultimately appear at the substantive hearing.

In a restricted category of cases, it may be necessary to allow the parties access to the full armoury of interlocutory procedures. Parties will be required to establish any perceived need for discovery and, more particularly, interrogatories. Where these procedures are considered appropriate, consideration will be given to whether discovery and/or interrogatories should be restricted to particular issues. Interrogatories submitted should be restricted to important, if not critical, aspects of the case. Prolixity must be avoided at the risk of the disallowance of all interrogatories submitted.

As a general rule, applications to strike out Statements of Claim/Defence, will not be entertained. The Court is concerned to avoid the delay occasioned by the majority of these applications and instead will focus on the preparation for an early hearing.

Parties will be required to make more frequent and efficient use of Notices to Admit and of the Court's powers to require admissions. Where expert witnesses are to be called, the Practice Note requires exchange of reports and makes provision for consultation between the experts in an endeavour to narrow and distil the points in issue.

The Usual Default Order will apply in all cases unless the Court makes a specific order concerning default. The Court will require compliance with the procedures provided in that Order, at the risk of removal from the Commercial List or other appropriate sanction.

Counsel often feel obliged to put every facet of their case to an opposing witness, notwithstanding that it is obvious what the case is and equally obvious that it cannot be reconciled with the evidence given by that witness. Disclosure of factual and expert evidence is calculated to make plain the detail of each party's case. Where these involve personal criticism of a witness or accusations against him, the details should be expressly put to him. This apart, the "putting of

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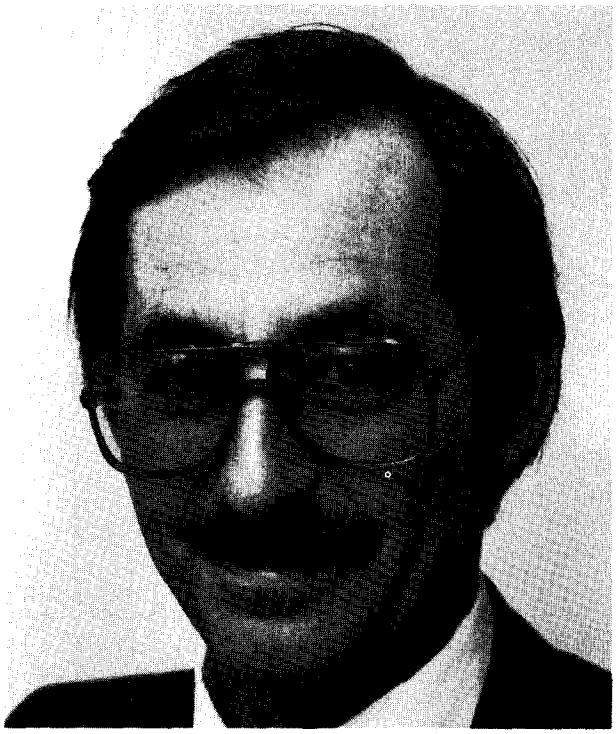
Judicial appointment

Mr Justice Anderson



Early in May the Attorney-General announced that Noel Crossley Anderson was to be appointed a Judge of the High Court. The new Judge will sit in Hamilton.

Mr Anderson commenced practice as a barrister in 1972. Previous to that he had been a principal in the firm of McKegg and Adams-Smith. In 1986 he was appointed a Queen's Counsel.

The new Judge has been active in the educational field. He has taken a leading part in some New Zealand Law Society seminars. He was for a time a tutor at Auckland University.

Mr Anderson was a member of the Auckland Legal Aid Committee and has been a member of the Auckland District Law Society's panel of Costs Revisers. He served on both the Auckland District Law Society and the New Zealand Law Society Committees on the proposed Bill of Rights.

His outside interests have included the Films Censorship Board of Review of which he was a Chairman for a time. He was also a member of the Board of Inquiry in Papua New Guinea established to inquire into Broadcasting Policies and Strategies for that country. The new Judge was a co-author of *Halsburys Australasian Commentary on Bills of Exchange.* □

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continued from p 190

the case" for form's sake is discouraged. Where counsel believes that disclosure of some particular evidence to the other side would result in the loss of considerable forensic advantage an application may be made ex parte for relief from the operation of the order to the extent necessary.

The Court will and parties should approach the calling of expert evidence in a flexible and pragmatic spirit. There is often a case for calling experts after all the evidence of fact on both sides has been adduced. Not only does this ensure that experts give their evidence on full factual data, but it facilitates the presence of one expert witness in Court while the other is giving evidence.

Lengthy interim injunction hearings will be discouraged. There is nothing to stop these coming on to the ordinary list. Parties to a genuine dispute should be able to agree on some interim holding measure pending resolution of the dispute.

Annexure 1

Usual Default Order

(a) If there is default for a period of 14 days by any party in complying with any order or direction for the taking of an interlocutory step, the solicitor for the party in default is required to submit to the solicitor for each other party to the proceedings a proposed revised timetable for the then outstanding interlocutory steps. If there has been any previous default by the same party, the period is reduced to 7 days.

(b) The solicitor for each party is required to inform that solicitor's client forthwith:

(i) of the existing timetable;
(ii) of the fact of the default;
(iii) of the revised timetable;
and obtain instructions as to whether the client will consent to the revised timetable.

(c) The solicitor for each party is required to inform the solicitor for the party in default of the client's instructions.

(d) If all parties consent to the revised timetable, interlocutory steps shall proceed in accordance with it and the appropriate order will be made when the matter next comes before the Court in accordance with the original timetable.

(e) If all parties do not consent to the proposed new timetable, the proceedings are to be brought on by the party in default so that such orders may be made as may be appropriate.

(f) Nothing in the foregoing precludes any party from exercising the general liberty to apply for further directions at any time. □

Defence and Mitigation of Social Welfare Offences

By John Hughes, Senior Lecturer in Law, University of Canterbury

This article examines recent trends in the prosecution of offences under the Social Security Act 1964 and the treatment of such offences in the Report of the Ministerial Review into Benefit Fraud and Abuse. *Particular emphasis is placed on lines of defence and arguments in mitigation.*

Introduction

The prosecution of claimants who are alleged to have obtained social security benefits by fraud is a controversial feature of the welfare system. The State obviously has a legitimate interest to protect in minimising "welfare fraud". Yet past political initiatives which have been taken in this direction and, more particularly, the manner in which those initiatives have been implemented have often led to the criticism that claimants, or particular groups of claimants, are being stigmatised unfairly. As we shall see, it is also argued that the legislation itself provides the basis for stigmatisation in its different treatment of various classes of claimant. Until recently, the debate was conducted for the most part at the political level. However, the past two years have seen a number of significant decisions in the High Court settling the boundaries of welfare offences and the release of a major empirical study of the background to such offences (Department of Social Welfare, *Report of the Ministerial Review into Benefit Fraud and Abuse*, August 1986). This article will examine the relevant statutory provisions and case law in the context of the *Ministerial Review*. Some suggestions for reform will be proposed and a number of possible arguments in defence and in mitigation will be canvassed.

The statutory framework

Under s 127 of the Social Security Act 1964 it is an offence for any person knowingly to make a false statement, or wilfully to do or say anything or omit to do or say anything for the purpose of misleading or attempting to mislead anyone, where the purpose or the result of that act or omission is the receipt or continued receipt by any person of any benefit, exemption or payment under the 1964 Act. The offence carries a penalty of imprisonment for a term not exceeding 12 months and/or a fine not exceeding $500. An information may be laid at any time within 12 months after the facts alleged in the information have been brought to the notice of the relevant departmental officer (s 128 of the 1964 Act). Given the reference in s 127 to omissions, it is relevant to note the circumstances in which an obligation arises to provide the Department of Social Welfare with relevant information. Under s 12 of the 1964 Act there is a general obligation on applicants for benefits to answer all questions put by the Department. In addition, s 80A contains a specific obligation to "forthwith" advise an officer of the Department of any change in circumstances which affects the right of the beneficiary to receive his or her benefit or which affects the rate of any such benefit. Similar, though more limited, provision is made in regulation 9 of the Social Security (Monetary Benefit) Regulations 1971.

Where any payment has been made in excess of the amount to which a beneficiary is legally entitled, the amount paid in excess may be recovered as a debt due to the Crown (s 86(1)). If, in the opinion of the Social Security Commission, an excess payment has been obtained by fraud the Commission may recover by way of penalty an amount not exceeding twice the amount so paid in excess (s 86(2)). Payment of any sum in respect of a benefit to which a person is not entitled also constitutes a debt due to the Crown (s 86(1A)), although there are no corresponding provisions for penalty payments in the case of fraud. In an appropriate case a reparation order might be sought under s 22 of the Criminal Justice Act 1985.

The "statement" under s 127

What does s 127 mean by a "statement" which is false in any material particular? In discussing the predecessor to the current s 127 in *Police v McNaughton* [1970] NZLR 889, 891, Haslam J held that:

> As I read that section, it is designed to prevent persons who make application for the purpose of obtaining a benefit under the Act from making a statement knowing it to be false in any material particular or wilfully misleading or attempting to mislead any officer concerned in the administration of the Act. In effect, it is aimed at representations by words or conduct which are intrinsically untrue, are known to the person concerned to be false and are used by a person for obtaining a benefit which otherwise would not be granted. In my opinion, the word "statement" is sufficiently wide to cover any form of representation, whether

> written or oral, just as the other limb of the section dealing with misleading the officer is wide enough to embrace conduct alone, or words and conduct combined.

Haslam J's analysis was applied in *Smith v Police* [1985] BCL 1183. Under the 1964 Act, domestic purposes benefit is not available to any person who is living with someone of the opposite sex in a relationship in the nature of marriage. In *Smith's* case the appellant, who had been granted a domestic purposes benefit, received an application for renewal of the benefit from the Department of Social Welfare. As well as containing various boxes for completion by the appellant, the application contained the words "I am not living in the nature of marriage (sic) with any other person". The form was completed by the appellant who signed it and returned it to the Department. On the basis of evidence that the appellant had been living together with a man at the relevant time, the appellant was convicted under s 127 in the District Court.

The first ground of appeal was that the document signed by the appellant was not a "statement" for the purposes of s 127(a). It was argued that the allegedly false words had been typed in by someone in the Department before the document was sent to the appellant, and that she had simply signed the document thus presented. Noting that it would have assisted if the applicant had been required not only to sign her name but to do so in the context of declaring or asserting that the information contained in the document was true, Quilliam J added nevertheless that the word "statement" is one of "very wide connotation". Applying Haslam J's reasoning in *Police v McNaughton*, Quilliam J held that:

> when the appellant signed the document she made it, and the contents of it, her own and in this way she made a "statement" that she was not living in the nature of marriage with any other person.

In most cases it may be surmised that the relevant statement will be made at the initial interview, whether orally or in the process of completing the relevant application forms. Nevertheless, as *Smith's* case makes apparent, regular reviews of cash benefits such as the domestic purposes benefit and the unemployment benefit will provide other avenues for challenge. Although procedures for application in both cases have recently been streamlined and more accessible information made available, the present level of access to information and format of documents under the 1964 Act (particularly the absence of documents in the Maori language) was forcefully criticised in a recent Maori perspective on social welfare (Department of Social Welfare, *Puao-te-ata-tu*, 1986, para 69). As we shall see, this may provide grounds for mitigation of penalty in appropriate cases. It is also, of course, of relevance to the question of intrinsic untruthfulness under s 127. To that issue we may now turn.

Knowledge of falsity

In order to be liable under s 127, the person making the statement must know that it is false in a material particular. "Material" for this purpose must mean, by inference, some particular which is relevant to the granting or continuation of a benefit, exemption or payment.

Given the complexity of the 1964 Act and its regulations, which require elucidation for Departmental administrators in a series of detailed practice manuals, it might be argued that requiring claimants or beneficiaries to identify material particulars will, in some cases, place an unnecessarily heavy burden upon them. Such a conclusion might, in cases of ambiguous language, persuade the Court to construe the ambiguity in the defendant's favour. In *Police v Meikle* [1985] BCL 376, Eichelbaum J met a similar argument in the context of the now-repealed s 81(2) of the 1964 Act, which required beneficiaries to report material change in circumstances that may have affected the rate of benefit payable. In *Meikle's* case, Eichelbaum J emphasised that the obligation under s 81(2) was to report changes which *may* affect the rate of benefit. Given that considerable detail of a readily available kind was required on initial application, the learned Judge held that alteration of circumstances that may (and not must) constitute a change was not unreasonable or onerous to the point that the plain statutory language could be read down. However had the obligation been one of reporting changes that *must* affect the rate of benefit payable, Eichelbaum J appeared willing to adopt a different approach. With the substitution of the word "must", His Honour suggested that there would be a "good deal of force" in the point that the beneficiary could not be expected to have a complete mastery of the Act, Regulations and Departmental practice.

Ironically s 80A of the 1964 Act, which replaced s 81(2), requires beneficiaries to advise the Department of any change in circumstances which "affects" the benefit and would thus be susceptible to this alternative analysis. By parity of reasoning, it might be argued that this approach should bear weight under s 127, where a person must make a statement "knowing it to be false in any material particular". Knowledge of falsity carries the clear inference of certainty on the offender's part.

Reference to the relationship between the required knowledge under s 127 and the labyrinthine provisions of the 1964 Act, its Regulations and practice manuals, was made also in *Smith v Police*. In that case, as we have seen, the appellant was convicted of making a false statement after signing a form stating that she was not living in a relationship in the nature of marriage. A further ground of her appeal was that if the relationship in question did indeed fall within this class, then she had not assessed it as such and thus did not know that her declaration was false. Quilliam J rejected this submission, pointing to evidence that the appellant was aware that her relationship would affect her right to benefit. She had lied about certain aspects of that relationship and she and her partner had altered their living arrangements after the interview. With this evidence in mind, Quilliam J held that:

> It must be remembered . . . that the question was not simply whether the appellant knew it was false to say that she was not

> living in a relationship in the nature of marriage. This might have involved some intellectual refinement as to the grammatical *meaning of the words* used, and those words were not her own. What she was charged with was making that false statement "for the purpose of misleading an officer". The real question was, therefore, whether she knew she ought to have disclosed her relationship . . . as being one in the nature of marriage. It seems clear that she did.

A similar analysis was advanced by Judge Mitchell in *R v Hyman* [1983] 2 DCR 164, 165. However it is submitted, with respect, that the syntax and punctuation of s 127 suggest strongly that the correct approach to the question of knowledge is that rejected by Quilliam J in *Smith's* case. The section states that an offence is committed by, inter alia:

> Every person who makes any statement knowing it to be false in any material particular, or who wilfully does or says anything or omits to do or say anything for the purpose of misleading or attempting to mislead any officer concerned in the administration of this Act or any other person whomsoever, for [the purpose of receiving or continuing to receive a benefit, payment or exemption]

The phrasing of the section appears to give rise to two sets of offenders in the present context. First, those who knowingly make a false statement for the purpose of receiving or continuing to receive a benefit. Secondly those who, for that purpose, wilfully do or say anything or omit to do or say anything for the purpose of misleading or attempting to mislead any officer. If this analysis is accurate, then a charge of knowingly making a false statement cannot be qualified by introducing the concept of misleading an officer and such a charge will indeed involve proof of some intellectual refinement as to the meaning of the words used. Later in this article the point will be made that the concept of a "relationship in the nature of marriage" is obscure even to those who administer the 1964 Act. The propriety of its central significance in criminal proceedings under s 127 must accordingly be called in question, particularly where the alleged offender has low English language skills perhaps combined with a background in an oral cultural tradition. It should not be overlooked in the latter context that Maoris and Pacific Islanders are proportionately over-represented in social welfare statistics.

Other aspects of mens rea under s 127

Under the corresponding and similarly worded statutory provision in the United Kingdom dealing with false representations for the purpose of obtaining a benefit, the Divisional Court has held that it is not necessary to show that the false representation in question was made with the intention of obtaining monetary advantage under the Act: it is sufficient that the person concerned, in the process of claiming the benefit, makes a representation which he or she knows to be false. In other words, the word "purpose", which is usually taken to indicate mens rea, is apparently read down so as merely to provide the factual context in which the offence occurs (*Clear v Smith* [1981] 1 WLR 399; *Barrass v Reeve* [1980] 3 All ER 705, construing s 146 of the Social Security Act 1975 (UK): see also *Tolfree v Florence* [1971] 1 WLR 141).

In *Barrass'* case, the appellant had made a false statement on a social security benefit form allegedly with the sole intention of deceiving his employer. The Court ordered a conviction to be entered. The issue has not arisen in any reported case in New Zealand. Nevertheless, the distinction between "benefits" and "payments" under s 127 might be thought to reinforce the reasoning of the Divisional Court in the New Zealand context. However, with respect, the apparent distinction drawn by that Court between the statutory benefit and the cash it represents seems artificial in the extreme: an application for a social security benefit is, in effect, an application to receive money. In practice such cases are likely to be rare. On facts similar to those in *Barrass'* case a conviction might be entered in New Zealand on the basis that it is enough under s 127 that a "result" of the false representation is the receipt of a benefit, payment or exemption. Yet exceptional cases might arise as where, for example, an applicant for unemployment benefit gives a false reason for leaving his or her previous employment with the object of disguising termination for misconduct. This might be done for the purpose of misleading the Department of Labour and any prospective employer, but might incidentally lead to the Department of Social Welfare not exercising its discretion to postpone payment of unemployment benefit for misconduct under s 60 of the 1964 Act.

Wilful omissions

Quality control data set out in the *Report of the Ministerial Review into Benefit Fraud and Abuse* suggests that approximately 90% of benefit fraud and abuse involves simple non-disclosure of facts (p 66). The *Report* acknowledged that many offenders in this respect saw their failure to disclose as being akin to tax evasion (and thus "less than criminal"), that the nature of case benefit administration facilitated the practice and that a common perception amongst offenders was that non-disclosure was justified by their previous negative experiences with the Department of Social Welfare (p 68). Failure to understand the complicated statutory provisons and the allegedly unhelpful attitude of some Departmental staff were among the "negative" features cited in the *Report* (pp 70-73). Maori and Pacific Island clients were seen as being particularly deterred from disclosure due to what the *Report* described as the "emotional costs involved in transacting with the system" which were seen to be higher for these groups than for pakehas (p 75).

In a District Court decision in 1983, Judge Mitchell held that s 127 of the 1964 Act did not impose or create in express terms an offence of omission to disclose a change of circumstances whilst receiving the benefit (*R v Hyman* (1983) 2 DCR 164). In Judge Mitchell's words, "simply lying low and allowing payments to continue is no offence". However, this approach was not followed in *Wyatt v Department of Social Welfare* [1984] NZAR 437. In

this case the appellant, who was receiving unemployment benefit, left New Zealand without notifying the Department of Social Welfare. He was prosecuted for wilful omission under s 127 and convicted. On appeal, he argued that no specific duty existed under s 127 to advise the Department of departure, or pending departure, overseas. Thorp J rejected this argument, approving and adopting the reasoning of Judge Murray in *Department of Social Welfare v Shanta* [1984] 2 DCR 249, 242. In that case, Judge Murray had stated that:

> I do agree that the statute could and should be framed more clearly and specifically, and that Judge Mitchell's other comments are perfectly apt that duties and obligations ought to be clearly defined and that time limits for compliance should be specified. Even however allowing for the clumsiness of s 127, I still think that, as it stands, it does provide (inter alia) that if a person omits to do or say "anything", wilfully for certain blameworthy purposes, then that person commits an offence.
>
> Because the word "anything" is so all-embracing, this is indeed a very broadly-stated offence, which will necessarily cover a huge range of widely differing fact situations, but even so, there are still some very important limiting factors provided for, namely that the omission must be "wilful" and that it must be for specified blameworthy purposes . . .

This approach was adopted in turn in *Police v Meikle* [1985] BCL 376. In *Wyatt's* case Thorp J rejected also the propositon that s 77(2) of the 1964 Act, which gives the Department a discretion to cancel a benefit when the person receiving it is overseas, superseded the general provisions of the now-repealed s 81(2) under which the beneficiary was obliged to notify the Department of any material change of circumstances. Following the criticism in these decisions of the inelegant drafting of s 81(2), the 1964 Act was changed by the Social Security Amendment Act 1984. A new s 80A(1), introduced by s 7 of the 1984 Act, states that:

> Every beneficiary shall forthwith advise an officer of the Department of any change in circumstances which affects the right of the beneficiary to receive the benefit received by him or which affects the rate of any such benefit.

Clearly this new provision, read in combination with s 127, will sustain a charge under s 127 in similar circumstances to cases decided under s 81(2) where the relevant mens rea and actus reus are established.

It is apparent that s 127 poses very wide basic obligations. The limiting factors, to quote Thorp J in *Wyatt's* case, are that the prosecution:

> must prove to the usual criminal standard the two stated purposes, and, in addition, that these be proved in the context of a wilful act or omission on the part of the defendant.

In *McColm v Police* [1985] BCL 1632, Heron J held that an omission was still wilful for the purposes of s 127 where the appellant had misled the Department due to fear of physical violence from her husband. Heron J held also that there is nothing in s 127 that requires the purpose of misleading to be an exclusive one, although it must be "substantial". The appellant's significant objective of avoiding harm to herself did not, then, overwhelm the purpose of misleading the Department. Duress was ruled out on the facts of the case. It is trite law, of course, that duress does not negate mens rea, and the statutory defence of compulsion under s 24 of the Crimes Act 1961 is notoriously narrow when compared with the common law defence of duress. It might be noted, nevertheless, that the defence of duress has succeeded on similar facts to those in *McColm's* case in other jurisdictions (see, for example, *Osborne v Goddard* (1978) 21 ALR 189).

In some cases the wilfulness of the act or – more usually – the omission will be fairly clear-cut. For example, in the case of unemployment benefit, the reverse side of the Department's form UB1 outlines the beneficiary's duty to inform the Department of any change of circumstances and, in particular, of the obligations arising on a return to work. The applicant is required to sign the statement (Department of Social Welfare, *Unemployment Benefit Manual*, para C1.6). Greater difficulty arises where the duty is to advise of changes in circumstances which are less readily identifiable. The principal example is non-disclosure of conjugal status. The *Report of the Ministerial Review* identified such failure as a leading source of "money lost" to the Department, in the case of unemployment benefit and domestic purposes benefit (para 2C). For this reason, and because the concept represents a significant legal problem in itself, the question deserves separate treatment.

Conjugal status and s 127

Section 63 of the 1964 Act deals with conjugal status for benefit purposes. Under s 63(b) for the purposes of granting, reviewing or setting the rate of any benefit, the Social Security Commission may "Regard as husband and wife any man and woman who, not being legally married, have entered into a relationship in the nature of marriage". The application of the statutory test has a controversial background (set out at [1979] NZLJ 32). The rationale for the test is the proposition that it would be quite inequitable if couples in a de facto relationship, or one partner to such a relationship, could receive a benefit in circumstances which would preclude a married couple from doing so. For present purposes we shall concentrate on the practical difficulties inherent in the implementation of the test, but it should be noted that the assumptions underlying it are open to forceful criticism (see MDA Freeman and C M Lyon, *Cohabitation Without Marriage*, 1983, ch 2).

Under the 1964 Act entering into a relationship in the nature of marriage may disqualify a person from a social security benefit directly by requiring that the beneficiary be "unmarried" (as in the case of the domestic purposes benefit under s 27B of the Act), or

indirectly by requiring that the income of both partners to the relationship be aggregated for purposes of entitlement (as in the case of unemployment benefit under s 59 of the 1964 Act). In each case the Department requires notification from the beneficiary at the commencement of such a relationship, an obligation outlined both in pamphlet form and on applications for renewal, which stress change in circumstances (see, for example, *Domestic Purposes Benefit Manual*, para B3.7). Yet, given the intricate cluster of constituents which go to make up such a relationship – financial, social, familial, and sexual – surprisingly little guidance is given to recipients of cash benefits on what that relationship actually entails from a legal perspective. Printed departmental guidance to applicants and beneficiaries is confined for the most part to the statutory wording although a more detailed administrative guide for departmental officers is contained in Part D of the Department's *Miscellaneous Provisions Manual.*

In *Smith v Police* [1985] BCL 1183, Quilliam J held that:

> The expression "in the nature of marriage" is one which defies precise definition but there seem to be certain matters which will, in each case, require consideration for whatever weight must be given to each in the circumstances. It is likely that one will be looking at the length of time the relationship has existed, the degree of permanence which might be expected, the living conditions (that is, whether or not there is the sharing of a bedroom and the general household arrangement), the existence and extent of a sexual relationship, whether the woman was in any sense financially dependent on the man, and the evidence of any genuine commitment by each to the interests of other. There are, of course, likely to be other considerations in individual cases. Plainly the relationship need not be such as to equate with marriage, but one would expect to find that it was such that other people would tend to look upon the parties in much the same light as if they were married.

In that case clear evidence of careful sharing of expenses was held not to take the relationship outside the statutory words so that financial dependence was not the sole, or even the most important, criterion (cf *Re Proc and Minister of Community and Social Services* (1974) 53 DLR (3d) 521). In *Police v Meikle* [1985] BCL 376, Eichelbaum J described the existence of a relationship in the nature of marriage as "very much a matter of fact and degree in the particular case".

This approach is reflected in the decisions of the Social Security Appeal Authority, which habitually refers to the well-known lists of factors going to a conjugal relationship in *Edwards v Edwards* (1978) 2 MPC 50 and *Dorf v Dorf* (1982) 1 NZFLR 331 when determining appeals in this area under the 1964 Act. The Department's internal guidelines likewise adopt an approach based on "common elements", stressing the sharing of the parties' lives, the degree of their commitment to one another and the degree of intimacy between them (*Miscellaneous Provisions Manual*, Part D, para D1.21).

To adopt the language of Eichelbaum J in *Meikle's* case it might be argued that a "relationship in the nature of marriage", like the elephant, "is not difficult to recognise, but [presents] problems of definition". Yet, with respect, this begs the question: Not difficult to recognise for whom? The task of identifying such a relationship clearly presents difficulties for Departmental officers familiar with the legislation and its implementation as well as for judges and lawyers with a background in family law. It is submitted that great caution should be exercised before determining awareness of a relationship in the nature of marriage on the part of an applicant for, or recipient of, a social security benefit, whose views on the factors which constitute a de jure marriage may well differ markedly from those of the tribunal of fact. Such uncertainty of principle at the core of what is, after all, a serious criminal offence, seems highly undesirable.

The whole question of the conjugal status rule will presumably be canvassed before the Royal Commission on Social Policy. If that Commission follows the path set by other law reform bodies in recent years, it will accept retention of the rule on grounds of equity (see, for example, the *Report of the Finer Committee on One Parent Families*, Cmnd 5629, 1974, 340). In the immediate context it would seem worthwhile as an interim measure to spell out more clearly the factors which are seen as going to make up a relationship in the nature of marriage.

If legislative reform must await the Royal Commission's report, then a published policy document might be considered. As an example, the now defunct Supplementary Benefits Commission in the United Kingdom published a policy document *Living Together as Husband and Wife*, 1976, which detailed the Commission's approach to the co-habitation rule under corresponding legislation. The internal policy guidelines in the Department's *Miscellaneous Provisions Manual* are, of course, available by request under the Official Information Act 1982 but current indications suggest – as might be expected – that few of the Department's clients utilise that legislation. As we shall see, one of the key failings in client services identified by the *Ministerial Review* lay in the inaccessibility of information.

Limitation

The general limitation provision in s 14 of the Summary Proceedings Act 1957 requires an information to be laid within six months of the time when the matter of the information arose. This period is habitually enlarged to assist in the prosecution of offences which are difficult to detect and difficult to prove to the standard required in criminal proceedings. Offences which are designed to protect public money are prime examples (see, for example, s 419 of the Income Tax Act 1949). The *Ministerial Review* recognised that there was a low likelihood of detection in cases involving benefit fraud and abuse (at 89). The Courts have commonly assumed that an increased time limit has been provided to allow for more efficient enforcement in such cases.

In line with this approach, s 128 of the 1964 Act enlarges the limitation period so that an information for any offence against that Act may be laid at any time within 12 months after the facts alleged in the information have been brought to the knowledge of any officer concerned in the administration of the Act. As Chilwell J noted in *Whitaker v Callander and Ors* [1982] BCL 596:

> The date of commission of an offence under s 127 could well pre-date the laying of an information by many years. The effect of s 128 is to enlarge the period of limitation by making it run from the time the facts alleged in the information have been brought to the notice of an appropriate officer.

It is clear that the key issues under s 128 are the precise meaning to be attached to the word "facts" and the phrase "brought to the knowledge of [any officer]". Given the frequently anonymous communications received by the Department, the high number of false or malicious complaints and the constraints on its ability to investigate there is a clear need to identify when time begins to run.

In *Russell v Wirihana* [1986] BCL 1777, the Department received an allegation that the respondent, a domestic purposes beneficiary, was living in a relationship in the nature of marriage. After inquiries the Department obtained a statement from the person with whom the respondent had been living. Within 12 months of that statement, but more than 12 months after the original allegation was made, the Department laid an information against the respondent.

In the District Court, it was held that the information had been laid out of time on the basis that the 12 month limitation period commenced on the receipt of the original complaint. Thorp J disagreed. The learned Judge held that time will generally run from the time when the officer in question has sufficient information of the likelihood of the commission of the offence to justify an investigation of the matter: time would not necessarily run from the receipt by the officer of an allegation of the commission of an offence.

Likewise, time will run under s 128 if the Department has sufficient admissible evidence to establish a prima facie case, "although it is not necessary that this point be reached before time commences to run". Thorp J rejected the proposition that any allegation which is subsequently confirmed becomes, on confirmation, a "fact" for the purposes of s 128, stating that "Whatever the degree of knowledge necessary to activate s 128, it must . . . be higher than constructive knowledge". Nevertheless; in a cautionary aside to the Department, Thorp J suggested that:

> If the Department wishes to rely upon the extended time limit contemplated by s 128, it must put before the Court evidence which will justify the contention that the particular case is one to which the extension applies. . . . Unless it can supply reasonable particulars of any allegations received including such particulars as the identity of the maker (if this has been supplied), or the fact that it was an anonymous allegation, it is altogether unlikely that the Department will be able to establish the factual basis for the statutory extension to the required standard.

Recent developments suggest that the Department has taken such strictures to heart. The *Ministerial Review* emphasised the need for specialised training for departmental staff in terms of legal and evidential requirements related to benefit fraud and abuse (at 121).

Summary trial only?

Section 128(2) of the 1964 Act provides that:

> All proceedings for offences against this Act shall be taken before a Stipendiary Magistrate.

The reference to a Stipendiary is now to be read as referring to a District Court Judge. In a number of High Court cases it has been argued that this subsection was intended to create summary offences only. However, s 66 of the Summary Proceedings Act 1957, which provides a right to elect trial by jury, is not excluded by the 1964 Act. The commonly accepted interpretation of s 128(2) is that of Chilwell J in *Byrne v Chew*, unreported, Supreme Court, Rotorua, 27 June 1978, M9/78:

> The plain meaning of the substantive verb "taken" in s 128(2) is the act of commencing proceedings. The plain meaning of the word "proceedings" prefixed by "all" is the institution of the process in respect of the particular offence alleged. "Proceedings" also includes all steps up to conviction and sentence so long as the "proceedings" remain under the Magistrate's jurisdiction . . . . Once the proceedings have been instituted before the learned Magistrate s 66(1) of the Summary Proceedings Act 1957 comes into operation. The defendant having been proceeded against summarily as required by ss 127 and 128 of the Social Security Act, is "entitled . . . to elect to be tried by a jury". The proceedings having been "taken" before a Magistrate the latter must yield to the statutory right of election imposed by s 66(1) of the Summary Proceedings Act.

This approach has been consistently applied in the District Court and in the High Court in *Whitaker v Callander and Ors* [1982] BCL 596, and *Kettle v Patterson and Ors* [1982] BCL 928.

Mitigation

In his definitive account of mitigating supplementary benefit fraud in the United Kingdom, Laurie Elks noted critically that in such cases "conventional pleas in mitigation tend to stress the character of the offender but to leave the offence in an unexplained vacuum" ((1975) LAG Bulletin 135). Whilst supplementary benefit has no statutory equivalent in New Zealand, many of the points raised by Elks' analysis are equally forceful in relation to prosecutions under the Social Security Act 1964. In the following paragraphs, the framework of arguments in mitigation supplied by that analysis

is applied to New Zealand's social security system.

General mitigation

It can safely be assumed that few Judges will be swayed by a detailed analysis of institutional shortcomings in the welfare state, regardless of whether such criticism is justified. However, certain practical points might be made in general mitigation.

1 *The adequacy of benefits* It is widely recognised that the level of some basic benefits is inadequate to meet everyday needs. Unemployment benefit, in particular, is arguably set to subsistence level and the *Ministerial Review* accepted that need was a significant motivating factor in terms of unemployment benefit abuse (at 63). The question of the adequacy of benefits – how much is enough? – is discussed in "Benefit Reform" (Ministerial Task Force on Income Maintenance, DSW, 1986) and is a social issue to be addressed by the Royal Commission on Social Policy. Nevertheless the *Ministerial Review* accepted, for example, that the policy of taxing unemployment beneficiaries without dependent children places such people in a "precarious" financial position and recommended that the net rates of unemployment benefit be increased so as to align them with other social security benefits (at 138). This analysis confirmed the similar views expressed in the report of the Budget '85 Task Force (*Benefits, Taxes and the 1985 Budget*, 1985).

Likewise, the current seven day "stand-down" period before becoming entitled to unemployment benefit (s 60 of the 1964 Act) was criticised as long ago as 1972 by the *Report of the Royal Commission on Social Security*, which noted (at 295) that:

> A week's income is lost, yet commitments for rent, food, electricity, and often hire-purchase continue. It must often be difficult to overtake these commitments, in addition to current expenses, from the weekly benefit when it is paid.

Despite that criticism, the stand-down period was subsequently doubled for single people without children. The net effect of the stand-down, when combined with payment in arrears, is that most applicants for unemployment benefit have to wait three weeks before receiving their first payment. Whilst s 60(3) of the 1964 Act gives the Social Security Commission authority to waive the stand-down period, and the Commission has determined that such waiver can be made where there is insufficient money to meet "essential living costs" (*Unemployment Benefit Manual*, para B2.22), the *Ministerial Review* recommends abolition of the stand-down as being "unrealistic and punitive" (at 138). The *Review* accepted similar criticism of the failure of the present system to deal with initial costs (such as transport and clothing) arising from re-entry into the workforce, recommending that the unemployment benefit span the first week at work (at 139). Implicit in this recommendation is the recognition that the new transition to work allowance under s 69D of the Act (inserted by s 15 of the Social Security Amendment Act 1986) is too narrow in its scope. That allowance is confined to those who have been out of work for 12 months or more.

In more general terms, the weekly rate of benefit received by the defendant might be compared with the Statistics Department's figure of $473 as representing average weekly *expenditure* for one-income families in the year ended March 1986 (*Report of the Statistics Department for the year ended March 1986*, AJHR, G28, 1986).

2 *The discretionary nature of supplementary services* The scale rates of benefits under the 1964 Act were never intended to cover all contingencies (see generally the *Benefits, Taxes and the 1985 Budget* at 13 et seq). Accordingly, cash benefits under the Act may be supplemented by other forms of assistance such as special benefit (s 61G) or accommodation benefit (s 61E). However, such payments are discretionary and the *Ministerial Review* recognised that inequities can and do result from the application of similar discretions due to factors such as ignorance of the part of administrators or inability to articulate need on the part of the beneficiary (at 137). In particular, the current policy to waive the stand-down period for unemployment benefit where the applicant was in financial distress was felt to be insufficiently understood. Measures, such as home visits, which might have alleviated this lack of information have been significantly retrenched in the face of other demands on Departmental staff (*Ministerial Review*, 87).

3 *Restriction placed on earnings* The social security system allows, but in some cases scarcely encourages, self-help by beneficiaries. The allowable rates of earnings are set out in the Schedules to the 1964 Act, as amended by the Social Security Amendment Act 1986. Two examples will suffice. Unmarried unemployment beneficiaries with one or more dependent children are permitted to earn only $60 a week before their benefit is affected. The corresponding figure for domestic purposes beneficiaries is $3,120 per year. Sporadic earnings may, in particular cases, generate commitments which cannot be maintained when the extra income ceases (as, for example, with the onset of school holidays).

4 *Difficulties on re-entry into the paid work-force* It has been argued, controversially, that many beneficiaries have no financial incentive to re-enter the paid workforce because their wage as a full-time employee will compare unfavourably with the benefit they receive (P van Moeseke, A de Bruin and J Goldsmith, *Production or Reproduction*, Massey University 1986). Inevitably such an argument is a two-edged sword when used in mitigation, conjuring up as it does the popular image of the work-shy "dole-bludger", and consequently should be deployed with reserve, if at all. Yet shifts in social security policy often lead to chances of financial betterment being overlooked. One recent example is the policy guideline, operative from October 1 1986, under which the "stand-down" on unemployment benefit does not operate if the benefit is suspended for less than three months. The object is to enable beneficiaries to work for nominated periods, particularly in seasonal industries, without the risk of a lengthy wait for recommencement of the benefit on termination of employment. The

response of beneficiaries to this innovation was apparently disappointing. Nor should the practical difficulties faced by beneficiaries re-entering the paid work-force on a permanent basis be overlooked. In addition to the incidental expenses associated with full-time employment, cancellation of the benefit and payment of wages in arrears will combine to repeat the effects of the "stand-down" period. The transition to work allowance, noted above, should not be overlooked in this context where the person concerned has been receiving a benefit for 12 months or more. Nevertheless, in the case of unemployment benefit, this will apply to only 12% of beneficiaries (Minister of Social Welfare, *The Press*, January 15 1987).

Specific mitigation pleas

Some of the points raised under the heading "General mitigation" may have particular relevance to the defendant. Some specific pleas will also be examined, often by way of development of the broader lines of argument raised above.

1 *The defendant has previously failed to claim entitlements* It may well be that the defendant's financial problems arose because of failure to claim benefits to which he or she was entitled, or because of a late claim (see, for example, the Department's *Unemployment Benefit Manual*, paras B2.9-10). This might apply not only to social security benefits, in areas such as subsidised telephone rentals, but also to concessions from other government departments such as the Department of Internal Affairs (rates rebates) and the Health Department (higher rate of GMS benefit, exemption from prescription charges). Even well-publicised assistance may sometimes be overlooked: on one occasion, in the course of assisting with the completion of a legal aid form by a transient defendant accused of petty theft, I discovered that he had lost his job after an accident leading to partial amputation of two fingers. He had not claimed accident compensation. In the context of social security, pressure of work on Departmental staff means that increasing reliance is placed on the ability of the claimant to identify and request assistance, a reliance which the *Ministerial Review* found to be misplaced. It might well be helpful in such cases to compare the amount allegedly received through fraud with the aggregated amount that might have been received had correct entitlements been claimed.

2 *The defendant has failed to claim discretionary benefits* A new pamphlet, *Your Social Security Benefit*, DSW, October 1986, lists available extra assistance and details of such assistance may also be attached to applications for benefits. Despite such steps, the defendant may well have been ignorant of a variety of statutory avenues for meeting exceptional needs or coping with emergency situations. For example, s 82 of the 1964 Act authorises the Department to pay benefit in advance for the purpose of best meeting immediate need. This may provide funds for essentials such as electricity and rental bonds (see the Department's *Supplementary Services Manual*, Section VII). Alternatively, a non-refundable special needs grant may be paid under s 61G of the Act to meet a need for emergency assistance, authority for such payments ranging to $1,000 (*Supplementary Services Manual*, para B12). Where the defendant is accused of working whilst receiving unemployment benefit, or of not disclosing earnings whilst receiving domestic purposes benefit, it may be that he or she was targeting earnings towards some particular item which might have been obtained under these provisions. The existence of the provisions, in particular the special needs grant, have not been widely publicised until recently and this lack of information may be compounded in some cases by inaccessibility of the Department's offices (a point raised in *Puao-te-ata-tu*, Department of Social Welfare, 1986).

3 *The defendant is in debt* It seems reasonable to assume that indebtedness acts as a catalyst for many cases of benefit abuse. Those defendants who have tried to retrieve their situation by working whilst on unemployment benefit, or by failing to disclose earnings, will often have been unaware of available alternative measures. For example, anecdotal evidence suggests that many Christchurch consumers whose electricity supply is disconnected due to non-payment of accounts have never tried to negotiate payment of arrears on an instalment basis. In such circumstances it might assist to produce evidence, for example budget sheets, indicating that the defendant has explored avenues such as the debt counselling provided by the Budget Advisory Service.

4 *Unsatisfactory dealings with the Department* In *Puao-te-ata-tu*, the authors noted (at para 63) that:

> People felt that the Department's offices were unwelcoming and impersonal. . . . We heard constantly that counter staff were too young, inexperienced, insensitive, poorly trained and judgmental. People were frustrated by having to deal with staff who did not know sufficient about entitlement conditions for the appropriate benefits, seemed unaware of the trauma some of the clients might be in, and were ignorant of Maori values.

This finding echoed the results of other studies (for example, *Quality of Service to Unemployment Benefit Clients at DSW Reception Areas*, Social Programme Evaluation Unit, DSW, 1985). The *Ministerial Review* identified poor service delivery as a causal factor in benefit fraud and abuse (at 70). In addition to the "emotional" costs of dealing with the system, the *Review* pointed to physical costs such as inefficiency and inaccessibility (in terms of travel, lack of information, and complicated forms, procedure and policy). Sweeping recommendations were made for internal reform in terms of staff training and more accessible documentation (at 129-30).

Thus it might be that the individual defendant has been motivated in part by a desire to avoid further problems, if not further contact, with the department. Mitigation under this head may well shade into the failure to claim entitlements and discretionary payments discussed previously. In many cases, recognition that adequate service has not been provided might lead to

a desire to acquire financial assistance by illegitimate means, particularly where need is a motivating force (a causative factor noted by the *Ministerial Review* (at 68)): in essence "colour of right" used in mitigation rather than as a defence.

5 *Co-habitation* The legal problems inherent in the concept of the "relationship in the nature of marriage" have already been discussed. Plainly if the defendant believes that such a relationship did not exist, the appropriate plea is one of not guilty and the question of mitigation should not arise. It should not be overlooked that the usual charge will be one of wilful omission to notify the department of such a relationship for the purpose of obtaining a benefit. The prosecution will thus have to prove the necessary mens rea as well as the existence of the relationship in question, which may not always be easy (see, for example, *Department of Social Welfare v Shanta* [1984] 2 DCR 249).

However, many of the arguments going to the existence or otherwise of such a relationship may also be deployed in mitigation if necessary. For example, the *Ministerial Review* recognised the dilemma presented to the woman concerned by the obligation to disclose entry into such a relationship. The woman may, because of past experiences, lack confidence in the stability of a new relationship. Pressures on the other partner, who will be faced with forming a relationship with children also, may add to the tension and uncertainty the woman feels. The *Review* continued (at 101):

> She may, for example, also be concerned to ensure that the relationship has stabilised before she forgoes her benefit income and is placed in a position of financial "dependency" on her new partner. She may consider that the "rules" are ambiguous and unclear and, as there is a low likelihood of detection, she will not disclose the existence of the relationship immediately. After a period of time she may, for various reasons, still not have disclosed the existence of the relationship and be too frightened to do so.

The defendant with a valid reason for not disclosing an incipient relationship may then grow accustomed to the extra income and enter into commitments on the basis of it, establishing a cyclical pattern of abuse. The *Review* recommended that allowance be made for continuation of benefit support during the formative stages of the relationship (at 36), a view consistent with that of the Finer Committee in the United Kingdom. Such factors plainly go to mitigation, particularly in the marginal case, and the vagueness of the information provided to beneficiaries in terms of indentifying such a relationship should not be overlooked. The criteria set out in Part D of the Department's *Miscellaneous Provisions Manual* reinforce the inherent difficulties of definition underlying the concept.

Summary

In considering the nature of social security policy and administration, a number of avenues will arise for defending, or mitigating, social security prosecutions which are not present in other cases of dishonesty. The *Ministerial Review* recognised a complex variety of causal factors underlying social security fraud and abuse. In defending prosecutions for alleged benefit fraud, it is essential that the defendant's advocate understand the social security system and convey to the Court an understanding of that system and its effect on the defendant.

The subject matter of this article has necessarily entailed an emphasis on shortcomings within the operation of the Social Security Act 1964. In fairness, it should not be overlooked that must of these shortcomings are able to be raised by virtue of published reports based on the Department's own internal investigations. The recent *Ministerial Review* and the Maori perspective supplied by *Puao-te-ata-tu* compare most favourably with overseas investigations, which have tended to be both unimaginative and punitive in their thinking (see, for example, the *Report of the Fisher Committee on Abuse of Social Security Benefits,* 1971 (UK)).

The recommendations of the *Ministerial Review* in relation to prosecutions and penalties, whilst outside the scope of this article, deserve wider study. In particular, there is much to commend the idea that penalties should not put offenders and especially their dependants to excessive disadvantage and that prosecution should be restricted to cases where the sole motivation is relative financial advantage over others rather than the meeting of needs arising from relative poverty (at paras 3.1-3.15). Whilst formidable problems of definition are posed by the latter line of reasoning, it is to be hoped that these suggested policy changes will be put into effect. In the meantime, to paraphrase Elks, advocates for defendants should be prepared to explain the nature of the offence as well as the character of the offender. □

World Association for Medical Law Congress in Prague, August 1988

The 8th World Congress on Medical Law will be held in Prague, Czechoslovakia from 21 to 25 August 1988. The World Association was founded in 1967. This is the first occasion that the three-yearly Congress has been held in Eastern Europe.

For those wishing to contribute papers, a synopsis of some 2,000 words is required to be delivered to the Secretary General, Professor Dr R Dierkens prior to 1 April 1988.

For those wishing further information, enquiries should be directed to Professor Dierkens, B-9000 Apotheekstraat 5, Gent, Belgium; or Claire Andrews, Secretary to Mr J D Dalgety, Vice President of the World Association (PO Box 1291, Wellington, New Zealand).