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Electoral reform and the South Sea Bauble

The tragedy of the constitutional disaster in Fiji following the elections there is all too vividly in everyone's mind. When something as dramatic as a military coup happens so close to us – and geographically Fiji is as close as Australia – and it is the Westminster system that is overthrown, it takes on a different complexion. Electoral systems are seen to be important. The Fiji experience puts the *Report of the Royal Commission on the Electoral System* in sombre context.

Back in the 18th century there was a euphoric investment binge in England in the South Sea Company. Eventually the South Sea Bubble, as the scandal became known, burst. It provided the basis for Walpole's long exercise of power and effectively therefore the development of the office of Prime Minister. The South Seas referred to in 1720 were those of the South Atlantic and not the South Pacific. Nevertheless we can be said to have witnessed recently with the Fiji coup and the rather different but still disturbing Vanuatu involvement with Libya, the bursting of a political bubble in our South Seas. These seas are ours not in the sense that we have any proprietorial rights in them, such as Dick Seddon would have liked, but in terms of the more mundane geographical reality that it is in the South Pacific we live and have our being as an economic and political community.

There is another historical constitutional precedent that the Fijian events bring to mind. England once had a Civil War – indeed if the Glorious Revolution and the Battle of the Boyne are counted, two civil wars. But the one that everyone knows is the Civil War that established, in school curriculum mythology, the supremacy of Parliament over the despotic administration of the Stuarts, culminating in the execution of the monarch.

The action of Colonel Rabuka has an interesting similarity with one of the more dramatic moments of the time of the Puritan Revolution.

On 20 April 1653 Oliver Cromwell, a commanding officer of the Army, went to the Parliament and sat for a while and listened to the debate. He then arose, and all unbidden harangued the Members, called in a group of armed soldiers, told the Members of Parliament that their work was ended, and dramatically gesturing towards the Mace said "What shall we do with this fool's bauble? Here, carry it away." Thus ended Parliamentary rule in England until it was effectively restored again by the Stuart King Charles II. Readers can rely on their memory of recent events to recognise what a precedent had been set in England some 300 years ago, although like all precedents it cannot be simply seen as having been repeated, for times have changed somewhat.

It is perhaps unfortunate that much of the rhetoric inspired by the Fijian coup has been couched in terms of the overthrow of a *democratically elected* government. From a legal point of view it is of more moment that it was the *constitutional* government that was overthrown. The two terms, "democratically elected" and "constitutional" are by no means necessarily identical. In the Fijian situation for instance, the voting arrangements are very complex with each elector having 4 votes (see [1987] NZLJ 176). It has been commonly assumed that an actual majority of the voters cast their votes for the National Federation-Labour Coalition headed by Dr Bavadra and that a minority of the electorate voted for the Alliance Party.

But apparently this was not so. An article in the New Zealand Herald of 26 May 1987, p 11, by Sir Leonard Usher, former editor of the *Fiji Times*, gave the actual figures which were quite different from the standard presumption. In terms of popular support the Bavadra government was a minority government. This time the carefully adjusted system, for a variety of reasons, came up with a result in Parliamentary seats that must have been unintended by the framers of the Contitution.

Sir Leonard Usher in his article explained the electoral system which he said had been designed to provide some representation for every racial group. He then wrote:

> The election of last April 4-11 put into power a 28-member Government comprising seven Fijians and two general elector members, all elected in national constituencies, and 19 Indians, seven elected in national and 12 in Indian communal constituencies.
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> . . .
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> The voting figures for last month's election show that in fact, the National Federation Party-Labour coalition was a minority Government. It gained 46.20 per cent of the total votes cast to 48.59 per cent for the Alliance Party headed by Ratu Sir Kamisese Mara.

The issue in Fiji was not so much a question of the rights of minorities, or the claim to privileges for indigenous people, or the recognition of cultural values, as the simple question of the rule of law. That has been called in question but we should remain hopeful that it will be reasserted in some form even if slightly altered. Minority governments are of course something that New Zealanders have come to accept. Twice in the last ten years the Labour Party got more votes but the National Party got more seats and thus became the government. New Zealanders accepted the working of our constitutional arrangement without giving it much thought in terms of democratic theory of majority rule. The unhappy events in Fiji should give some point now to a more careful analysis of our own democratic constitutional arrangements as embodied in our electoral system. The Report of the Royal Commission on our electoral system deserves more attention than it has so far received. It is intended to look more fully and critically at the Report in the next issue of the *New Zealand Law Journal.*

P J Downey

Case and Comment

The trade name proviso

In *Western Motors Ltd v Urlich* [1987] BCL 245 the dubious utility of the trade name proviso to s 16(a) of the Sale of Goods Act 1908 was again highlighted.

The respondent under a conditional hire purchase agreement purchased a Holden Rodeo utility from an authorised sales agent of the appellant on 30 November 1981. He used the vehicle in his business as a rural mail contractor in the Kaitaia region. It was also used occasionally on the beach to go fishing. The vehicle when not in use was stored uncovered between two buildings some 400 metres from the beach. Some months after purchase the respondent first noticed rust on the vehicle but it was not until February 1985 that he complained about the rusting to the manufacturer (General Motors Ltd). By that stage he no longer used it considering the vehicle to be "rotten" and unsafe to drive.

Despite some deficiency in the respondent's pleadings, Barker J allowed the case to proceed on the basis that the claim fell within the relevant provisions of the Sale of Goods Act. In doing so, His Honour disposed of the argument that certain provisions of the hire purchase agreement signed by the respondent excluded the operation of the Act. In a familiar fashion, the respondent when signing had acknowledged he relied purely upon his own skill and judgment and that "the only warranty" under the agreement was that given by the manufacturer.

Concerning the first point, Barker J accepted the District Court Judge's finding that the respondent had in fact relied on the seller's skill and judgment when making his purpose known to the appellant's agent. His Honour followed the approach taken by the English Court of Appeal in *Lowe v Lombank* [1960] 1 WLR 196 that notwithstanding signed disclaimers, it remains a question of fact whether particular purpose is made known to the seller. Secondly, construing the word "warranty" strictly, His Honour held its use here did not exclude the statutory implied conditions as to quality. This was so notwithstanding the fact that the respondent by his extended use had "accepted" the vehicle and thus by s 13(3) had to treat any breach of condition as one of breach of warranty. The term broken was still in its nature a condition (*Benjamin's Sale of Goods*, 2 ed (1981) para 969).

Concerning the question of merchantable quality (s 16(b)) there was no doubt that this was a "sale by description" and that the appellant's agent dealt in goods of that description. More problematic was whether the vehicle was of merchantable quality. Barker J adopted the "usability" test propounded by Lord Reid in *Kendall v Lillico* [1968] 2 All ER 444, 451. Here the vehicle was driven for three years and therefore could not be said to be of "no use for any purpose" for which such vehicles would normally be used. It seems inherent in the concept of merchantability that goods remain in a merchantable condition only for a reasonable length of time given the circumstances of the case and the nature of the goods. (Atiyah, *The Sale of Goods*, 7 ed (1985) 129)

In determining whether the implied condition as to fitness for purpose (s 16(a)) had been breached, the evidence as already mentioned, satisfied His Honour that the respondent had effectively made known his particular purpose (namely rural mail delivery and storage nearby the beach). The other requirements – reliance by the respondent and sale being in the course of the appellant agent's business – were also met. Accordingly, the vehicle was held to be unfit for its purpose and the case was remitted back to the District Court for further determination as to the respondent's precise loss. The real interest lies in Barker J's consideration of whether the proviso to s 16(a) applied.

His Honour invoked the interpretation given the proviso by Salmond J in *Taylor v Combined Buyers* [1924] NZLR 627. On this view, the proviso only applied when the buyer himself selects and indicates to the seller the class of article which he desires by ordering it under its patent or trade name. In such circumstances, "he is conclusively deemed to rely on his own skill and judgment and not on that of the seller" (p 632). Applying this construction then, the proviso had no application on the present facts since:

> [T]his is not "a case of a contract for the sale of a specified article under its patent or trade name". There is no suggestion in the evidence that the respondent had decided upon a Holden Rodeo and had gone to the appellant specifically to buy such a vehicle. Rather he had made known his needs for a vehicle to use in his business, and the appellant, by its agent, had effectively said in relation to the Holden Rodeo,

> "This will do your job – we will sell it to you." In the language of Salmond J, it was the appellant which selected the class of article in this case. (p 10)

Barker J thereafter effectively undermined the continuing rationale for the proviso in an illuminating, albeit obiter, passage:

> With respect to such a distinguished Judge as Salmond J, in today's world, with an enormous variety of vehicles, selling and marketing techniques are vastly different. I cannot agree that the sale of a motorcar under the name by which it is known in the market will generally by the sale of a specified item under its trade name. In many cases, the trade name will be no more than a descriptive term. I am not saying that cases are not common still where a buyer will have a fixed idea as to the particular brand of vehicle he wants, which will exclude the reliance on the vendor; however, the situation is prevalent that the salesman will have exerted considerable influence on the choice of vehicle actually sold. To assert a general rule that the description of a vehicle in the contract under its trade name will generally cause the proviso to operate is contrary both to modern practice and the purpose of the Act. (ibid)

It seems impossible not to agree with His Honour's reasoning. Commercial conditions have clearly altered since Sir John Salmond delivered his seminal judgment in 1924. Modern marketing techniques together with the proliferation of brands make Salmond J's interpretation of the proviso too generous today.

Whether Salmond J's interpretation was contrary to the purpose of the Act is more difficult to say. Arguably it was consonant with the then laissez-faire environment in which caveat emptor still prevailed. However if one views the purpose of the Act today against the modern background of greater protection to the consumer, Salmond J's interpretation does thwart the beneficial protection provided to the buyer under s 16(a).

Although not explicitly alluded to by Barker J, another and perhaps the most compelling argument against the proviso remains. The English Court of Appeal in *Baldry v Marshall* [1925] 1 KB 260 gave the proviso a severely restricted interpretation which to use Atiyah's words "virtually interpreted the proviso out of existence". (*The Sale of Goods*, p 143)

The proviso would not apply unless the trade name was specified in such a way as to show that the buyer had not relied on the skill or judgment of the seller. So for instance (and this nicely captures the situation in *Urlich*):

> where a buyer asks a seller for an article which will fulfil some particular purpose, and in answer to that request the seller sells him an article by a well-known trade name, there . . . the provision does not apply (Bankes LJ at p 266).

In short, the proviso after *Baldry* was reduced to a specific application of the reliance requirement. (see Goode, *Commercial Law* (1982) at p 276; Sutton, *Sales and Consumer Law* (1983) at p 189) Essentially superfluous, the UK Law Commission recommended its deletion, a result achieved by s 3(3) of the Supply of Goods (Implied Terms) Act 1973 (UK). Such reasoning has been affirmed in North America also. The framers of the Uniform Commercial Code eliminated the proviso entirely and the Ontario Law Reform Commission in its seminal 1979 *Report on Sale of Goods* (Vol 1 at p 221) recommended the same.

The trade name proviso remains something of an anachronism as His Honour in *Urlich* reminds us. Given restrictive interpretation by the Courts its successful operation will be rare. It becomes almost churlish to reiterate the manifest need for a complete overhaul of the Sale of Goods Act. Undoubtedly, this unenviable task will be eventually completed at some stage by the recently established Law Reform Commission. It would be surprising if the trade name proviso was not viewed as one of the provisions most ripe for abolition.

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Judicial review — locus standi

The Society for the Promotion of Community Standards Inc v Everard, High Court, unreported, Wellington Registry, CP 616/86, 9 April 1987.

Not so many years ago an application for review by a public morals group of the Film Censor's decision approval of two video films would have seemed doomed to fail, at the preliminary stage, for absence of locus standi. The Court of review would almost certainly have held that such a group had no special interest in the matter of film censorship beyond that shared by any member of the public at large, and that it therefore did not meet the requirements of standing in public law (for examples of such an approach see *Victoria University Students Association v Government Printer* [1973] 2 NZLR 21 and *Environmental Defence Association v Agricultural Chemicals Board* [1973] 2 NZLR 758).

Today, however, it seems that locus standi is barely arguable as a separate jurisdictional issue, even when the action is brought on a "class" basis.

The decision and judicial approach

In *Everard's* case the applicant society sought review of the Film Censor's approval of two video films entitled "Pretty as you feel" and "Inches". The applicant argued that the Censor had acted unreasonably, and had failed to have regard to relevant statutory criteria in the Films Act 1983. The respondent moved for an order dismissing the proceedings on the grounds of abuse of the process of Court; the respondent argued that no reasonable cause of action was disclosed and that the applicant lacked standing. Davison CJ rejected both arguments. On the matter of standing the Chief Justice stated that:

> . . . over recent years the Courts have moved a long way from considering standing as a separate issue and from considering it substantially unconnected with the main issue in the case.

Noting also that the Court now ". . . concentrate more on the merits of a particular claim than on the standing

of a person to make a claim" His Honour refused to dismiss the application on the grounds of locus standi.

The reasoning and authorities

The Chief Justice did note in his judgment that the applicant could claim a long history of activity in areas related to pornographic films, and he declared that "all of its members have a legitimate interest in the care and health of the community at large". But, of course, such an interest does not really demarcate members of the society from other members of the public who share similar concerns. Thus Davison CJ did not really attempt to base his decision on the reasoning that the society had a special interest in the subject matter. Rather His Honour argued that the Act was strongly concerned with the public interest, and that if the applicants, as concerned members of the public, did not have standing then no one would. That in turn would mean the Act could be breached with impunity. Such a consequence is obviously unacceptable to the Courts today and Davison CJ found support for his approach from judicial views expressed by Lord Denning in a not dissimilar case, *R v Greater London Council ex p Blackburn* [1976] 3 All ER 184, 191, and from academic comment by Sir William Wade in his leading textbook *Administrative Law* (5 ed) at p 557.

Support for a "class" action such as this was also derived from the judgment of the Court of Appeal in *EDS v South Pacific Aluminium (No 3* [1981] 1 NZLR 216, and from the generative judgment of Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. In the latter case his Lordship declared that it would be "a grave lacuna in our system of public law" if a pressure group such as the respondent federation (or a single public-spirited taxpayer) were to be denied standing in an action alleging administrative illegality.

Comment

The *Everard* decision may be seen as displaying a green light to citizen's actions, *actiones popularis*, within New Zealand. Certainly the judgment of the Court of Appeal in the *EDS* case had already foreshadowed such a possibility; but in that case the Court of Appeal buttressed its finding of standing for the environmental societies by noting that s 8(1)(f) of the National Development Act 1979 authorised bodies representing the public interest to appear before the Planning Tribunal. In *Everard's* case there was no such statutory recognition for the applicant society. Indeed the Chief Justice noted that there was:

> . . . no right for any member of the public at large to participate in any way in decision-making under the Act.

Thus in this case representation of the public interest alone was sufficient for the applicant to survive a challenge to standing.

The judgment means that the person christened by American writer Louis Jaffe as the "ideological plaintiff" can more readily argue the merits of a case in Court. If, following the *Inland Revenue Commissioners* case, the test for standing within New Zealand is now that of "sufficient interest", it seems that a sufficiency of interest could be established by the possession of responsible intellectual beliefs as well as by the possession of the more traditional pecuniary or property interests.

Such an approach may be viewed by some as the long overdue recognition from the Courts that members of the public may value and wish to protest non-economic interests — interests ranging, for example, from aesthetic interests in the environment, to social interests in the control of pornographic materials, to more general interests in securing governmental compliance with the law of the land. Others may fear that the approach may result in an undesirable flood of applications for review from cranks and busy-bodies.

There are perhaps two points which can be made against the "flood-gates" argument. The first is that it can not be supported by any empirical evidence. As American writer, Kenneth Scott, put it "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom" (1973) 86 Harv L Rev 645, 674. Indeed Scott maintains that the only barrier to litigation in public law should be the litigation expenses; the argument being that a litigant is unlikely to incur those expenses unless he/she has a genuine interest in the matter. The second point which can be made against the flood-gates concern is to note that the *Inland Revenue Commissioners* judgments expressly recognised that standing could be dealt with as a separate threshold issue in any exceptional cases where the applicant obviously had no interest in the subject matter other than as a busybody or mischiefmaker. Thus any action by a vexatious litigant could still be quickly disposed of at a preliminary stage.

It is also pertinent to note that whilst, for general purposes, standing might not be arguable as an isolated, preliminary issue, it does remain relevant and arguable in the substantive proceedings. As Barker J put it in *Van Duyn v Helensville Borough Coucil* (1985) 5 NZAR 55, 60:

> . . . the modern approach looks first at the alleged breach of the law and its seriousness before considering the question of standing.

Again in *Budget Rent a Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 Cooke J asserted that "[a]ny tendency to consider the issue of standing in isolation from the nature of the complaint is resisted", and His Honour stated that "[t]he emphasis is on the totality of the facts".

Thus standing is relevant, but it is no longer determined by reference to the judicial tests of standing expounded in the older cases. Standing is now determined by reference to the particular statutory provisions in issue, the particular facts, and the particular allegation of illegality. And so in *Everard's* case itself the dismissal of the respondent's arguments at the preliminary stage was not necessarily conclusive of the issue of standing in the case. Davison CJ acknowledged that the question would have to be further considered, if the respondent wished to pursue

it, at the substantive hearing ". . . when it can be considered in relation to all the evidence in the case, the statute, and to the submissions then made".

In the meantime the judgment of the Chief Justice is a powerful reminder of the extent to which this area of law has liberalised in recent years.

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Trespass and remoteness in the Court of Appeal

The decision of Casey J in the High Court in *Mayfair Ltd v Pears* [1986] BCL 110 was noted and discussed in an earlier edition of this journal ([1986] NZLJ 141). It may be recalled that the defendant had unlawfully parked his car on the plaintiffs' property and that while he was absent the car had inexplicably caught fire. The blaze damaged the building above the carpark and in an action for, inter alia, trespass to land the plaintiffs sought to recover the cost of making good the damage. Casey J held that the test for remoteness of damage in trespass was foreseeability as laid down in the *Wagon Mound (No 1)* [1961] AC 388, that the fire damage was not in the circumstances foreseeable and that accordingly it was too remote. The Court of Appeal (CA 175/85, 17 December 1986) has now come to the same conclusion as Casey J but has declined to endorse the reasoning which led His Honour to that conclusion.

The plaintiffs put their case on two main grounds. One was that there was a strict liability at common law for the escape of fire. Cooke P and Somers J both noted that as regards the escape of fire from premises the legislature had intervened long ago in the form of the Fires Prevention (Metropolis) Act 1774 to exclude liability for mere accident as distinct from negligence. There was no clear authority imposing a strict liability for the escape of fire from a chattel rather than from premises and their Honours were not prepared to extend the old, undiluted common law to cover this case.

The plaintiffs' main submission was that the defendant was guilty of an intentional trespass to their land and that as between a trespasser and an innocent owner it was just that the former should be liable.

Cooke P said that Casey J's opinion that liability depended on reasonable foreseeability and that the damage was not reasonably foreseeable had an attraction but might involve some over-simplification. He thought that in dealing with problems of remoteness in both tort and contract the Courts had created unnecessary difficulties, without adding appreciably to the certainty of the law, by striving for hard and fast formulae capable of solving cases more or less automatically. His Honour accordingly preferred simply to list the main considerations bearing one way or the other on whether liability should be imposed. These were:

1 The trespass was intentional but there was no intention of causing any damage.
2 The fire was not reasonably foreseeable and there was no negligence on the part of the defendant.
3 The causal link between the wrong and the damage was not as direct as in *Re Polemis* [1921] 3 KB 560, it was not immediate and there was nothing to suggest that the fire was due to the trespass. It was an overstatement to characterise the damage as *directly* caused by the trespass.
4 The damage was to property and in essence the loss was economic. Had an owner of the building died in the fire the result might have been no different at common law (assuming no Accident Compensation Act) but that did not inevitably follow. In general the law was rather more ready to redress personal injury than property damage.
5 Weight should be given to the concurrence of the two Courts below in rejecting the claim. The result reflected contemporary standards of justice.
6 The practice of insuring buildings against fire was so common that the loss would normally be borne by insurers and thus spread. It was less likely the vehicle owner would be insured against this form of liability. The insurance position did not have great weight but was not altogether irrelevant.

Taking these considerations together His Honour thought that the balance was unmistakeably on the side of the defendant and that it would be unjust to impose liability on him. He recognised that some would ask for a more definite rule. But in the centuries of case law nothing closely comparable had arisen before and in remoteness cases generalisations could in any event be dangerous.

McMullin J, like Casey J, looked at the cattle trespass cases (which are discussed in the earlier note on Casey J's decision) but felt they were not decisive of the issue because they might fall into a special category. They did, however, rather support the approach of Casey J in favouring foreseeability and also suggested that any differences of approach to the question of remoteness might not be great, if in most cases they existed at all.

Turning to the present case, His Honour observed that the fire was not foreseeable or a natural consequence or a probable consequence or a direct consequence. The trespass was not the proximate cause of the fire in the sense of being the operative or effective cause of the damage to the building. In the end he felt that the adoption of an appropriate test was likely to be governed by the weighing of policy considerations. One consideration was that trespassers should trespass at their peril. There might be cases where it was reasonable that a trespasser should be fairly held liable for quite unexpected damage directly resulting from an unintentional trespass. On the other hand it would be unreasonable to adopt a rule that a trespasser should in every case be liable for all damage resulting from his trespass even though he had not been careless. The foreseeability test had the merit of applying a common test in determining the question of remoteness, be the action founded on negligence or trespass. There might, however, be some cases where it was too benevolent to the trespasser. If it were to be applied in the present case then plainly the defendant

could not be held liable for the fire damage. But, even assuming a rule of liability for damage directly resulting from the trespass, the defendant still would not be liable. He did not start the fire, he was not negligent and the damage could not be said to be a direct or natural consequence of his unauthorised parking.

Somers J also examined the cattle trespass cases and concluded that none of them provided a reliable guide on questions of remoteness of damage for trespass to land. His Honour was unwilling as then advised to accede to the proposition that in the absence of intent or foreseeability of damage there should be no recovery. He referred to the test of directness or immediacy between the damage and the trespass but thought that whether such a nexus would provide a generally sufficient and satisfactory test of remoteness did not need to be decided in the present case. Here the injury to the plaintiffs' premises was without intent or negligence, was not foreseeable, and could not reasonably be described as a direct or immediate result of the trespass. At most the tort provided the occasion – it was a sine qua non. His Honour thought it would not be reasonable to require the defendant to meet the loss in those circumstances.

It cannot be said that the decision of the Court of Appeal has assisted in clarifying the law. Stripped of all inessentials, the question ultimately was whether the test of directness or of foreseeability should be applied. All members of the Court were agreed that on the facts neither test was satisfied and on that basis the appeal could be dismissed. A choice between them did not have to be made.

It might be argued that Cooke P's judgment demonstrates that factors apart from directness or foreseeability might also need to be brought into account. His Honour listed six considerations bearing on the question of liability. The first two merely stated the problem: in a trespass action are consequences too remote where they are neither intended nor foreseeable? The third was that the causal link was not sufficiently direct or immediate. The fourth factor is difficult to understand. It simply is not right to say that the loss was "in essence economic". It was physical damage to the building. It could be regarded as economic only in the sense that the plaintiff was seeking compensation in damages, as is always the case in every such claim. No authority was given for the suggestion that the law is more ready to redress claims for personal injuries than for property damage. It is submitted that there is none. The fifth factor is not satisfactory either. First instance Judges may or may not correctly state the law. The Court of Appeal is there to give authoritative guidance upon which Judges and practitioners may rely in the future. If a first instance opinion is not right, it is difficult to see why weight should be given to it. To do so seems to erect an extra hurdle in the way of the success of an appeal. Surely the rule should have a content more specific than "contemporary standards of justice". Lastly there is the insurance position. It is submitted that liability should not turn on whether litigants may have been prudent in insuring against a particular loss or liability. Cooke P referred, moreover, to the "practice" and the "likelihood" of insurance. Might evidence be adduced as to whether insurance had in fact been taken out and, if so, the extent of cover provided?

McMullin J seemed to be inclined towards foreseeability but nonetheless left room for the case where a trespasser should be liable for quite unexpected consequences. His Honour did not indicate the circumstances which would produce such a case. Somers J thought that as the damage was neither foreseeable nor direct it would not be reasonable to impose liability. Thus the principle to be applied where damage is unforeseeable but also direct or immediate was not determined by any member of the Court.

In on sense *Mayfair v Pears* is a unique case, as Cooke P recognised. Nonetheless the point at issue was straightforward, it could arise in other contexts and it was one that could easily have been decided. We have a test of remoteness for claims in negligence and in nuisance. Why can we not have one for trespass? Casey J favoured, as has been seen, the foreseeability test of the *Wagon Mound (No 1)*. This is now a well established test, it has proved to be reasonably workable in practice and to adopt it for trespass would harmonise recovery in the different torts. Directness, on the other hand, may be criticised as recognising no necessary link between the element of fault or wrongdoing in the trespass and the damage that occurs: the defendant might be innocent as regards the risk which eventuates. (See Glanville Williams (1961) 77 LQR 179.) It is also a concept of uncertain meaning. Indeed it is not very clear how it ought to be applied to the facts of *Mayfair's* case. Directness carries within it the notion of causal proximity and in a physical sense, at least, such proximity between the trespass and the damage was undoubtedly present. The Court did not see the presence of the car, however, as an *operative* or *effective* cause. One wonders whether this conclusion says anything more than that the damage was quite unexpected or unforeseeable.

Whichever should be the preferred rule, it is undesirable that every case be regarded as turning on its own particular facts or that rules and principles be eschewed in favour of the "fairness" or "justice" of the case. This approach tends to create considerable uncertainty and also to encourage unnecessary litigation. At the end of his judgment Cooke P said that some would ask for a more definite rule. This writer is one of them.

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Revolution and the Crown

By G M Illingworth, Barrister of Auckland

In the aftermath of the military coup in Fiji on 14 May 1987, the Governor-General and Commander-in-Chief, Ratu Sir Penaia Ganilau, called upon the armed forces, the police and the public service "to return to their lawful allegiance in accordance with the oaths of office and their duty of obedience without delay". Those words, along with the revolutionary actions of those who motivated them, have prompted the following comments concerning the nature of the fundamental duty to which His Excellency referred.

The concept of allegiance was considered long ago in *Calvin's case* (1608) 7 Co Rep 1 a; 77 ER 377 where Coke CJ said:

> As the ligatures or strings do knit together the joints of all the parts of the body so doeth ligeance join together the sovereign and all his subjects . . . and therefore it is holden . . . that there is a liege or ligeance between the King and the subject . . . subjects are called liege people . . . the King is called the liege lord of his subjects . . . ligeance is the mutual obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.

Thus allegiance involves reciprocal obligations: the subject owes a duty of fidelity and obedience towards the sovereign and the sovereign has a responsibility to govern and to protect the subject. There are said to be four kinds of allegiance: natural, acquired, local and legal. Natural allegiance arises by virtue of the birth of a person within the sovereign's dominions. Exceptions are where a child is born to the diplomatic representative of a foreign state (who does not owe allegiance to the sovereign of the country to which he is accredited) and where a child is born to a member of an invading force of an enemy power or to an alien in an enemy occupied area. Acquired allegiance is obtained by naturalisation or "denization". Local allegiance is a temporary form of allegiance which is due from an alien so long as he remains within the protection of the Crown. The term "legal allegiance" refers to the case of a person who has taken an oath of allegiance as prescribed by statute as a prerequisite to undertaking some special position or public office.

A natural-born subject of the sovereign owes allegiance wherever he may be. He may breach his duty of allegiance in a foreign country as much as in his own country. There are, however, several situations where it may be argued that the duty of allegiance has ceased. In *de Jager v Attorney-General of Natal* [1907] AC 326 a resident alien was found guilty of treason. It was argued on his behalf that he did not owe a duty of allegiance at the crucial time because the protection of the Crown had been withdrawn owing to the occupation of that territory by enemy forces. That plea was rejected. Although allegiance and protection are reciprocal duties they are not strictly co-terminous such as to enable an accused person to raise the absence of protection as a defence in circumstances where the absence of protection is temporary and involuntary.

In *Joyce v Director of Public Prosecutions* [1946] AC 347 the appellant was the notorious Lord Haw-Haw who had collaborated with the German Nazis during the Second World War. Purporting to be British he had acted as a radio announcer making anti-British propaganda broadcasts. In fact Joyce had been born in the United States of America, although he had lived in Britain for many years. The acts of treason alleged against him had not been committed within the King's dominions, so the doctrine of local allegiance did not appear to apply. At his trial Joyce was convicted and his appeals to the Court of Criminal Appeal and the House of Lords were dismissed. Joyce was shown to have obtained a British passport. On the basis that he was assumed still to have the passport, there being no evidence of his divesting himself of it, it was found that he owed allegiance to the King and could be convicted of treason. He owed allegiance because, by obtaining and holding the passport, he took the benefit of the protection which the passport afforded. The word "allegiance" has feudal origins, describing as it essentially does the relationship between a liege and his lord. Breach of duty by the liege was a breach of trust – a betrayal. As Lord Jowitt LC pointed out in *Joyce v Director of Public Prosecutions* (supra, at 368) the word "treason" has as its root meaning the betrayal of a trust. Such a betrayal could occur in any situation where the relationship of liege and lord existed. So, in a sense, a servant by betraying his master committed treason, but only a "petit treason". When the betrayal occurred as between the sovereign and the subject the betrayal became "high treason".

One Crown or Many?

What, then, is the nature of the entity to which allegiance is owed? In *Calvin's case* one of the issues was whether allegiance was due to the natural person of the sovereign or to the sovereign in his "politic capacity". Coke CJ said:

> Now, seeing the King hath but one person and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered, to which capacity ligeance is due. And it was resolved, that it was due to the natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity), and it is not due to the politic capacity only, that is, to his crown or kingdom distinct from his natural capacity. . .

This doctrine was mentioned by the Privy Council in *Theodore v Duncan* [1919] AC 696, 706 where Viscount Haldane said:

> The Crown is one and indivisible thoughout the empire, and it acts in self governing states on the initiative and advice of its own ministers in these states.

The legal doctrine so expressed, while appropriate to the circumstances of the British Empire, is not necessarily appropriate to present day circumstances. In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Indian Association of Alberta* [1982] 2 WLR 641, 651 it was held in the English Court of Appeal that the Crown was no longer to be regarded as single and indivisible but separate in respect of each self governing territory within the Commonwealth. In a characteristically robust passage Lord Denning M R remarked:

> Hitherto I have said that in constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century – not by statute – but by constitutional usage and practice. The Crown became separate and divisible – according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926 . . .

Similarly, in a New Zealand case *Re Ashman and Best* (not originally reported but now noted in [1985] 2 NZLR 224), Wilson J came to the conclusion that New Zealand had become established as an independent sovereign state and that the Queen of New Zealand is a different legal entity from the Queen of the United Kingdom, although the same person. Wilson J's reasoning was subjected to critical analysis by Professor Brookfield, [1976] NZLJ 458. The point was made that, because of the powers conferred on the New Zealand legislature by the Statute of Westminster 1931, once adopted, and the New Zealand Constitution (Amendment) Act 1947 (UK), the New Zealand legislature was able, without a revolutionary breach of continuity, to repudiate the powers of the United Kingdom Queen and Parliament over New Zealand, but that in fact no such repudiation had taken place. A statutory provision relevant to this issue is s 73 of the Crimes Act 1961 which commences with the following words:

> Everyone owing allegiance to Her Majesty the Queen in right of New Zealand commits treason who, within or outside New Zealand . . .

Before 1961 there was no express requirement in the law regarding treason that allegiance be owed "in right of New Zealand". It could be argued that by amending the statutory formula in the way it did, the New Zealand legislature was giving recognition to the doctrine that the Crown is divisible and separate in respect of this country. An examination of ss 94 and 99 of the Crimes Act 1908 reveals that those provisions were based upon the concept of a united Crown over the whole British Empire. Some species of treason or related offences were dependent upon an intent:

> . . . to depose His Majesty from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's dominions or countries under the obeisance of His Majesty.

One section referred to the invasion of "any part of the dominions of His Majesty" and another referred to assisting "any public enemy at war with His Majesty". The marked difference in approach between the old provisions and the new certainly does appear to have been intended to reflect the great changes which had taken place during the transition from Empire to Commonwealth. Section 53 of the Fijian Penal Code contains provisions which are substantially the same as the New Zealand statute of 1908.

Shifting Allegiance

In 1495 there was passed "An Act That No Person Going With the King To the Wars Shall Be Attaint of Treason". The Act refers to the duty of allegiance and the consequent duty of subjects to serve the King in warfare. Reference is made to the difficulty faced by subjects who are required by their duty of allegiance to go into battle but who find after the battle that they are on the losing side. The new King, naturally enough, would be in a position to claim that he was the rightful King all along and that those who opposed him were guilty of treason. So the statute enacted a rule:

> . . . that from henceforth no manner of person or persons whatsoever he or they be, that attend upon the King and sovereign lord of this land for the time being in his person and do him true and faithful service of allegiance in the same, or be in other places by his commandment, in his wars within this land or without, that for the same deed and true service of allegiance he or they be in no ways convicted, or attainted of high treason . . .

The effect of the statute was generally thought to be that treason could be committed only against a monarch in possession and that a breach of allegiance towards a monarch in possession, including a de facto monarch, amounted to treason. Blackstone pointed out that other writers had taken this interpretation to the point where a rightful King who had been displaced by a usurper could not command the allegiance of his subject. To the contrary, it had been argued, the subject would owe a duty of allegiance to the de facto King such that he or she would be required to resist the displaced monarch. Blackstone could not accept a doctrine of allegiance which

would bind the subject to fight for his "natural prince on one day" and "by the same duty of allegiance to fight against him tomorrow". He pointed out that the statute did not *command* any opposition to the lawful but displaced King. In Blackstone's view the statute did no more than to *excuse* the obedience of the subject to a King de facto.

In his article "Allegiance and the Usurper" [1967] CLJ 214, Honoré argued that Blackstone had been right. He reasoned that a doctrine of shifting allegiance was not part of the law of England and that the 1495 statute itself presupposed that allegiance was owed at common law to the de jure monarch out of possession. The Privy Council had occasion to consider this issue, albeit briefly, in *Madzimbamuto v Lardner-Burke* [1969] AC 645, 726. The majority quoted Blackstone and, referring to the 1495 statute, said:

> Their lordships are satisfied that it cannot be held to enact a general rule that a usurping government in control must be regarded as a lawful government.

It is also important to note that the 1495 statute afforded protection only in the case of a de facto King or Queen, not in respect of a republican de facto government. Such was established by the Trials of the Regicides. Against this background it is of interest to consider s 64 of the Crimes Act 1961 which says:

> Everyone is protected from criminal responsibility for every act done in obedience to the laws for the time being made and enforced by those in possession de facto of the sovereign power in and over the place where the act is done.

Two points of importance emerge from the wording of s 64 (which was enacted in substitution for the provisions of the 1495 statute). First, it is clear that the section is framed to provide a justification or excuse for conduct which might otherwise be unlawful. This agrees with Blackstone. The section does not purport to command obedience to a de facto government. Nor does it follow from the wording of the section that a lawful sovereign out of possession must be opposed. Section 64 goes no further than to absolve from criminal responsibility a person who has acted in obedience to the de facto sovereign. Secondly, it is significant that s 64 employs the phrase "those in possession de facto of the sovereign power". This undoubtedly encompasses a republican government and, unlike the statute of 1495, is not restricted to acts done in obedience to a de facto King or Queen.

The section seems to operate as a defence only where the act in question is done in obedience to *laws* of the de facto government. The statute of 1495 was not cast in the same terms. The old provision merely referred to the duty of allegiance and the fulfilment of that duty by going into battle for the King. The modern provision would seem to apply only where the de facto government has purported to enact legislation in some form.

Harming the Sovereign

Turning once more to Blackstone's *Commentaries* we learn that under the ancient common law judges had great latitude in determining what constituted treason. These judges, "the creatures of tyrannical princes" as Blackstone called them, took the opportunity to create numerous constructive treasons by elevating lesser offences into that crime. An early example was known as the accroaching of royal power. Of this category of offence Sir Matthew Hale said, in his treatise *The History of the Pleas of the Crown* (1800, Vol 1 at 79):

> Accroaching of royal power was a usual charge of high treason anciently, though a very uncertain charge, that no man could well tell what it was, nor what defence to make to it.

As a result of the uncertainties created by the inventiveness of the judges a petition was presented by the commons to the King requesting that it might be declared in parliament what accroachment of royal power meant. This led to the passage of the Treason Act 1351. The statute set out several categories of treason, the first and most important of which was "compassing or imagining" the death of the King, his Queen or their eldest son and heir. Of compassing or imagining the death of the King, Blackstone tells us that these are synonymous terms. Both signify the purpose or design of the will. But as the imagination cannot come under judicial scrutiny the offence had to be demonstrated by an open or overt act. The overt act or acts had to be specifically pleaded in the indictment. This ancient rule is still applicable by virtue of section 336 of the Crimes Act 1961 which requires that an indictment for treason state overt acts, that no evidence is to be admitted of an overt act not pleaded and that the normal power of the Court to amend the indictment does not apply to the addition of new overt acts.

The position in New Zealand is simplified by reason of the fact that s 73 specifically lists all the possible categories of overt acts under our law. Six separate categories are created. The first of these categories relates to a person who:

> . . . kills or wounds or does grievous bodily harm to Her Majesty the Queen, or imprisons or restrains her.

This category is narrow compared to the possibilities which existed, and to some extent still exist in England. No room is left for any of the forms of constructive treason which at one time abounded under this branch of treason. (Egg-throwing, for example, is not included.) So, whereas under English law words spoken or written and published could constitute an overt act of compassing or imagining the death of the sovereign if they related to a treasonable act or design, under the Crimes Act 1961 such deeds could not be overt acts of treason, except possibly under s 73(f) which deals with conspiracy and for which a lesser punishment is provided.

Section 50 of the Fijian Penal Code provides, in essence, that the law of England is applicable in Fiji in respect of this branch of treason, with death as the mandatory penalty.

Levying War

In the Treason Act 1351, one of the forms of treason specified was "if a man do levy war against our lord the King in his realm . . . " This category is substantially retained by s 73(b) of the Crimes Act 1961 which applies to a person who levies war against New Zealand. There appear to be two main differences between the law of the United Kingdom and the law of

New Zealand in respect of this category. First, all of the categories of treason under s 73 apply whether the act in question takes place within or outside New Zealand, but the Treason Act 1351 seems to confine the category of levying war to acts against the King *in his realm*. Secondly, under the Treason Act 1351, this species of treason involved levying war *against the King*. Under s 73(b) of the Crimes Act 1961 the offence is levying war against New Zealand. This is consistent with the duty of allegiance being owed to the Queen in right of New Zealand.

Leaving aside those differences, it might seem that the legislature intended to leave unchanged the substantive category of treason denoted by the words "levying war". But this would be to overlook the provisions of s 94(f) of the Crimes Act 1908, which said that treason included:

> Levying war against His Majesty, either –
>
> (i) With intent to depose His Majesty from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's dominions under the obeisance of His Majesty; or
>
> (ii) In order by force or constraint to compel His Majesty to change his measures or counsels, or in order to intimidate or overawe both Houses or either House of the Imperial Parliament of New Zealand.

Section 53 of the Fijian Penal Code contains very similar provisions but the penalty under this limb is life imprisonment. The strange thing about the New Zealand position is that the specificity of the older provision was abandoned and, in the 1961 Act, the legislature reverted to the traditional wording. Obviously, change was required because of new circumstances but the two sub-categories of treason by levying war found in the 1908 Act still could have been retained. The fact that the legislature reverted to the traditional wording for this category of treason could be a matter of some significance. Under English law the levying of war against the monarch could be either direct or constructive. A definition of these two kinds of treason by levying war was given by Lord Mansfield in the trial of Lord George Gordon (1781) 21 ST 485, 644:

> There are two kinds of levying war:
>
> One, against the person of the King; to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors:
>
> The other, which is said to be levied against the Majesty of the King, or, in other words, against him in his regal capacity; as when a multitude rise and assemble to obtain by force and violence any object of a general public nature . . .

Lord Mansfield went on to list some examples of the second category:

> Insurrections, by force and violence, to raise the price of wages, to open all prisons, to destroy meeting houses, to destroy all brothels, to resist the execution of militia laws, to throw down all enclosures, to alter the established law, or change religion, to redress grievances real or pretended, have all been held levying war. Many other instances might be put.

It was not necessary for any great number of persons to be assembled in order to constitute levying of war. Three or four would do. Neither was it necessary that those who assembled should be armed or in uniform and no actual fighting was necessary. But a mere rising or tumult was not treasonable, unless for a purpose of a public or general nature, and an insurrection for some private purpose was not enough. It may come as a surprise to consider that in some cases gross public disorder could constitute, theoretically, treason by levying war, an offence punishable by death.

Assisting the Enemy

Section 73(c) of the Crimes Act 1961 provides that treason is committed where a person:

> . . . assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country.

The original form of this category of treason as found in the Treason Act 1351 consisted of being:

> . . . adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere . . .

In Archbold, *Criminal Pleading Evidence and Practice* (41 ed 1982) paras 21 - 28, the view is expressed that giving aid or comfort includes every assistance given to the enemy. In his article "Casement and Joyce" (1978) 41 MLR 681, Wharam draws attention to the older case law on adhering to the King's enemies. The view is expressed that aiding and comforting the enemy was limited to supplying the enemy with information, forces or material for the purpose of levying war against the King. This was the test for which Sir Roger Casement's counsel had argued, but his counsel's formulation was not accepted by the Court. Wharam cites earlier authority which tends to support the view that Casement's counsel was correct. The test was settled definitively in New Zealand by the wording of s 73(c).

It is a recognised part of the royal prerogative to declare war and peace. Accordingly the subjects of a state against which war has been proclaimed or declared by the Queen are her enemies. But the declaration of war is not conclusive and, at least according to English law, the subjects of a state engaged in actual hostilities are classified as enemies. So it would seem that the provisions of s 73(c) are intended to express the same principles as those which apply to this head of treason under English law, as it was now developed.

Inviting Invasion

Under s 73(d) of the Crimes Act 1961 it is treason to incite or assist any person with force to invade New Zealand. Under the Crimes Act 1908 the comparable provision referred to "instigating any foreigner with force to invade any part of the dominions of His Majesty". The Treason Act 1351 made no separate reference to this head of treason. It appears to have been dealt with as part of the category of adhering to the King's enemies by giving aid or comfort. The main difference effected by the 1961 Act seems to be that the invading

forces do not have to be "foreigners". So, if an invading force included New Zealand citizens, convictions for the New Zealanders could still be entered under this head, whereas under the old law it would have been necessary to deal with them under a different head. Consistently with the independent status of New Zealand the 1961 Act relates to the invasion of this country only. The 1908 Act related to the invasion of "any part of the dominions of His Majesty". The Fijian Penal Code contains provisions as to instigating the invasion of Fiji (which carries the death penalty) and instigating the invasion of the Queen's dominions and protectorates (which carries life imprisonment).

Overthrowing the Government

Section 73(e) of the Crimes Act 1961 provides that it is treason to use force for the purpose of overthrowing the government of New Zealand. There was no corresponding provision in the Crimes Act 1908. Neither is there any provision in the English law which directly corresponds to this provision. There was, however, in the Treason Act 1351, a category of treason which related to slaying:

> . . . the Chancellor, the Treasurer, or the King's Justices of the one bench, or the other, Justices in eyre, or Justices of assize, and all other Justices assigned to hear and determine, being in their places doing their offices.

Obviously, the 1961 New Zealand provision has been designed to meet changed constitutional conditions, but the new provision replaces a specific test with a general one, leaving the possibility of borderline and doubtful cases. The words "overthrowing" and "the Government of New Zealand" sound clear enough at first but on analysis are found to be capable of wide variations in meaning. But those words clearly do include conduct of the kind engaged in by Lieutenant-Colonel Rabuka and his supporters. There is no specific provision comparable to either the English or the New Zealand provision in the Fijian Penal Code, but as has been noted already the treason provisions of the Fijian criminal code do contain a provision which is roughly the same as the old New Zealand definition of levying war which certainly appears to apply to the current Fijian situation. So it was a matter of some constitutional significance that within a week of the Fijian coup the Governor-General saw fit to declare that he would exercise the prerogative of mercy in respect of the rebel soldiers. He was thereby declaring his intention to wipe the slate clean for an indeterminate number of participants in what could reasonably be described as one of the most serious acts of criminality in the history of Fiji. The decision was the more remarkable for the fact that at the time it was announced the Governor-General had no ministers to advise him on the matter he having announced, at about the same time, his decision to assume executive power in the absence of any lawfully elected government able to control the country.

It scarcely needs to be said that the circumstances were less than conducive to the attainment of full constitutional propriety, but effect may be given nevertheless to the Governor-General's decision. If that situation is permitted to occur the administration of justice in Fiji will have been seriously compromised — it will always be remembered that the threat of violence was able to overpower the due process of law, and it could never again be truly said that justice in Fiji is administered without fear or favour. □

BOOKS

Group Homes and Planning Disputes — A Guide for Community Groups

Editor: John Dawson

Published by the Mental Health Foundation of New Zealand. PO Box 37-438, Parnell, Auckland.

Reviewed by Peter Haig

The scope of this publication (vii + 79 pp) is set out in the following passage from the introduction:

> This publication reprints the Planning Tribunal's decision in the *Hawke's Bay* case *[Hawkes Bay Hospital Board v Napier City* 11 NZTPA 404] and collects together materials used by the Hospital Board in its successful claim. Dean Henderson and Sue Ward, responsible for developing the group home proposal, provide a social work perspective on the planning process; the lawyer who represented the board, Peter Tong, provides a legal perspective; and we set out the evidence given at the hearing by the medical superintendent, a senior social worker, a community psychologist, a psychiatric nurse, and a planner. The publication concludes with a brief piece on the effects of group homes on property values, and further references.

The Planning Tribunal has generally been sympathetic (so far as planning law permits) to proposals for the establishment in residential zones of institutions of modest size for the purpose of helping disadvantaged groups; see also *NZ Society for the Intellectually Handicapped v Hawkes Bay County Council* 11 NZTPA 430 (though decided on a different point) and *New Plymouth City Council v Minister of Works and Development,* noted at [1987] BCL 404.

continued on p 225

Control of discretion of the Commissioner of Inland Revenue (I):

The office of Commissioner of Inland Revenue

By Kristy P McDonald, Crown Counsel, Wellington

This is the first part of a three-part article in which the author discusses aspects of control over the exercise of the discretions vested by statute in the Commissioner of Inland Revenue. In this part she considers the legal status of the Commissioner and the restraints of judicial review and the objection procedure. The next two parts will deal with Estoppel and the effect of the Lemmington Holdings *decision respectively.*

Part I — The Office of Commissioner of Inland Revenue

The office of Commissioner of Inland Revenue is provided for by s 4 of the Inland Revenue Department Act 1974. The Commissioner is a corporation sole; that is, he is recognised as having a legal personality and can therefore sue and be sued. Under s 4 the Commissioner is the head of the Inland Revenue Department. Apart from a few exceptions, the Commissioner is autonomous in his administration of the affairs of the Department because it is the Commissioner who is charged with the responsibility of administering the affairs of the Department.

(i) Legal Status of the Commissioner

The legal status the Commissioner holds was discussed in *Cates v Commissioner of Inland Revenue* (1982) 5 TRNZ 294 (HC). In that case the taxpayer had requested a case stated to the High Court over an assessment raised on some profits made from a land sale.

Prior to the hearing the taxpayer applied for an order for discovery against the Commissioner in the hope that he would be able to ascertain the provision of s 67 on which the Commissioner would rely. The High Court, dismissing the application held that there was no statutory jurisdiction to make such an order for discovery in tax objection proceedings by way of case stated. The Court of Appeal overturned the High Court and held that the High Court had jurisdiction to order discovery (1982) 5 TRNZ 603 (CA). In reaching its decision the Court had to consider the effect of s 27 of the Crown Proceedings Act 1950 which provides that the Court *may* require the Crown to make discovery in any civil proceedings, if it could be required to do so if it were a person of full age and capacity. The Commissioner had argued that s 27 did not apply to him as he was not the Crown, but merely a person designated by statute to exercise the powers and functions conferred by the Inland Revenue Department Act 1974 and the Income Tax Act 1976.

The Court of Appeal held that the Commissioner is an officer of the Crown. The Commissioner, who is head of a department of State assesses tax and collects it on behalf of the Crown. He is for all purposes the statutory agent of the Crown and therefore the Court has a discretionary jurisdiction to order discovery.

(ii) Functions of the Commissioner

The main function of the Commissioner, is the collection of income tax. However, the carrying out of that function must, of necessity, involve the exercise of judgment *CIR v International Importing Ltd* [1972] NZLR 1095. It would not, therefore be true to describe the Commissioner's role as merely that of quantification of the amount due. There is authority for the view that is the Act itself which imposes, independently, the obligation to pay tax and that the assessment and objection procedures are merely machinery for quantifying and they cast no liability. [1] However, in *Lemmington Holdings Limited v Commissioner of Inland Revenue* (No 2) (1983) 6 TRNZ 333(HC). Eichelbaum J said that while this may be true "no one would contend that [the Commissioner] is a mere scribe mechanically carrying out an inescapable obligation". (ibid at 340)

In *CIR v H Farnsworth Ltd* (1984) 7 TRNZ 77 Richardson J commented that the Commissioner's statutory duties are

directed to the ascertainment of the liability imposed by the Act. In making the amended assessments reflecting his judgment at the time of the application of the legislation to the affairs of the taxpayer for a particular period the Commissioner is performing a statutory function and duty. However, those responsibilities are discharged within the framework and are subject to the time limits which the Act prescribes.

(iii) The Commissioner's Duty To Assess

In discharging the duty to make assessments, the Commissioner is not entitled to act arbitrarily or in disregard of the law or facts as known to him. This principle was stated by Richardson J in *Lowe v Commissioner of Inland Revenue* (1981) 4 TRNZ 233 at 251-252. In *Tierney v Commissioner of Inland Revenue* (1982) 5 TRNZ 271 at 275, the comment was made by Bisson J that "the Commissioner" must not produce an assessment out of thin "air". Section 19(1) of the Income Tax Act 1976 states:

> From the returns made as aforesaid and from any other information in his possession the Commissioner shall in and for every year, and from time to time and at any time thereafter as may be necessary, make assessments in respect of every taxpayer of the amount on which tax is payable and of the amount of that tax.

This section imposes an absolute duty on the Commissioner to make assessments. He cannot be estopped from performing that duty and nor can the taxpayer issue proceedings to prevent the issue of an assessment.[2]

(iv) The Commissioner's Discretion

The Commissioner's statutory duty to discharge his responsibilities is in many situations a matter of discretion. Often the liability to pay tax will depend expressly upon the opinion of the Commissioner. This will occur when the statutory provision which imposes the liability is made subject to "the satisfaction of" or "the opinion of" the Commissioner. The Commissioner has widespread discretions. There are no less than 107 sections in the Act which use the discretionary phrase "the Commissioner may"; 103 sections use the the phrase "where the Commissioner is/is not satisfied"; 61 sections rely on "in the opinion of the Commissioner"; 60 provide that "the Commissioner may in his discretion allow/determine", and 15 allow a determination "as the Commissioner thinks/considers reasonable". It is not the purpose of this article to discuss these discretions in any detail, however, it is significant to note their existence and to note also that where a taxpayer is dissatisfied with an assessment which is based on this type of provision, his objection will involve a challenge to the Commissioner's exercise of a statutory discretion. For example, a taxpayer who is dissatisfied with the amount of a depreciation allowance provided in his assessment for fair wear and tear to his business premises, will in fact be challenging the Commissioner's opinion, as s 108 provides that the Commissioner may "allow such deduction as he thinks fit".

The use of discretionary powers is common in all areas of governmental administration and can be justified, to some extent, on the basis that the scope of government administration is so wide and its subject matter so complex that it is not practicable to legislate in detail for the future.

One of the desirable qualities of a fiscal system is said to be certainty of application so that taxpayers can discern the limits of their liability. The granting of such a wide discretion to the Commissioner appears to be inconsistent with this principle.

Restraints on the Commissioner

(i) Judicial Review as a means of control

The Privy Council in *Ranaweera v Wickramasinghe* [1970] AC 951 said that the Commissioner, in carrying out his responsibilities "must act judicially in the sense of being fair and impartial".

In New Zealand there is authority in *Reckitt & Colman (NZ) Limited v Taxation Board of Review* [1966] NZLR 1032 per McCarthy J for the proposition that the Commissioner must act fairly and treat all taxpayers alike. That proposition was made in the context of determining whether the Commissioner had a discretion to accept a notice of appeal lodged outside the time prescribed by the statute. The Court of Appeal held that for public policy reasons the Commissioner had no discretion to accept a late notice of appeal. Turner J, in discussing the manner in which the Commissioner must carry out his responsibilities made three points: (ibid at 1042)

First, it is "of the highest public importance that in the administration of such statutes [Revenue Statutes] taxpayers shall be treated exactly alike, no concession being made to one to which another is not equally entitled".

Secondly, the Commissioner may only exercise a discretion to differentiate between cases where the statute makes either express or implied provision for him to do so. Turner J provided no example of an implied provision which would allow the Commissioner to differentiate one taxpayer's case from another.

Thirdly, where there is no express provision for discretion then "none can be implied from the tenor of the statute".

In *Lemmington Holdings Ltd v CIR* (No 2) (1982) 5 TRNZ 776 the High Court said that the Commissioner must act consistently towards the same taxpayer. Having advised the taxpayer in one respect he cannot do the opposite. However, Eichelbaum J said there were limitations on this notion because of the Commissioner's over-riding duty to exact the correct amount of tax. This was an obligation which could not be fettered by previous assessments against the same taxpayer, whether for the same or previous income years.

If the Commissioner did adopt a fresh basis the taxpayer might consider this to be unfair and be without any remedy except the objection procedure. His Honour did go on to assert that, at the pre-assessment stage, the High Court had jurisdiction to see whether the Commissioner had acted fairly.

A similar point arose in the

English decision of *Inland Revenue Commissioners v National Federation of Self Employed Businessmen Ltd* [1981] 2 All ER 93, where it was held that the Court will intervene only where the Revenue is acting ultra-vires or illegally. Up to that point the Revenue will be permitted a wide managerial discretion in the exercise of statutory discretions. The facts of this case arose out of an agreement negotiated between the Revenue and the employers and unions connected with Fleet Street publishing houses. For many years casual workers employed by the publishing company had supplied their employers with false names thereby impeding proper collection of the tax payable on their earnings. By agreement the Revenue undertook not to pursue collection of back taxes if the employees supplied their proper names. The applicants sought a Writ of Mandamus declaring that by granting this "amnesty" the Revenue had acted unlawfully and that it should collect all of the taxes owing according to law.

The Court said that the applicants would need to show that they had a "sufficient interest" in the matter to which the application related before relief could be granted. The applicants claimed they had such an interest by virtue of the fact that they represented a body of taxpayers who had a genuine grievance. The House of Lords held that the applicants failed to satisfy this requirement.

Their Lordships held the view that judicial review would be available only where it could be shown that the Revenue was acting in breach of a duty or illegally. Judicial review does not apply where the Revenue is acting for good management reasons, and in the lawful exercise of a discretion which the legislation confers. Their Lordships concluded that the Revenue is responsible to a Court of Justice for the lawfulness of what is done.

It is unclear just how far the *National Federation* decision would be applied in New Zealand. In *North Island Wholesale Groceries Ltd v Hewin* (1982) 5 TRNZ 855, Woodhouse P and Richardson J said:

> The Commissioner's statutory functions . . . are directed to the quantification of the liability for tax which is imposed by the statute itself. They are not a matter of balancing management and collection responsibilities as in England (see *Inland Revenue Commissioners v National Federation of Self Employed & Small Businesses Ltd* [1981] 2 All ER 93). He does not have a general dispensing power. He cannot be estopped by past conduct from performing his statutory obligations in making assessments reflecting his present judgment as to that statutorily imposed liability. This makes it particularly inappropriate to determine what may be difficult questions of interpretation of the income tax legislation outside the objection procedures or other proceedings to which he is properly a party.

Such comments suggest that the different statutory schemes applying in the two countries make it inappropriate that the views expressed in the *National Federation* case would apply here. Further the majority of the Court of Appeal in *Commissioner of Inland Revenue v Lemmington Holdings Ltd* (supra at 782) observed of the Commissioner that:

> when he is discharging his statutory assessing function under s 19 and the associated provisions, he is performing a duty imposed on him in imperative and unconditional terms. The resulting assessment is susceptible to objection under the statutory procedures (except as provided in s 36) but not otherwise. That is, an intra vires exercise of the assessment function is not amenable to judicial review in terms of the Judicature Amendment Act.

It is important to note, however, that the majority also made the following distinction. (idem)

> There is, however, a distinction between challenging the correctness of an assessment and impugning the legitimacy or validity of the process adopted in making a purported assessment. The legitimacy of the process by which a purported assessment was arrived at or a proposed assessment is to be made may perhaps be susceptible to challenge in other proceedings on administrative law grounds.

In Australia the Courts have indicated that some judicial remedy may be available where the Commissioner is shown to have been acting mala fides. The taxpayer in *Lucas v O'Reilly* 79 ATC 4081 participated in a tax avoidance scheme with the object of generating a large loss for offset against his other income. Anticipating that the Commissioner would issue an assessment disallowing the deduction, and imposing the penalty tax, the taxpayer commenced proceedings for an injunction restraining the Commissioner from assessing him as liable for the penalty tax.

The Commissioner took out a summons to have the taxpayer's Statement of Claim struck out on the ground that it disclosed no cause of action. The taxpayer also took out a summons seeking an interlocutory injunction until the trial of the action. The Supreme Court of Victoria dismissed both summonses.

The taxpayer's summons was dismissed because there was no real evidence suggesting mala fides by the Commissioner. In relation to the Commissioner's summons, the Statement of Claim disclosed a sufficiently arguable cause of action to prevent its summary striking out. In view of the allegation of abuse of power, a proper exercise of judicial discretion required the Court to leave the taxpayer to pursue his action because it could not be said that, on the evidence, his action would necessarily fail. Young C J indicated that damages would be an adequate remedy for the taxpayer in his action. It is evident therefore that the Court thought that the taxpayer would have had a remedy if the allegation of mala fides could be substantiated. The claim would be in the nature of a pleading of misfeasance in a public office.

This is getting close to a possible cause of action in negligence. Equally, it could be said that the action was more aptly described as a statutory review proceeding. It is not at all clear from the decision exactly what the cause of action was. What is clear is that the action

as pleaded was premature in that there had been no decision made which could be the subject of a review and nor had there been any damage sustained by the plaintiff on which he could base a negligence action.

The decision is interesting for two reasons:

(a) The two actions, that is, negligence and review proceedings appear to have merged to some extent.
(b) Clearly the Court would have been prepared to have entertained a cause of action of some sort had mala fides been made out. Just what that cause of action would have been is far from clear.

(ii) Objection procedure as a means of control

(a) High Court and Taxation Review Authority

Both the High Court and the Taxation Review Authority have a statutory power to consider objections (s 31(2) and s 33 of the Income Tax Act 1976). The Taxation Review Authority was established by the Inland Revenue Department Act 1974. It is a judicial authority and a commission of inquiry. The powers conferred upon it by the Inland Revenue Department Act 1974 and the Income Tax Act 1976 are also conferred upon the High Court for the purpose of hearing and determining objections. However, the inherent powers of the Court, which are not shared by the Review Authority, mean that the High Court has in practice wider powers.

(b) Discretion

Although s 36(1) of the Income Tax Act 1976 bars objections relating to a number of discretionary provisions, it is suggested that the Court is empowered to exercise unusually wide powers in the majority of cases. The Court has all of the powers, duties, functions and discretions given to the Commissioner and thus must substitute its own determination for that of the Commissioner where, upon hearing the objections, it comes to a different conclusion.

In view of the wide ranging powers of the High Court and the enormous number of discretions exercisable by the Commissioner in determining taxpayers' liability to tax, it is to be expected that many objections would involve challenges to discretionary determinations.

Taxpayers must often find that their liability to tax is dependent, to some extent, upon the formation of an opinion by the Commissioner rather than on the words of a section of the Act per se. Despite this, very few objections have involved challenges to the Commissioner's discretion. In the few instances where the Court has been in a position to substitute its own discretion or opinion for that of the Commissioner no significant change in approach has been apparent.[3] There are probably three main explanations for this:

(1) One purpose of giving discretions to the Commissioner is their deterrent effect. In this regard they appear to be effective. Taxpayers seem to consider the Commissioner's opinion, unless manifestly wrong, as unchallengeable.
(2) The Commissioner, in many instances may take a liberal approach to challenges to his discretion; that is, if a taxpayer protests at the exercise of a discretion, and can give some reason or basis for his dissatisfaction, the Commissioner may well be inclined to accept the taxpayer's view, or come to some mutually acceptable settlement at this informal stage.
(3) There are several obstacles to effective challenge in the objection procedures themselves. In particular, the express onus of proof and the limitation to the grounds of objection can make the objector's task extremely difficult.

Also the Commissioner's restrictive attitude towards discovery of documents relating to the formation of his opinion may have handicapped potential objectors.

The possibility for dissatisfaction with assessments which depend upon the opinion and exercise of discretion by the Commissioner must frequently arise. The present statutory objection procedures provide the High Court with adequate powers to review such assessments. At present the Commissioner seems to exercise a wide range of discretions with little threat of challenge.

After the Commissioner has considered an objection he may alter the assessment if the objection is completely allowed, or, if he disallows the objection in whole or in part, then the taxpayer has a right of objection in respect of that part of the objection which the Commissioner disallows.

(c) Commissioner's power to delay Objections

Section 31 of the Income Tax Act 1976 deals with objections to assessments. Nowhere in s 31 or anywhere else in the Act is there a provision which requires that the Commissioner should act on an objection within a specified time – this proposition was confirmed by the Taxation Review Authority in *Case E5* (1981) 5 NZTC 59, 024. There the taxpayer was involved in a land subdivision scheme and the Commissioner issued an assessment including some of the profits from the scheme in the taxpayer's assessable income. A notice of objection was lodged immediately. The taxpayer's legal adviser thereafter contacted the department's district office several times over the matter, but although verbal indications were given that the objection would be disallowed, no formal notice of disallowance was ever given. The taxpayer decided to treat the objection as having been disallowed and he wrote to the Commissioner requesting a Case Stated before the Taxation Review Authority. Eight months later a Case Stated had not been filed and so the taxpayer made an application to the Authority requesting that his objection be disallowed because the Commissioner had not filed the Case Stated within six months of the request to do so. The taxpayer submitted that there should be implied in s 31 a provision that an objection must be dealt with by the Commissioner within a reasonable time and any failure to alter an assessment within that reasonable period may be treated as notice of disallowance, and thereupon the Case Stated machinery comes into operation.

The Authority rejected this view, and in so doing examined a number of provisions in the Act and concluded that it was quite clear that there is no duty cast on the Commissioner to give a Notice of Disallowance within any particular time.

The Authority pointed out that in many cases long and detailed inquiries might have to be made before the Commissioner can decide whether an objection is valid. If Parliament had intended that the Commissioner must take action on an objection within a particular time, it would have have said so. It therefore followed that an application such as the present one could not be lodged until an actual notice of disallowance had been issued and the Commissioner had done nothing in the six months after the taxpayer had requested a Case Stated to the Authority.

A different view was taken by Murphy J of the High Court of Australia in the case of *O'Reilly* 83 ATC 4807 (HC) at 4808 where the taxpayer failed to file returns of income and the Commissioner issued default assessments requiring payment of a large amount of tax, objections to the default assessments were lodged and later the outstanding returns were filed. The taxpayer instituted proceedings requiring the Commissioner to act on the objection. In discussing the issue Murphy J said:

> The first question is whether the Commissioner has a public duty to allow or disallow within a reasonable time. The Commissioner suggested that the duty to consider the objection under s 186 of the Act, at its highest, is a duty to give diligent and honest consideration to objections. He contended that there is no time limit, reasonable or otherwise, in which he is required to determine an objection. Where the limits have not been specified in other sections of the Act, a reasonable time has been implied (see *Ganke v FC of T* 75 ATC 4097, (1975) 1 NSWLR 252). Without a time limit any duty would be illusory. I interpret s 186 of the Act as requiring the Commissioner to allow or disallow an objection in whole or in part within a reasonable time.

His Honour went on to hold that the delay in this case was adequately explained. The taxpayer's affairs were very complicated, true and full disclosure had not been made, and the objections relate to the whole of the assessments and not just some item of income or deduction.

In light of these two conflicting authorities it is unclear whether there is any obligation on the Commissioner to act within a "reasonable time in considering an objection". With respect the decision of the Review Authority in *Case E5* supra, seems not only unfair but also poorly reasoned. The Authority's reason for reaching the conclusion that the Commissioner was not under any duty to act within a reasonable time was that in many cases long and detailed inquiries might need to be made before the Commissioner can decide whether the objection is valid. If that was so, one would think that what amounted to a "reasonable time" would be an objective test, taking into account all the circumstances of the particular case, and in particular, what matters the Commissioner had to consider and how long he needed to do so.

It is possible to envisage a number of situations where it would be crucial for the taxpayer to have his objection determined as quickly as possible for both matters of convenience and finance. □

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1 See *Reckitt & Colman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1032 per McCarthy J. Also *Lowe v CIR* (1981) 4 TRNZ 233 at 251-252 and *CIR v Farmers Trading Co Ltd* (1982) 5 TRNZ 504, 894; *CIR v Lemmington Holdings Ltd* (1982) 5 TRNZ 776 at 780-781.

2 *Case D27* (1980) 3 TRNZ 384, *Maxwell v CIR* [1962] NZLR 683 at 702. See also *Gregoriadis v CIR* (1985) 8 TRNZ 705.

3 In *Felt & Textiles (NZ) Ltd v CIR* (1968) 10 ATR 743.

Correspondence

Dear Sir,

re: Better public relations by changing the format of our bills

I wondered whether we have been suffering from self-inflicted bad publicity merely in the way we draw our legal bills. I was trained in the old way whereby the legal fee is set out, the disbursements are totalled, and the grand total is given. This grand total is what the public have taken to be legal costs.

These days inflation has boosted the disbursement content of our bills to the point where disbursements can exceed the legal fee. Using the old format, however, the public make no distinction between legal fees and total costs and when they wish to complain about the high cost of things, blame the lawyer for the combined total.

I altered the format of my own bills at Christmas to separate the true legal fee content and show the other bits and pieces somewhere else.

Here is an example for a simple discharge of mortgage:

	Our fee	60.00		
	GST	6.00		
		$66.00		
CASH STATEMENT				
BY	Your cheque			5,000.00
TO	Trust Bank		4,875.00	
TO	Our costs plus GST		66.00	
TO	Government Charges:			
	Stamp duty	10.00		
	Registration fee	35.00		
	Finding fee	12.00		
	Production fee	12.00	69.00	
	Balance due by you			10.00
			$5,010.00	5,010.00

continued on p 217

Jews, terrorists and Turks:

A new direction for pleading meanings of words in defamation?

By R J B Fowler, a Wellington practitioner

The law of defamation continues to be important in this country as well as in other common law countries. In this article the author considers in particular the question of innuendo. He analyses a recent decision of the Court of Appeal in England in the Polly Peck *case in which the Court of Appeal expresses some reservations about the decision of the New Zealand Court of Appeal in* Templeton v Jones.

> *Even at the very bottom of the river I didn't stop to say to myself, "Is this a hearty joke or is it the merest accident?" I just floated to the surface and said to myself, "It's wet", if you know what I mean.*
>
> A A Milne

The meanings attributed to the words complained of in defamation proceedings is a topic of fundamental importance. The established approach is summarised in *Gatley on Libel and Slander* (8 ed) at paragraph 1075:

> Where the plain and obvious meaning of the words is defamatory, an innuendo (as to their meaning) is unnecessary and, if made, negligible. But this is only the rule in the plainest cases. Where there is any unclarity as to the natural and ordinary meaning, or any uncertainty as to the meaning for which the plaintiff will contend at the trial, or there is room for disagreement as to what inferences may reasonably be drawn from the words themselves . . . the plaintiff must plead the meaning which he alleges the words to have.

In an interesting trilogy of recent cases, the issue has arisen as to what extent (if any) a defendant may be required to plead the alternative meanings which he will attribute to the words complained of.

Before turning to those cases, it may be useful to set out what are perceived by this author to be the two contrasting approaches to this issue. For ease of reference these will be called respectively "the purist view" and "the Polly Peck view".

The purist view

The purist view would be thus: the plaintiff sets out the words of which he complains and then (except in cases where the meaning is absolutely and unequivocally plain) he pleads the defamatory meanings that *he says* flow from those words (otherwise known in libel law as "false innuendoes").

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continued from p 216

Nowhere in that statement are our costs plus disbursements totalled.

My favourite expression is "Government Charges" as I think this points the finger exactly where it belongs. I also think that the Government has in the past pointed the finger at lawyers and suggested our charges were too high, and it's nice to demonstrate effectively that their charges can be higher than ours.

Public reaction has been excellent. I have had some rather nice discussions with clients purchasing houses who had not previously appreciated that stamp duty was such a major item and a form of taxation. It is pleasant to be on the clients' side agreeing that stamp duty on a house purchase is a miserable form of taxation and a blight on what is otherwise a very pleasant transaction. It is much better than me facing a tense client who is angry that "legal costs" (being the global total) are too high and it is all my fault.

This general reaction from my small trial is so good that I believe that this simple change, which costs nothing, could do as much for lawyers in the public relations field as the expensive advertising programs which have been run to date.

However, lawyers are an independent lot and we are all reluctant to change our own practices. Although I would like everyone to separate fees from disbursements, if you refuse to change, at least I would like to give you the expression "GOVERNMENT CHARGES".

Registration fees up. New search fees. New finding fees on productions. Point the finger back where it belongs. Label such things "Government Charges" as this shifts antagonism from you to them.

R T Carter

The purist would argue that the plaintiff in so choosing his meanings has chosen his battleground. He cannot then fight the battle on some other battleground. The defendant can ignore all other meanings other than those chosen by the plaintiff.

The defendant then scrutinises the meanings that have been chosen by the plaintiff and decides whether he will plead justification of those meanings. If so, he will plead his particulars accordingly.

Thus in the purist's view the emphasis is on the meanings attributed to the words by the plaintiff and if the plaintiff fails at trial to establish any of those alleged defamatory meanings he will fail without further ado. On the other hand if he succeeds in establishing the defamatory meaning, the defendant is now called upon to justify that meaning. Thus there is no question of the mêlée of battle spilling over onto the battlegrounds (ie meanings) that were *not* chosen by the plaintiff.

The purist view is adopted by *Gatley* at paragraph 1108:

> Where, however, the Plaintiff relies on one or more "false" innuendoes, he is stating how he is going to present his case, and the defendant cannot allege that the words have some other natural and ordinary meaning and then justify that.

The Polly Peck view

Inherent in the Polly Peck view is recognition of two fundamental principles relating to meanings of words in defamation actions:

1 The context of the words (not just the words themselves) is a necessary consideration; and
2 Multiple defamatory meanings can sometimes be extracted from the words complained of.

The Polly Peck approach would be thus: the plaintiff has complained of the words and set out his alleged defamatory meanings. Not surprisingly the plaintiff is most likely to choose the most serious meaning that he can possibly wring out of the words.

The defendant may well consider that the words are defamatory but have a meaning which is less serious than that alleged by the plaintiff — yet a meaning that the defendant can justify.

In those circumstances a defendant may consider that he should not be "strait-jacketed" to the plaintiff's choice of meanings when it comes to justification. Put more bluntly, a defendant may feel vulnerable that with a plaintiff picking and choosing his meanings he (the defendant) will be cut out of the possibility of justifying "softer" defamatory meanings. With the defendant locked into the "harder" meanings pleaded by the plaintiff the justification defence may take on an unfairly contrived or strained appearance.

Thus the Polly Peck view advocates that the defendant should plead *his* alternative defamatory meanings of the words with his justification thereof.

The trilogy

Turning now to the trilogy of cases the first in the sequence is *Templeton v Jones* (1984) 1 NZLR 448 CA. In that case the defendant had said of the plaintiff that he was:

> a man who despises many people . . . bureaucrats, civil servants, politicians, women, Jews and professionals. Doesn't it sound familiar? The politics of hatred.

The plaintiff ignored all allegations except the one about Jews and sued on that alone. The defendant pleaded justification but in his particulars he sought to justify not only the allegation that the plaintiff despised Jews but also that he despised bureaucrats, civil servants, politicians, women and others including Boy Scouts.

Not surprisingly the plaintiff applied to strike out all of these particulars other than those relating to Jews. In the High Court Ongley J allowed that application and struck out those particulars. The defendant appealed and the Court of Appeal dismissed his appeal.

It is important to note that the defendant did not plead an alternative meaning to the words: he simply sought to justify the other allegations. Thus the pleading of alternative meanings by the defendant was not before the Court as an issue.

In the judgment of the Court (per Cooke J) the issue of severability became the cornerstone of the reasoning:

> The principle that the defendant cannot go into evidence bearing on a charge of which the plaintiff does not complain has been established for more than a century . . . see *Bembridge v Latimer* (1864) 12 WR 878 . . .
>
> The principle does not apply if the words are not severable in that there are not distinct charges but in substance only one . . .
>
> In the present case, however, the allegation that the plaintiff despises Jews is not reasonably capable of being treated as other than a distinct charge. It is obviously different, for instance, from the allegation that he despises women. It is true that many of the allegations in the passage quoted in para 5 of the Statement of Claim are variations on or illustrations of a theme: namely that the plaintiff indulges in the politics of hatred. They are specific and severable allegations nonetheless. (Per Cooke J 451-2)

The second case in the sequence is *Lucas-Box v News Group Newspapers* (1986) 1 All ER 177; [1986] 1 WLR 147. Miss Lucas-Box was evidently a young attractive jetsetter who was living with an Italian, Petrone, when the latter was arrested by anti-terrorist detectives for questioning about various terrorist murders and bombings in Spain and Italy. This prompted two British newspapers to run articles highlighting an apparent phenomenon of young beautiful privileged girls forming relationships with ruthless fugitive terrorists. The Daily Mail even invited a psychologist to comment who said:

> They meet these men, who seem to come from another world . . . they reek of danger which has always been an aphrodisiac. To a certain kind of woman this is devastatingly attractive . . . many girls brought up in comfortable, conventional homes see these men as living a thoroughly abandoned buccaneering existence — rather like Errol Flynn . . . it is the easiest and most obvious form of rebellion and one in which Mummy and Daddy can never compete.

Miss Lucas-Box sued pleading that the words meant (inter alia) that she had been living with a man she knew to be a ruthless killer and the generalisations such as the psychologist's comments meant that she had a complicity or acquiescence in terrorist activities similar to that of Ulrike Meinhof and other young notorious women mentioned in the articles.

Two years after the first defences had been filed the newspapers applied to amend by raising the defence of justification and also seeking discovering of correspondence between Miss Lucas-Box and Petrone. The plaintiff appealed to the Court of Appeal against the decision of Saville J giving leave to amend the defences.

It would appear that the basic complaint by counsel for the plaintiff was that he did not know what it was that the defendants were seeking to justify and therefore he sought to have the defendants plead the meanings that they would seek to justify.

The judgment was delivered by Ackner LJ:

> Counsel were wholly unable to refer us to any rule of pleading which would prohibit the defendant from stating in his defence what he alleged was the natural and ordinary meaning of the words complained of, although we were told that there was a convention not to do so . . . indeed, it would be odd, to say the least, if the current practice, which obliges the plaintiff to plead the natural and ordinary meaning of the words complained of, where that meaning is not clear and explicit, should treat as frivolous or vexatious or likely to embarrass or delay the trial of the action a similar such helpful definition by the defendant.
>
> We fully appreciate that where an action in defamation is tried with a jury it is for the jury to decide what meaning or meanings the words in fact bear. They are not limited by the meanings which either the plaintiff or the defendant seeks to place on the words. Accordingly a defendant who seeks to rely on the defence of justification does not wish to tie himself to a potential defamatory meaning which may turn out to be more serious than that which a jury ultimately conclude to be the true defamatory meaning. (Per Ackner LJ 182)

The appeal in this regard was allowed and the particulars amended (although it is not entirely clear from the judgment whether the amended particulars actually contained the alternative meanings).

The last case in the trilogy is *Polly Peck Holdings v Trelford* (1986) 2 All ER 84; [1986] 2 WLR 845. This was also a decision of the Court of Appeal. Although the argument had been heard prior to argument in *Lucas-Box*, judgment was delivered three weeks after the judgment in the latter case. With the exception of Nourse LJ the composition of the Court was different.

In *Polly Peck* the defendant newspaper did a lengthy alleged exposé of the business activities of a Turkish businessman and his companies (the Polly Peck Group). The articles covered a number of the Polly Peck ventures. The plaintiffs sued in respect of some (but not all) of those ventures. The defendants pleaded fair comment and justification and produced 54 paragraphs of particulars covering (inter alia) the published ventures of which the plaintiffs had not complained. The plaintiffs applied to strike out those particulars and the Judge refused that application on the basis that "the subjects raised in the articles are linked and form the grounds of a single composite criticism". The plaintiffs appealed and the appeal was dismissed.

O'Connor LJ delivered the judgment of the Court and commences a careful analysis at p 94 of *Brembridge v Latimer* (1864) 12 WR 878 (noting incidentally that all three reports of that case need to be examined to get a summary of the publication of the libel) and concludes at p 96 that *Brembridge* was wrongly decided. O'Connor LJ then discusses *S & K Holdings v Throgmorton Publications* (1972) 3 All ER 497 which had been doubted in *Templeton v Jones* before turning to an examination of *Templeton v Jones* itself and concluding thus:

> . . . I am very doubtful that the allegation is clearly severable from the rest of the passage. With very great respect to the New Zealand Court of Appeal, I would have thought that the words in their context were at least capable of meaning that the plaintiff was an intolerant bigot, preaching politics of hatred in the hope of political advantage, and that, if that was the sting of the passage as a whole, the defendant was entitled to introduce the particulars which were rejected. (Per O'Connor LJ 101-2)

In an attempt to collate and summarise the principles canvassed O'Connor LJ then states his conclusions:

> In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different to that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and give particulars of the facts and matters on which he relies . . . it is fortuitous that some or all of those facts and matters are culled from parts of the publication of which the plaintiff has not chosen to complain.
>
> Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.
>
> Whether a defamatory statement is separate and distinct from the other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. (Per O'Connor LJ 102)

Then in another passage there is a clear attempt to re-direct United Kingdom pleading practice:

> While this judgment has been under preparation, another division of this Court has ruled in *Lucas-Box* that the practice which dictated that a defendant does not state in his defence what he alleges is the natural and ordinary meaning of the words complained of is ill-founded and should not be followed. That case has decided that a defendant who pleads justification must state the meaning which he seeks to justify. It follows from that case and this that in future, where differences of meaning are proposed by the parties, the issue as to the possible meanings of the words will be confined to those pleaded. (Per O'Connor LJ 102)

The New Zealand direction

It will be interesting to see whether the New Zealand Courts will adopt the Polly Peck direction. Historically the New Zealand Courts did adopt the views of

the House of Lords in *Lewis v Daily Telegraph* (1964) AC 234 that ushered a change in the United Kingdom for plaintiff's pleadings of meanings of words. The criticism of *Templeton v Jones* in *Polly Peck* is, after all, apparently confined to the approach the New Zealand Court of Appeal took to the severability of the allegation that the plaintiff despised Jews, and, impliedly, the following of the *Brembridge* decision. Furthermore, since the issue of alternative meanings has not yet been addressed by the New Zealand Court of Appeal, there is no reason why all three decisions in the trilogy cannot be reconciled in the New Zealand context: ie the reasoning of *Templeton v Jones* can be said to be a simple application of O'Connor LJ's second principle of his conclusions.

But should the Polly Peck view be preferred to the purist view? There is an obvious practical advantage to the purist view: pleadings do not contain a proliferation of meanings and the administration and conduct of trials is easier.

There is also an undeniable logic to the purist view: if the plaintiff fails to establish his meanings the exploration of justification becomes, strictly speaking, redundant.

Indeed, the prospect that defamation trials might become more complex and prolix in their pleading might be seen in some quarters to be one more technical complication to be avoided at all costs in a field already rife with judicial criticism as to how complex and technical defamation actions have become at the hands of pleading draftsmen and counsel.

Yet perhaps in the final analysis the Polly Peck view has the persuasion of solid pragmatism. If the use of language and other communication tools was an exact science it would be hard to fault the purist view. But we pride ourselves on our ability to flavour language with contextual variations, to use communication modes that have layers of different and sometimes overlapping meanings, and to use words as both a cloak and a dagger.

The Polly Peck view recognises this and permits the defendant to justify otherwise defamatory meanings but outside of the "strait-jacket" of the plaintiff's selected meanings. Where juries are only asked whether the words are defamatory of the plaintiff there must be an undoubted fairness in allowing the defendant, in the context of justification, to put forward his alternative meaning against which he will attempt to prove the words to be true. After all, as an author or publisher of the words, one would have expected that, meant as the defendant intended them, the defendant more often than not published the words because he believed them to be true.

The *Lucas-Box* case is factually more of a paradigm of the Polly Peck escape from the purist "strait-jacket" than the facts of the *Polly Peck* case itself. In *Lucas-Box* the plaintiff pleaded that the words meant that she had a complicity or involvement in Petrone's alleged terrorism heightened by the references to and therefore similar to the involvement of notorious young women such as Ulrike Meinhof. The newspapers clearly felt that they could not justify those meanings. But they obviously considered that they could justify a defamatory meaning that was less than that pleaded by the plaintiff: namely, that Miss Lucas-Box knew that Petrone was wanted for questioning about acts of terrorism in other countries. (Presumably the newspapers would at trial treat the references to Ulrike Meinhof and others as separate and part of the exploration of the theme as to why young privileged women seem to be attracted to terrorists.) On the purist approach the newspapers could not have sought to justify their "softer" defamatory meaning; they would have been left with simply persuading the jury that the "harder" defamatory meaning pleaded by the plaintiff was unsustainable. In other words, it may not necessarily be putting the cart before the horse to say that the "softer" defamatory meaning may look much more appealing to a jury when backed by solid justification evidence.

Other consequences

It is not suggested that the implementation of the Polly Peck view is the panacea to difficulties in the law of defamation on this issue.

Certainly in terms of procedure there would be no difficulty as the alternative meanings (where required) would simply form part of the particulars of justification required when that defence is raised. As to the rule that interim injunctions should not be granted to prevent further publication where justification is pleaded in the Polly Peck style, see the subsequent case of *Khashoggi v I.P.C. Magazines* [1986] 3 All ER 577.

The freedom of the jury to select its view of the meaning of the words remains unexplored. There is a conflict between *Lucas-Box* and *Polly Peck* on this point. In the passage quoted above from *Lucas-Box* at p 182 Ackner LJ confirms the traditional view that the jury "are not limited by the meanings which either the plaintiff or the defendant seeks to place on the words". But O'Connor LJ in *Polly Peck* in the passages cited from p 102 states that "where differences of meaning are proposed by the parties, the issue as to the possible meanings of the words will be confined to those pleaded".

There are also other areas of difficulty that would have to be resolved. For example, would the Polly Peck view apply equally to the fair comment defence? The *Polly Peck* decision suggests that it does (at p 102) but the fair comment defence is essentially different from justification in that the justification defence goes to the truth or otherwise of the allegation contained in the defamatory material thereby making the search for the meanings arguably axiomatic, whereas the fair comment defence tends to by-pass the truth issue and turns entirely on the issue of whether the actual words used are comment or not. To put this another way, once the defamatory meaning is established, the focus in a fair comment defence skips back and away from the plaintiff's meanings to an examination of the words actually used as to whether they are assertions of fact or are comments.

Possibly O'Connor LJ, with great respect, is misled by the fact that common practice is to plead the same particulars both by way of justification and fair comment (at least that seems to commonly be the case in New Zealand). Nevertheless, the two defences are quite different conceptually and there is no reason why the particulars should necessarily be the same and there is nothing in Rule 189, High Court Rules to suggest otherwise.

Conclusion

However, these peripheral and consequential matters are not impediments to the adoption of the Polly Peck view in New Zealand. For the reasons stated above, that approach has the attraction of a basic fairness and a solid pragmatism which recognises the multi-texture of human communications. □

The Religious Right and the legal process

An essay

By J L Caldwell, Lecturer in Law, University of Canterbury

The neo-Conservative movement is very strong in the United States and has developed intellectual respectability. At the grass-roots level there has been a corresponding movement based on Protestant Christianity of Biblical fundamentalism. The two movements are probably to be seen as allied rather than identical. Both movements have political and legal connotations. Both are reflected in New Zealand. In the this article S L Caldwell looks at the implications of the group known as the Coalition of Concerned Citizens for legal developments and the political process.

In 1924 the American wit, H L Mencken, observed that "if any man stands up in public and solemnly swears that he is a Christian, all his auditors will laugh". Perhaps partly for such reasons Christians in New Zealand have tended to keep their religion a private affair. Certainly for some time the mainstream churches have been active at an institutional level in promoting legislation for such "liberal" causes as anti-nuclearism and the elimination of racism; but , the issue of abortion apart, the Churches' actions in such causes have enjoyed the sympathy of a generally liberal intellectual community. The biblical motivation for their work has therefore been either overlooked or regarded as quite harmless.

Now however a new phenomenon has arisen in New Zealand whereby Christians from the newer, and rapidly growing, Pentecostal and so - called "fundamentalist" Churches wish to enshrine "God's Law" as statutory law. This obviously causes liberals more concern. But to date the actual arguments of the Religious Right have not been treated with a great deal of seriousness by their opponents. The arguments often seem too foolish to consider or counter, and their proponents are frequently open to personal attack. Moreover pragmatic, busy lawyers and parliamentarians are notoriously uninterested in philosophical discussion of any kind, yet alone a jurisprudential discussion on the apparently peripheral topic of the role of religion in the legal process. Yet there is a danger in either disdain or aloof silence. The concerns of large numbers of ordinary citizens should be directly addressed if the legal process is not to become unacceptably élitist. Thus this essay, in a modest and preliminary way, will attempt to describe and analyse the arguments of the Religious Right, as evidenced by the statements issued through the Coalition of Concerned Citizens.

Composition of the Religious Right

The Coalition of Concerned Citizens, which was formed in September 1985, is the most obvious mouthpiece of the Religious Right within New Zealand. Perhaps strictly speaking it should be described as an organisation of "Moral Right", as its adopted Statement of Position conspicuously makes no specific reference to Christian ideology. However the Chairman of its National Executive is a retired missionary, its National Media Spokesman is pastor of an Auckland church, and the Coalition's publication *Coalition Courier* reveals a most definite conservative Christian bias and is distributed through the evangelical Christian weekly publication, *Challenge Weekly*. (Other public morals organisations, such as the Catholic influenced Society for the Protection of the Unborn Child could, however, be more accurately be described as belonging to the "Moral" rather than the "Religious" Right.)

In a recent feature article in the *National Business Review* (March 24, 1987), Yvonne van Dongen indicated there were 5000 supporters on the Coalition of Concerned Citizens' mailing list, twenty per cent of whom were members of the Dutch Community. At the time of writing, however, the latest *Coalition Report* (April 17, 1987) claimed that a special *Courier* issue on the topic of secular humanism had been distributed to 105,100 people.

The Coalition also claims implicit support from the 835,000 alleged signatories on the petition opposing Homosexual Law Reform. (Indeed

the National Media Spokesman, Mr Barry Reid, claims that it was the rejection of that petition which led to the involvement of concerned citizens in the political process.) Spokesmen also like to claim that poll figures reveal that 76% of New Zealanders register a belief in God – which is, incidentally, the same proportion of believers as that revealed in two newspaper polls in Britain at the end of last year – and on that basis the spokesmen deny that they are a small minority of the population.

Are they "fundamentalists"?

It would seem that overt Coalition sympathisers are a little wary of being described as "fundamentalists" (*Challenge Weekly* December 13, 1985 pp 10-11). The wariness accords with the view of Professor J Barr in his leading work *Fundamentalism* (1977, SCM Press) that the persons to whom the word "fundamentalism" is applied do not like to be so called, because of its connotations of bigotry and narrowness. Barr, who is Regius Professor of Hebrew at Oxford University, continues to use the term, however, because in his opinion the connotations happen to be true. However Professor Barr does emphasise that, contrary to the belief of most lay observers, "fundamentalists" do not necessarily insist on the *literality* of the Bible. Rather, he says, they insist on its *inerrancy*. He notes that "[i]n order to avoid imputing any error to the Bible, fundamentalists twist and turn back and forward between literal and non-literal interpretation". Another, rather more sympathetic, scholar G M Marsden has also argued that in the American context "fundamentalism" has respectable intellectual roots and intelligible beliefs (*Fundamentalism and American Culture* 1980, OUP).

Certainly it would be mistaken to regard all members and sympathisers of the New Zealand Coalition as being woodenly unintelligent. For instance, the key position of Secretary of the Coalition was filled in 1985 by a partner in an established Christchurch law firm, and some impressively-argued submissions against the Draft Bill of Rights were made to the Parliamentary Select Committee on behalf of the Coalition by an Auckland barrister. A Senior Lecturer in Accountancy at the University of Canterbury wrote the booklet *The Social Effects of Homosexuality*, which has been promoted and relied upon by the Coalition in its activities against Homosexual Law Reform. Thus if the word "fundamentalist" does indeed carry connotations of unreasoned bigotry, it would be better to use the neutral term "conservative Christian" as a fairer description of the members and supporters of the Coalition.

Beliefs concerning Law

Ms Fran Wilde, the Member of Parliament for Wellington Central, has argued that if the Coalition had to be specific about their legislative agenda there would be "a lot of internal disagreement" (*NBR*, March 24, 1987). Certainly in speaking of its aims the Coalition has preferred to deal in generalities rather than in detail – except, of course, with respect to its oft-stated wish for the repeal of the Crimes Amendment Act 1986 (which changed the law with respect to homosexual practices).

However there are various themes which emerge from the public statements and writings of spokesmen of the Coalition.

Firstly it is apparent that conservative Christians do not accept the division, or the "wall of separation" as Thomas Jefferson called it, between Church and State. They argue for a unity of life whereby both material and spiritual affairs are united; following on from that they argue that the civil government and its laws should be seen as instruments of God.

Secondly they argue that many laws in our society, such as the Human Rights Commission Act 1977, presently reflect a moral/religious view: that of liberal secular humanism. They argue that this liberal secular humanist "religion" is also evident in current law reform proposals (such as, for example, the proposals to allow alcohol sales on Sundays, to expand the legal definition and understanding of the "family", and to introduce the game of Lotto as a means of raising governmental revenue). Conservative Christians argue that divinely ordained morality, as prescribed in the Bible, should be preferred over this secular humanism (or its variant utilitarianism) in the making of laws. Secular morality they argue is relative, continually changing, and has resulted in the social and sexual chaos which is evident in today's society; conversely, they argue, divinely ordained morality, as prescribed in the Bible, is constant and can be relied upon to produce social stability.

Thirdly the Coalition argues that liberal secular humanism has become the prevailing ideology because of the take-over of power by humanist intellectuals within the education and political system. Thus a strong theme within the Coalition's Literature is the perceived loss of power by the ordinary citizen. As Mr Barry Reid wrote in December 1986, "[f]or too long ordinary, decent, lawabiding citizens have felt like aliens in their own towns and cities". The Wellington Regional Committee of the Coalition recently issued a letter box pamphlet reassuring citizens that they never again need feel " . . . overwhelmed by the 'experts' when common sense told you 'they have it all wrong' ".

Fourthly their emphasis is on the enactment of laws aimed at the removal of immorality within society rather than of laws aimed at the removal of structural injustice. There is very little emphasis on the "social gospel". As one of the Coalition's spokesmen, Mr John Stenhoff, wrote in October 1986, "[w]e do not believe that structural injustice causes evil, but rather out of the heart proceeds all evil, including structural injustice". Following on from this the Coalition proceeds to justify laws controlling morality in a way explained by Rev Richard Flinn in *Coalition*, April 17, 1987:

> [t]he Coalition argues that while what a person believes in his heart cannot be controlled by law, some practices (as distinct from beliefs) are so grotesque and degenerate they must be proscribed by law. This necessarily means an infliction of morality upon the community.

Certainly spokesmen for the Coalition have advocated some specific conservative policies such as the imposition of a minimum mandatory sentence of 14 years for rape and the building of more prisons, but the expression of the general concerns described above tend to dominate their literature.

Although the Coalition initially insisted it was apolitical in a party sense (and has always been very dissatisfied with the moral views of the Deputy Leader of the National Party), it has more recently set about participation within the legal process by gaining membership and candidacies within the National Party. The Coalition membership would certainly still include many Labour Party adherents, but in expressing its general concerns the Coalition has increasingly come to launch a bitter attack upon the fourth Labour Government. This is well exemplified by the column of the Chairman, Mr Joe Simmons, in the *Coalition Courier*, December 1986 when he wrote that a "predominantly permissive" Labour caucus

> . . . have already opened the sluice gates for moral pollution. Another term could well see the sluice gates removed totally and the nation wallowing in the mire of permissiveness.

The social significance of the Coalition

(a) The reasons for its formation.

In his recently published book *The Politics of Nostalgia, racism and extremism in New Zealand* (Dunmore Press, 1987) P Spoonley argues that the election of the fourth Labour Government in July 1984 provided the catalyst for the mobilisation of religious conservatives. In particular the early feminist slant evident in the ratification of the United Nations Convention on the Elimination of Discrimination against Women 1979, and the involvement of the Ministry of Womens Affairs in the various women's forums persuaded the Religious Right that feminists had gained an élitist influence over the legislative process. They became anxious to counter that influence. The sponsorship of the Homosexual Law Reform Bill by a Government member of Parliament, and the perceived cavalier response to their massive petition provided a further impetus for conservative Christians to develop an umbrella organisation. But from comments made by Coalition spokesmen, it appears that the "ignominy" of being given only two minutes to speak to the Parliamentary select committee considering the proposed Bill was the real stimulant to setting up the organisation of "ordinary concerned citizens".

In his typically perceptive book *The Quiet Revolution* (1986, Allen and Unwin) Colin James has argued that the seizure of power by the "emergent generation" has created social strain which has been caused, in part, by their rejection of old social and moral standards. He proceeds to state that the political "revolution" and changes of the 1980s has exhilarated the élite, but left the ordinary New Zealand wage worker and homeworker politically leaderless " . . . leaving a gap which a populist leader or movement could fill". Without doubt the Coalition aims to fill that gap.

Consistent with James' analysis the Coalition's National Media spokesman, Mr Reed, has criticised the social and economic management since 1984 as being a "juggling of market forces to create a climate of change" (*Coalition Courier*, December, 1986); and, upon the foundation of the Coalition in September 1985, Mr Reed stated that "[i]ts aim is to coordinate views and resources to maintain traditional (Christian) values".

Finally it must be noted that the Coalition's statement of position declares that it is "an indigenous body controlled by New Zealanders and is not beholden to any overseas bodies financially or otherwise". And whilst the Moral Majority movement of the United States clearly provided some inspiration for the Religious Right within New Zealand, there never appears to have been any direct organisational or financial assistance. Indeed by way of contrast to the Moral Majority movement in the United States, the Coalition currently appears to be somewhat weak in its financing, public relations, and organisational base.

(b) Acceptance of the Coalition's views.

In *The History of New Zealand* (1969, Penguin) Professor Keith Sinclair commented that the prevailing religion within New Zealand is a "simple materialism". He continued, "[t]he pursuit of health and possessions fills more minds than thought of salvation". Today such a comment may be even more apposite. As a world-wide phenomenon the 1980s are often being compared to that of the 1920s. For instance Haynes Johnson writing in the *Washington Post* observed of the United States that "[n]ot since the 1920s. . . has the nation witnessed so much common celebration of greed and selfishness". Such a social environment may, as discussed above, give rise to Religious Right movements; but equally such an environment is likely to ensure that they will intially enjoy only marginal support.

Indeed within the current Parliament only a handful of Members are open supporters of the Coalition; and some of their support must do little to facilitate the Coalition's wider acceptance. For instance when in February 1987 the Member for Whangarei issued a Press statement in support of the Coalition declaring that Parliament was "overrun with wimps and atheists" and that New Zealand was "fast becoming a nation of disoriented drongos", he was unlikely to have attracted many additional members into the Coalition's ranks. Conversely, when in September 1985 a former Prime Minister, Sir John Marshall, called for a religious revival to overcome the "multitude of social, economic, and moral problems" which New Zealand faced, he may have afforded some respectability and credibility to the Coalition's arguments.

But because the Coalition does not enjoy a good image there is very little express support for the organisation itself from opinion makers within the wider community. However some of the concerns expressed by the Coalition are increasingly being expressed in circles far removed from those of conservative Christian churches. For instance both conservative Christian and feminist groups form a curious alliance in calling for stricter censorship laws in order to protect the dignity of women. Both diverse groups also share a particular concern over the prevalence of rape offences—though their diagnosis and solutions for the problem are certainly quite different.

In recent months the Roper Ministerial Committee of Inquiry into Violence also described it as an "unpalatable truth" that " . . .for the last two or three decades

permissiveness has gone unchecked; . . . [an] awareness of spiritual values is sadly lacking". Those sentiments could well have come from a Coalition report. Furthermore the Roper Committee sympathetically commented that "[t]here are people who have worked to reverse those trends but all too often they have been ignored or regarded as eccentric busybodies". Arguably, though, the horrendous implications of the disease of AIDS could make the proponents of traditional sexual morality seem less eccentric within the near future.

The concerns expressed by the Coalition over the liberal direction of education in schools may also enjoy wider support. For instance in a recent *Metro* issue (April, 1987) Carroll du Chateau wrote a feature article entitled "The Lost Generation" in which she concluded that children were the "victims" of liberal education. She told her readers that "parents must not be frightened to insist on unfashionable, old - fashioned things". The affluent "upmarket" readers of *Metro* could find similar sentiments in any edition of the *Coalition Courier.*

(c) Rejection of the views.

Clearly the rejection of the petition and the arguments of Conservative Christians against Homosexual Law Reform signified a more general rejection of the biblically based ideology of the then nascent Coalition. In the parliamentary debates Mr Trevor de Cleene MP dismissed reliance on the Bible by saying "one can get out of the Bible any argument that can be taken from the New Zealand Law Reports". He perhaps summed up the underlying sentiments of all proponents for the liberalising of the law against homosexuals by adopting Mrs Campbell's blunt aphorism and declaring "I don't give a damn what they do provided they don't frighten the horses".

Within the intellectual community the extent of the opposition to the conservative Christian campaign against homosexual law reform was perhaps most neatly highlighted by the fact that all but five of the thirty academic staff of the University of the Victoria Law School signed a statement giving unqualified support to the original, unamended Homosexual Law Reform Bill.

But probably the most vocal of all critics of the Coalition are the mainstream Protestant churches. In 1986 the Public Issues Committees of both the Anglican Church and the Presbyterian General Assembly issued discussion papers strongly critical of the ideology and assumptions of the Coalition. Their concerns were summed up by the Anglican Assistant Bishop of Wellington who said,

> [t]here is a very real danger th. the extreme religious Right will engender moral retreat, not moral advance.

The Catholic Church does not appear to have devoted the same specific attention to the Coalition. In principle, one would expect it to be philosophically opposed to the movement. For the Coalition, arguing from the Protestant stance, is emphatic that the Bible is the role source of revelation concerning morality, whereas the Catholic Church argues that Church thinking and teaching is a valid separate source. However despite these philosophical differences it appears that conservative Protestants may view the Catholic Church as an important ally in their greater battle against secular humanism. Thus in an editorial in *The Challenge Weekly* (November 14, 1986) the editor announced that the "Holy Wars have ended", and he argued that conservative Protestants might well find the greatest support for their views on biblical, moral and social absolutes from within the Catholic community.

Finally it can be noted that many members of the National Party were apparently so concerned by the Coalition's move into the Party organisation that there was reportedly some early discussion of forming an alternative urban party; now, however, the National Party is said to have decided the Coalition's presence is inevitable (*NBR*, March 24, 1987).

The role of religion in Law

Even if the 1987 General Election should rebuff the Coalition's hopes, both the Coalition spokesmen and some opponents (as Ms Fran Wilde MP) believe that the Coalition could make a major impact at the following election. Certainly it seems that the Coalition's presence on the political landscape is likely to be a long-term one. Thus the issue of religion and law could become a surprisingly important one.

At present it can be safely assumed that the overwhelming majority of lawyers would state without hesitation that religion has no role to play in lawmaking. The positivist traditions and inclinations are deeply embedded in the lawyer's heart and head; on the general issue of morality and the law Professor Hart is generally thought to have convincingly won the debate against Lord Devlin. Moreover many would say that in a seemingly liberal, secular, godless society it would be inappropriate to enact religiously based laws. The historically minded might like to support their argument by pointing to the nature of societies under previous theological governments — whether those governments happened to be Puritan, Papist, or Muslim. The academically inclined might emphasise the dictum of Lord Sumner in *Bowman v Secular Society* [1917] AC 406, 464 when he held that " . . . the phrase 'Christianity is part of the law of England' is not really law".

In his book *The Enforcement of Morals* (1965 OUP) Lord Devlin accepted that Christianity was no longer part of the law of England, but he nevertheless argued that "Christian concepts divorced from their doctrinal origins are still active in it". Those Christian values, he maintained, have formed the moral values generally accepted in Western societies, and that the shared morality of a society is its cement. Thus, he said, the law may validly seek to enforce the shared morality in order to ensure the very existence of society. Lord Devlin had great faith in the "ordinary man", and he explained that "immorality for legal purposes is what every right-minded person is presumed to consider immoral". And in his opinion, "intolerance, indignation, disgust are the forces behind moral law".

The criticisms of the thesis are now obvious and familiar. Is there any empirical evidence to support the premises of Lord Devlin's argument? Is not society considerably more pluralistic than Lord Devlin gives it credit for? If there is indeed a shared morality in today's society, is it not based on the liberal philosophy of tolerance, and, in the absence of provable harm, on the philosophy of live and let live? Are not the stated

criteria for moral law ("intolerance" and "disgust") amongst the most irrational of all imaginable criteria?

Indeed of the more recent prominent common law judges perhaps only the moralistic Lord Denning would still attempt to argue the Lord Devlin thesis. However in New Zealand there have been the series of most striking dicta from the current President of the Court of Appeal, Sir Robin Cooke, concerning "fundamental common law rights" which, whilst far from supporting the Devlin thesis, do suggest that the positivist argument is not invulnerable from attack. And it is of some interest in this context to note Roscoe Pound's observation in the *The Spirit of the Common Law* (1921) that "[p]uritanism has been a significant factor in the moulding of the common law".

Another indicator that the black letter positivist approach to law is gradually losing its influence over the New Zealand judiciary comes from public addresses by another member of the Court of Appeal, Sir Ivor Richardson. For example in an address "Judges as Lawmaker" (1986) 12 Monash Law Review 35, 47, Sir Ivor gently chided counsel who " . . .still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history". There is a recognition here that legal questions can not always be divorced from social, economic and moral questions.

Conclusion

At the time of writing it is reasonably clear that the Coalition's views on religion and the law do not enjoy a great deal of influential support. And certainly some of their views must place them on the extreme fringe of mainstream thinking. For instance in a remarkable echo of Emperor Justinian's observation that "homosexuality causes earthquakes", a recent issue of the *Coalition Courier* quoted the Book of Job and implied that the Bay of Plenty earthquakes occured because "we have had the gall not only to ignore God, but also to make laws against Him". Such an implication would strike many as being more than a little foolish. However the Coalition's more general concerns must certainly be taken seriously, for they represent the disenchantment of a significant number of citizens with the moral nature of our laws and lawmaking.

It is thus important that lawyers and Parliamentarians turn their attention to those concerns, lest the Coalition's solutions prevail by default. In 1975 Professor Unger of the Harvard Law School observed that "disintegration is the defining experience of the culture of modernism", and it is precisely that sort of experience and perception which can make a return to old Christian precepts seem attractive to the alienated person. Arguments about authoritarianism, anti — intellectualism, and intolerance will have little appeal to such a person, in the absence of any alternative solutions.

In the recent unreported judgment *Radio Rhema Ltd v Broadcasting Tribunal*, Greig J described New Zealand as being a "predominantly Christian" society. If this were so, one could expect the democratic processes within New Zealand to presently produce "Christian" laws. And indeed many people of liberal persuasion within the mainstream churches would be happy to describe the Crimes Amendment Act 1986, liberalising homosexual practices, as being good "Christian" legislation.

Of course conservative Christians strongly reject such liberalism as being unbiblical, and therefore "unchristian". They say that true Christian views can only be discovered within the words of the divinely inspired Bible. Thus on the issue of homosexual law reform they would cite passages such as Leviticus 20 v 13, which condemns the practice of a man lying with a man. However there is an inevitable selectivity in citation; and herein lies the great, internal inconsistency of their argument. For instance only the most extreme of the conservative Christians would advocate the death penalty for homosexual practices, which is the penalty clearly prescribed in the same Leviticus 20 v 13. And in the homosexual law reform debate conservative Christians did not address themselves to the immediately preceding verses in Leviticus 20 (vv 9 and 10) which equally clearly prescribe the death penalty for both adulterers and for children who curse their parents. One can take many examples. For instance few conservative Christians presumably accept such biblical prohibitions as those found in Deuteronomy 14 v 10 against the eating of shell fish.

The point is that the letter of biblical law, particularly Mosaic law, appears patently inappropriate as a normative code for modern society. The spirit of the Bible, however, could arguably retain some value. And contrary to emphasis of many conservative Christians, the spirit of the Bible is not to be found in its proscriptions on sexual practices, but in its teachings on responsibility, justice, and selflessness. Thus if the feeling of social disintegration were to become widespread, and if an increasing number of New Zealanders were to feel that the law had lost its moral authority, then there may be Christian solutions other than those emanating from the Religious Right. Certainly it would be unwise, though, for lawyers and lawmakers to assume that the concerns raised by the Religious Right are not worthy of debate. □

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The Hawkes Bay Hospital Board decision contains a sensitive evaluation of the body of evidence from alarmed neighbours, based largely on fear of the unknown or of media-based stereotypes. The question of the weight to be given to such fears is always a difficult one, which occurs also in the case of uses such as bulk storage of LPG. For example, in *Allens Service Station Ltd v Glen Eden Borough Council* 10 NZTPA 400 at 414, Chilwell J commented on the reality of community fear based on proximity to other uses seen as threatening, such as penal institutions. The converse of this is the *Hawkes Bay Hospital Board* case, at p 410, where the Tribunal, commenting on the attitude of some objectors, said:

> It is putting persons who have suffered from [psychiatric] illness in a type of "noxious" category similar to some industries which because of noxiousness are required by many district schemes to be separated from the neighbours.

Lawyers should find this a useful compendium when preparing an appeal relating to the proposed establishment of any home or institution having social aspects likely to arouse opposition from neighbours. □

Child maintenance:

Custodial parent defying access orders — the *Shrimski* problem again

By P R H Webb, Emeritus Professor of Law, University of Auckland

The Shrimski *case has been referred to earlier in the* New Zealand Law Journal, *see [1987] NZLJ 90 and [1987] NZLJ 148. The point at issue is whether the Court had a discretion to make a maintenance order in terms of s 76(1) of the Family Proceedings Act 1980. The problem is acute when the parent paying maintenance is in effect deprived of any practical right of access. The issue is a difficult one as the cases illustrate.*

Klasema v Klasema, Family Court, Hastings; No FP 020/187/83.
Ray v Ray, Family Court, Hastings; No FP 020/198/75.
Judgment, in both cases, 22 January 1987. His Honour Judge B D Inglis, QC (34 page judgment).

In each of these cases, which were heard together, the applicant fathers applied under s 99 of the Family Proceedings Act 1980 for variation, suspension or discharge of child maintenance orders and remission of arrears. In each case the marriages had been dissolved. (In the *Klasema* case the evidence indicated that the mother was in business on her own account, and well able to support herself and the child. In the *Ray* case, the mother had remarried. Having regard to the terms of s 64 of the Act, there was plainly no ground upon which the orders for spousal maintenance could survive. They were discharged under s 99, and all arrears were remitted.)

In each case the applicants objected strenuously to making any payment for child maintenance amounting to a subsidy of the mother's household expenses. Their respective counsel argued that the Court's powers in terms of s 99 were discretionary and that, in the circumstances, the discretion should be exercised so as to ensure that neither mother received any benefit from the existing orders. In each case the mother was custodial parent, and in each case the Court had reserved to the father reasonable access to the children. In each case the mother had deliberately and in breach of the access order excluded the father from the children's lives, so usurping de facto sole guardianship of the children. In neither case was there any evidence that either father had expressly or by implication delegated sole guardianship to the custodial parent, nor was there any evidence to suggest that denial of access by the custodial parent could have been justified by anything related to the children's welfare. There was no evidence to suggest that either father could be held to have abandoned or deserted the children or to suggest that any of the children might suffer if child maintenance were withheld from the custodial parents. The father in the *Ray* case had demonstrated, in terms of s 72 of the 1980 Act, that he did not have the present ability to contribute towards child maintenance in any event. This was not the position in the *Klasema* case, however. The Court considered it unrealistic to believe that the attitude of either custodial parent towards recognising the non-custodial parent's rights was likely to undergo a significant change, whatever was done about maintenance.

The Court summarised counsels' argument in detail thus:

(a) In each case the custodial parent had deliberately excluded the non-custodial parent from his legal guardianship rights.
(b) In each case the custodial parent had done so in defiance of access orders of a competent Court and in contempt of that Court.
(c) In each case the denial of access by the custodial parent was a criminal offence according to New Zealand law: see Guardianship Act 1968, s 20A.
(d) In exercising its powers under s 99 of the 1980 Act, the Court had an unfettered discretion to grant the relief sought by each applicant.

(e) Because an order for child maintenance might be claimed and enforced only by the custodial parent, the question here was whether either custodial parent could properly retain the benefit of the child maintenance order.
(f) In the exercise of its discretion the Court ought not to uphold the rights of either custodial parent in terms of the respective child maintenance orders while such parent deliberately denied to the non-custodial parent, and without lawful justification, that parent's fundamental guardianship rights.
(g) By usurping sole guardianship, each custodial parent had assumed control of all matters relating to each child's upbringing, and sole regulation, to the exclusion of the non-custodial parent, of each child's standard of living, the amount to be expended on each child, and each child's expectations in life.
(h) The question in each case was whether either applicant could be required to continue to subsidise, by a direct payment to the custodial parent, a mode of upbringing in which he had been deprived of any voice.
(i) It was contrary to public policy, in the circumstances of these cases, for either custodial parent to gain or retain any advantage.
(j) In any event the Court will not lend its assistance to a party who is in contempt of an order of a competent Court.

His Honour observed that:

> It will be noticed at once that counsels' submissions go beyond the issues raised by the decision of His Honour Judge McAloon in *Green v Green* (1986) 2 FRNZ 11 and by that of Sinclair J in *Shrimski v Shrimski* (1985) 3 NZFLR 707. The judgment in *Green* was written before *Shrimski* had been reported. In each case it was held that maintenance and guardianship rights are separate and independent issues, and that to deny maintenance because access is denied is to punish the child for the default of the custodial parent. Both were considered judgments, but there is no indication in them that either learned Judge was invited to consider submissions of the kind that I am now required to rule upon.

In deference to the arguments presented by counsel, the Court felt it appropriate to re-examine the whole topic afresh.

Judge Inglis proceeded to give an extensive and illuminating judgment on the following lines:

Approach to the Modern Statutes
He first adverted to the approach to modern family law statutes, referring to *Slater v Slater* [1983] NZLR 166 (CA), at p 173, per Richardson J, and to *Bunce v Bunce* [1980] 2 NZLR 247 (CA), at pp 255-256, also per Richardson J. In Judge Inglis's view, if the new approach was adopted,

> it is seen that both the Guardianship Act 1968 and the Family Proceedings Act 1980 lay down clear statutory parameters relating to the relationship of parent and child and to the obligations and rights attached to that relationship. And in considering such matters regard must be paid to the general context in which those rights and obligations are required to be examined. The provisions of Part II of the Family Proceedings Act (applicable to proceedings under the Guardianship Act) [They deal with counselling and conciliation.] plainly require the Family Court, counsel, and solicitors both to induce and to produce wherever possible a result which the parties themselves will see as just and acceptable. Of course that is not to say that the Court may freely ignore statutory guidelines, but it is a context which must necessarily influence the interpretation of those guidelines. Part II of the Act in itself could hardly be a more radical break with the past.

Guardianship
His Honour then turned to a consideration not only of ss 6, 3, 2(1), 10(2) and 20A of the Guardianship Act 1968 but also of *Seabrook v Seabrook* [1971] NZLR 947 ("an important decision frequently overlooked") and said:

> It would be hard to find any more clear expression of policy. It can be expressed in two ways. It expresses as a matter of public policy the continuing right of a parent to participate in the guardianship of his or her children, regardless of separation or dissolution of the marriage, and regardless of which parent has custody. Alternatively it expresses as a matter of public policy the right of the child to the continuing influence and company and control of both his or her parents. It is a right which cannot be taken away by the Court except for the "grave reasons" stated in s 10 [of the 1968 Act]. Much less can it be taken away by the unilateral action of one parent.

His Honour continued thus:

> This is not merely theory, or a statement of the ideal. Consider the practical impact in the present cases. In each of the present cases the custodial parent has elected to regulate, to the exclusion of the non-custodial parent, the whole of the child's upbringing: the child's standard of living, the child's education, the amount to be expended on the child, the child's expectations in life. Each custodial parent has usurped for herself control over the moulding of the child's future. On none of these matters has the non-custodial parent been left with any control or means of control. The non-custodial parent has no means of regulating or controlling expenditure on the child or of knowing what is reasonably needed. All those are matters on which the law requires the parents to make joint decisions: if they cannot agree, there are ways of resolving the conflict: see Guardianship Act, ss 13, 14.

Child Maintenance
His Honour then went on to deal with child maintenance, stating that, just as the 1968 Act fairly and squarely imposed joint guardianship powers and obligations on a child's parents, so did s 72 of the 1980 Act impose on them a joint obligation

to maintain the child, subs (1) providing expressly and simply that "Each parent of a child is liable to maintain the child", though with some qualifications not here relevant. Having noted the definition of "maintenance" in s 2 of the 1980 Act, he said there was thus a statutory obligation on the part of each parent to provide for the child as specified. (He observed in passing that Mrs Ray's second husband was a "parent" for the purposes of s 72 by virtue of s 60(c)(ii).) Having referred also to ss 74 and 76 of the Act, he stated:

> An important point needs to be stressed at this stage. The child himself is not entitled to apply for maintenance. He is not entitled to receive for himself any amount ordered to be paid. Nor is he entitled to enforce any order that is made in respect of him or to apply for its variation. In terms of the Act child maintenance proceedings are between parent and parent. The child is not a party.

In the view of the learned Judge it had appeared, from some of the discussion on child maintenance, that it was a common assumption that a child maintenance order would automatically benefit the child and that the purpose of child maintenance proceedings was to benefit the child. Such a view was misleading and not necessarily true. The reality was that a child maintenance order required the payer to pay to the custodial parent a contribution towards the cost of running the household of which the child was a member. There might or might not be a direct benefit to the child. There was nothing to prevent the payee from using the money for the private purposes of any member of the household. The use of the money provided by a child maintenance order depended entirely on the priorities of the parent in whose favour it had been made. Obviously in some cases a child maintenance order would turn a marginal solo parent household into a viable one and naturally the child would benefit from that. But in other cases it could be no more than an assumption that a child maintenance order would benefit the child markedly or at all. And it could be no more than speculation to assume that if a maintenance order was not made it would be the child who would suffer.

This point was of importance in both the present cases, for there was no evidence in either case to support the view that the standard of living of any of the children concerned would be reduced below acceptable levels if the present orders were not enforced. There was no evidence that maintenance was required by either custodial parent to ensure that the children were provided with an adequate standard of living. In the absence of any evidence on the point, the Court was simply not prepared to speculate on the impact that the result of the present proceedings was likely to have on the children concerned. The most that could be said was that continued child maintenance payments by the non-custodial parents could be of assistance to the custodial parents in running their respective households.

Judge Inglis, QC, went on:

> In terms of s 72(1) the parental obligation is to the child. If that obligation is converted into solely a money obligation by means of a child maintenance order, it becomes an obligation to the custodial parent, enforceable by that parent and payable to that parent. To recognise an obligation to "maintain" a child is one thing: to convert it into an obligation to the custodial parent is fundamentally different. A child's right to maintenance is not the same as a custodial parent's right to claim a money contribution towards the child's maintenance, especially in a case where the level of support required for the child is regulated by the custodial parent's exclusive guardianship decisions.
>
> At this point, therefore, s 72(1) may be seen in its proper context as placing child maintenance as an obligation of guardianship. And that conveniently brings me to s 72(2), which is obviously enough based on the premise that parents' guardianship decisions will be joint, so that the level of support required by the child will be based on joint decisions as to upbringing, training, education, and so on.

Having adverted to the terms of s 72(2) and (3), the Court observed that it was necessary to note that denial of access by the custodial parent or the assumption of de facto sole guardianship by the custodial parent were not among the specific factors set out in s 72(3) as being relevant to apportionment of liability between the parents. The "general scheme of s 72" was to be described thus:

> subsection (1) makes it clear that the obligation to "maintain" a child falls equally on each parent, though of course not necessarily equally. Subsection (2) tells us what level of "maintenance" is needed by reference to factors affecting the child; subs (3) tells us what level of contribution to the "maintenance" of the child can reasonably be required by reference to factors affecting each parent. But of course the level of contribution, assessed in terms of subs (3), cannot necessarily be regulated by the assessment of what is needed in terms of subs (2). It is a matter of the coat having to be cut according to the available cloth. It would be quite wrong to assess the quantum of the child's ideally reasonable needs and then simply to apportion the cost among those legally liable to contribute to the child's maintenance, for such an approach would ignore consideration of how much each liable parent could be made legally liable to contribute.

Some further refinement of the above basic pattern was seen to be necessary by the Court. It was said:

> In the first place the expressions "maintain" and "maintenance" must obviously be interpreted in terms of their statutory definition. That means that the obligation to maintain cannot be seen solely in terms of providing money. In many, if not most, child maintenance cases it may be convenient and appropriate to think of the child "maintenance" obligation in money terms; but of course, as already explained, that can lead to the fallacy of assuming that an order in money terms will automatically benefit the child. The statutory definition of "maintenance" requires us to focus on a much

> wider concept of provision for a child. The obligation imposed by subs (1) and quantifiable in terms of subss (2) and (3) is not necessarily a money obligation. Secondly, the opening words of subss (2) and (3) are deceptive and can mislead. Both subsections open with the words, "In determining the amount that is *payable* . . .", thus suggesting that the quantification in terms of both subsections is to be finally expressed in terms of money. That cannot be right, for the basic obligation is not expressed solely in terms of money. Nor is it possible to say that in maintenance proceedings the basic obligation must necessarily be translated into terms of "payable" money, for that would mean that an obligation to "maintain" a child, already being completely performed, could be translated into an obligation to pay money to the other parent merely by that other parent's election to commence child maintenance proceedings. So that, for instance, a trust scheme set up by one parent to benefit the child beyond the extent required by s 72 could be defeated by the other parent's insistence on a maintenance order — payable to and enforceable by only that other parent. (It should be noted that s 72(3)(d) is not sufficiently flexible to cope with such a situation or similar situations.)

His Honour thought it safer to interpret the word "payable" as meaning "to be provided", as being not only consonant with the definition of "maintenance" but as also providing the whole of s 72 with the character Parliament obviously intended that it should have — "a yardstick for child 'maintenance' of general application, by which the extent of parental obligations — whether met by the provision of property, by a settlement or trust for the child's benefit, by contract, by meeting the expenses of the child's education, or by periodic payments of money — are measurable". In many cases, as already stated, it would be appropriate and convenient to express the extent of the obligation in terms of money, but in other cases where "maintenance" was already being provided the provisions of s 72 would be used to determine whether there was any shortfall between what was being provided and what should be provided and it might be perfectly appropriate to express such a shortfall in money terms. The ways in which "maintenance" could be provided for a child were infinitely variable, and Parliament could not have intended that the way in which s 72 should be interpreted was to be limited by concepts and practices which might have been appropriate at the turn of the century but which had now been completely overtaken by modern social changes. Further, the Court stated, because s 72 provided a yardstick for the assessment of the parental obligation to "maintain" the child, the provisions of the 1980 Act which enable a parent to apply for a maintenance order and the Court to make one were to be seen as supplying no more than one particular method by which the obligation to provide "money, property, and services" for the child could be defined and enforced. There was nothing in the Act which compelled a custodial parent to elect to apply for a maintenance order, nor was there anything in the Act which obliged a custodial parent who wished to undertake sole financial responsibility for a child to seek a contribution from the other parent by way of a maintenance order. Maintenance proceedings under the Act would, in many cases, provide a convenient means of determining the appropriate level of child maintenance and its enforcement. But naturally it did not follow that maintenance proceedings or orders were the only way of achieving those objectives; and it certainly did not follow that a maintenance order would necessarily always be the most appropriate way of recognising a parent's liability in a particular instance. Once it was appreciated that a child maintenance order was no more than one method of securing a contribution by the non-custodial parent to the expenses of the custodial parent's household, it could not logically be argued that the custodial parent's election to apply for a maintenance order must necessarily result in a maintenance order being made once liability had been established in terms of s 72. That would be to say that the manner in which the contribution was to be provided was irrevocably fixed by the custodial parent's form of proceedings. Section 72, therefore, did no more than lay down the principle that each parent had an obligation to support their children, and guidelines for determining the extent of that obligation and how it was to be apportioned between the parents.

The Court warned:

> What s 72 does not do is to prescribe how the provision of "money, property, and services" by each parent is to be made. The obligation to maintain the child is not an obligation to provide money only: it is an obligation to provide "money, property, and services". Since a maintenance order can be expressed only in money terms it cannot possibly be argued that s 72 imposes on either parent an obligation to pay money only: even if the definition of "maintenance" did not exclude that view, it would still be excluded by s 72(3)(d), which requires the extent of the obligation to be assessed by reference to both tangible and intangible contributions by either parent to the care of the child in question. That being so it is clear that the purpose of s 72 is limited to stating the extent of a parent's obligation to maintain a child. It does not purport to give any directions as to how that obligation ought to be discharged. Nor does s 72 given any direction as to how that obligation is to be enforced. It does not require the obligation to provide "money, property, and services" to be expressed in terms of a financial obligation. It does not require that obligation to be evaluated in terms of money payments.

Judge Inglis, QC, continued thus:

> The purpose of a maintenance order, on the other hand, is to quantify the extent of the obligation in money terms. Other provisions of the Act provide for straightforward methods of enforcing the obligation as so quantified. So that one of the advantages to a custodial parent in obtaining a maintenance order

> is ease of enforcement. But, as already pointed out, a child maintenance order can operate only to the direct benefit of the custodial parent. So that, when a custodial parent applies for child maintenance, what that custodial parent is really doing is to express a preference, not for "money, property, and services" as provision for the child's support, but for a contribution expressed in money terms only, payable only to the custodial parent, and enforceable only by the custodial parent. It goes without saying, on this analysis, that child maintenance proceedings provide only one means of assessing the extent of the non-custodial parent's obligation under s 72, and only one means of enforcing it.

There was nothing novel, in the Court's opinion, in recognising the plain distinction between the existence of a legal obligation on the one hand and its enforcement on the other. In terms of the 1980 Act there was a further element, for child maintenance proceedings enabled the Court to translate an obligation with a number of intangible and variable features into an obligation to pay to the custodial parent a quantified money sum. Obviously the question must always be asked, in each case, whether such a translation was either necessary or appropriate in the circumstances. Similarly, there was nothing novel in recognising the existence of a legal obligation, but at the same time declining to allow it to be enforced in a particular way: *Caron v Caruana* [1975] 2 NZLR 372 was an example of the use of equitable principle in maintenance proceedings. The Court explained:

> The inevitable conclusion from the structure and objective of the relevant provisions of the Act is that child maintenance proceedings are brought for the benefit of the custodial parent and not necessarily for the direct benefit of the child, and invite the Court to compel the non-custodial parent to satisfy his or her general obligations towards the child in terms of s 72 by way of a money payment payable only to the custodial parent. That obligation, once it is put in place by a child maintenance order, is quite different from the general obligation imposed by s 72. It follows logically that the Family Court must necessarily have a discretion to consider whether or not a maintenance order is an appropriate way of expressing the general obligation imposed by s 72, and must necessarily have a discretion to consider whether the making of a maintenance order is a necessary or desirable way in the particular circumstances of achieving the objectives set out in s 72. In some cases the making of a maintenance order may be contrary to the interests of the child: see, for instance, *Jones v Jones* (1986) 4 NZFLR 106, [noted in [1986] NZ Recent Law 363] where the view was taken that in the circumstances it would be a disastrous course to require the non-custodial parent to contribute towards the custodial parent's household, and another way was found for the non-custodial parent to provide "maintenance". From that position it is a logical step to the view that, because a maintenance order converts an obligation to the child into an obligation to the custodial parent, the Court should consider whether in the exercise of its discretion equitable principles or principles of public policy should influence it in deciding whether the applicant should have the advantage of a maintenance order.

The Court held that the power to make a maintenance order conferred by s 76(1) must necessarily be discretionary:

> The section is expressed permissively: the Court "may" make any one or more of the types of order specified. Nothing in s 72 requires the Court, on a child maintenance application, to express any identified obligation to "maintain" only in terms of a maintenance order under s 76(1). Simply because a parent has applied for child maintenance, it does not follow that the Court must necessarily convert an obligation to the child into an obligation to the applicant. This is no doubt why Parliament deliberately chose to express s 76(1) permissively. The permissiveness of the provision is emphasised by other provisions in the Act where Parliament has clearly enough indicated statutory directions which are intended to be mandatory. For example, subs (9) of s 76 itself: "No order *shall* be made . . .". See also s 13(2) (mandatory requirement that a mediation conference be convened in certain circumstances); s 39(4) (". . . *shall* make an order dissolving the marriage."); s 45 (". . . *shall not* make an order dissolving the marriage . . .) . . .

The question remained: on what principles was the discretion to be exercised? No doubt a variety of factors would influence the exercise of the discretion, such as whether a maintenance order was needed because of the relative ease of enforcement, or whether it was needed at all, bearing in mind that "maintenance" could be provided for a child in a variety of different ways, and bearing in mind that it could not be assumed that the respective parents' obligations to support their child need always coincide in point of time. The learned Judge said:

> The central question in the present case, however, is whether the Court may properly refuse to make a maintenance order because the parent who seeks it is at the same time denying the other parent guardianship and access rights. In the present cases issues of equity and public policy arise. In the present cases the question is of course as to the exercise of the discretion under s 99, not under s 76(1). It is convenient to consider the issue initially in terms of s 76.

The real issue was seen by the Court as being whether either of the non-custodial parents should be required to contribute to the expenses of the custodial parents' households and whether the custodial parents might properly seek a money payment for that purpose while denying guardianship rights and access in contempt of the orders of competent Courts.

In the Court's eyes, if child maintenance was denied in cases such as the present, it might be

argued that the child was being punished for the misconduct of the custodial parent, contrary to s 72(2), which required the Court to "have regard to all relevant circumstances affecting the welfare of the child". That appeared to have been a major consideration in the *Green* and *Shrimski* cases. His Honour did not think it helpful to see the problem in terms of "punishment", for that suggested that a child's entitlement was being withheld which, but for the custodial parent's conduct, the child would otherwise have received. For the reasons already expressed, and apparently not argued in either of the cases referred to, the entitlement created by a child maintenance order was not the child's entitlement at all: it was (if anything) the custodial parent's entitlement. The Court preferred to approach the present issue without any preconception that the child would necessarily benefit from any amount paid to the custodial parent. In the present cases it was in any event not strictly accurate to see the present maintenance orders as representing the children's needs: they represented rather the custodial parents' needs, created at least in part by the custodial parents' decision to assume sole guardianship of the children and solely to regulate the children's upbringing. When the matter was looked at in that light it was seen that the withholding of child maintenance from the custodial parents was to do no more than to require them to live with the consequences of their own deliberate actions. The obligation to support the children remains recognised. What is not recognised is the right of the custodial parents in the circumstances to insist upon a contribution from the non-custodial parents towards the children's upkeep.

It seemed to the Court that s 72 had been regarded as not only creating a legal obligation to support a child, but also requiring that obligation to be enforced. The Court declined to read the section that way. The machinery for one method of enforcement was provided by s 76(1), but that was one method only, and could be activated only by a parent or person in place of a parent for that parent's benefit. There was nothing novel in acknowledging the existence of a legal obligation but at the same time declining to allow its enforcement for reasons related to the party who wished to adopt that particular remedy. The child's rights must be recognised. The right of the custodial parent to claim for himself a money payment based on the principles of s 72 need not be. Nothing in the section required the Court to assist a parent who for his or her own purposes refused to acknowledge the other parent's legal rights in contempt of Court and in breach of the criminal law.

There was no need to consider here whether a different view might be required had it been shown that the children actually needed support which the custodial parents were unable themselves to provide. This question did not arise on the present facts.

His Honour concluded this part of his judgment by saying:

> If I am right in concluding, as I do, that it would have been wrong and contrary to public policy to make maintenance orders at the suit of the custodial parents in the present cases, then it must inevitably follow for the same reasons that the discretion under s 99 must be exercised against allowing either of them to enforce the existing maintenance orders. However s 99 is of course expressed differently from s 76(1), and it is helpful to consider s 99 separately. The interpretation of s 76(1) does not necessarily govern that of s 99.

Variation Proceedings

The Court, having adverted to s 99(1) and (6) of the 1980 Act, held that plainly the principles in s 72 must be applied de novo to the circumstances as they existed when a s 99 review was undertaken, observing that a review in terms of subs (1) required it to have regard to those principles but left it with a residual discretion and that the discretion in terms of subs (6) was not fettered by any express provision. In regard to subs (1), there could be no room for suggestion (as there had been in regard to s 76(1)) that the Court had no power to refuse to make any of the specified types of order. Much of what had already been said applied equally to s 99(1) and (6). In the present cases, the non-custodial parents' obligation "to maintain" the respective children was translated into an obligation to pay money to the respective custodial parents, and the question now was whether they should continue to retain that advantage. Section 99(1) required the Court to recognise the obligations imposed by s 72 and their extent. That having been done, the next necessary step was to determine whether or not any order of the kind specified should be made. In determining that question the Court was entitled to consider whether the obligation to the children in terms of s 72 was appropriately recognised and enforceable by the existing maintenance orders which of course required money to be paid to the respective custodial parents. On principle, and for the reasons already stated, the learned Judge considered that there were grounds for discharging the maintenance orders altogether, leaving it to the custodial parents to apply afresh for maintenance orders in their favour when they were prepared to obey the existing access orders and to recognise the non-custodial parents' legal rights as co-guardians. There was a further reason justifying the same result. In each of the present cases the children's present and future needs were entirely the product of the custodial parents' sole decisions on which the non-custodial parents had never been consulted. There was indeed no evidence as to what the children's present and future needs were and therefore no way of assessing them in relation to the non-custodial parents' own position. Any attempt at assessment would be "entirely speculative". There was thus no way of knowing whether either maintenance order represented an appropriate measure of the obligations imposed by s 72, or of knowing whether it was appropriate in the circumstances to continue to express those obligations in the form of a maintenance order. In those circumstances, the Court considered it could not properly require either non-custodial parent to continue to subsidise by any direct payment to the custodial parent a mode or standard of upbringing about which the Court had no evidence and in which both non-custodial parents had been deliberately deprived of any voice or control. Nothing

further needed to be added to what had been said about its being contrary to public policy to assist a party who is in contempt of an order of a competent Court and possibly guilty of a criminal offence according to New Zealand law. Finally, the Court reiterated that its regret at being unable to follow the *Green* and *Shrimski* cases was "tempered by the fact that in the present cases the submissions of counsel had gone into important areas which the learned Judges in *Green* and *Shrimski* were apparently not given the opportunity to consider".

It is clear from His Honour's judgment that he had referred to Ludbrook's *Family Law Practice*, paras 8E.04 and 8J.09, to the *Family Law Service*, pp 5031-5032 and to an article by Mr W R Atkin, "Child Maintenance and Access" (1986) 1 Fam Law Bulletin 93, at pp 94-95. He considered it desirable "to say a word about what has not been decided. It does not follow that every parent who denies access will necessarily be deprived of maintenance. Each case must depend on its own facts, and the Court must remain alert to the possibility that some non-custodial parents show their first real interest in their children when it serves their purpose to use a denial of access as a reason for not wishing to pay maintenance to the custodial parent for the children's support. That is not the position in either of the present cases. Moreover, there may be cases where a custodial parent, though adamantly denying access to the non-custodial parent who genuinely wishes to contribute towards the child's upbringing, may be in a financial position where a contribution to the child's support is badly needed. In such a case, a denial of maintenance will reflect directly on the welfare of the child. It may be that imaginative measures, within the Court's discretion, may need to be developed to protect the child while not appearing to condone the custodial parent's improper and unlawful denial of access". The Court concluded its discussion of principle with this general observation:

> It is only too easy to become hypnotised with the traditional view of child maintenance: that the support necessary for the child can be provided only by a maintenance order in favour of the custodial parent against the non-custodial parent. In the majority of cases such an approach is perfectly satisfactory, and the parents co-operate in sharing the financial burden just as they co-operate in sharing the child's upbringing. But in other – perhaps exceptional – cases, a maintenance order may not be the only or the best means of protecting the child's interests, and in such cases it is as well to remind ourselves that nothing in s 72 requires an obligation to provide child maintenance to be recognised or enforced by means of a maintenance order. One of the difficulties, emphasised by the present cases, is that a maintenance order does not require money to be paid to the child or to be used only for the child's benefit: it is money payable to the custodial parent. The approach of the Court, particularly that of the Family Court, should reflect sensitivity to the human aspects of a child maintenance case.

Having applied the above reasoning, the Court held that the maintenance order relating to maintenance payable to Mrs Ray in respect of the children of the parties' former marriage should be suspended until further order of the Court and that all arrears be remitted.

As regards the child in the *Klasema* case, it appeared that fruitful contact had been made between her and her father, with the result that the father had now indicated to the Court that he was willing to contribute towards her future but in a manner which would ensure that no money came into the hands of Mrs Klasema. It was accordingly ordered that all arrears under the order should be remitted and that the order should be suspended subject to the following conditions:

(a) that Mr Klasema forthwith set up a fund for the sole benefit of this child;
(b) that he pay into such fund monthly payments of not less than $80 and
(c) that he report at six-monthly intervals in writing to the Registrar of the Hastings Family Court as to the state of that fund.

In neither case was any order for costs made.

Comment

In a recent English decision, *Foot v Foot* (1987) Fam Law 13, it appears that the Registrar had been asked by the former husband for a downward variation of the child maintenance that he had originally been ordered to pay, viz, £10 per week for each of five children. The Registrar reduced the £10 per week to £8 and remitted £1,500 of the arrears. The balance of £680 was ordered to be paid at the rate of £3 per week, so that the husband had to pay £43 per week in all. In arriving at these figures, the Registrar had evidently allowed a "discount" of £4 per week in order to reflect the husband's lack of access, which had denied him a real relationship with his children. The wife appealed on the basis that, under the relevant English legislation, the Registrar had been wrong in taking conduct into account in assessing child maintenance. She accordingly asked for the maintenance to be increased by the amount of the Registrar's reduction. The husband could afford to pay the extra £4, though the case was one where neither party had substantial finances. When all the husband's expenses were added up, however, he would have been left with very little leeway.

Hollis J held that the Registrar had been wrong in principle to allow the "discount", but concluded that £8 per week for each child was the correct order and dismissed the appeal. His approach thus seems to agree with that of Sinclair J in *Shrimski*.

On the matter of public policy, cf *Re Sigsworth* [1935] Ch 89; [1934] All ER Rep 113. □