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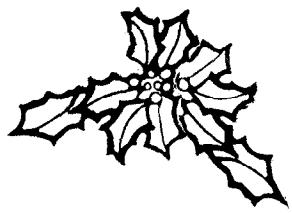


A bagful of books: Reading for the summer

In these days when the Waitangi Tribunal is coming to be seen by many as no more than a Maori grievances registration board based on the current interpretation by one party of what was originally a two-party document, it is important to look at the history of the understanding of the Treaty of Waitangi. This is done with authority, by Claudia Orange in her new book simply called *The Treaty of Waitangi* (OUP $49.95).

For lawyers, particularly in view of the present series of cases concerning the Treaty, it is of considerable interest to know more of the history of the document, and of legal attitudes to it. One view – certainly the prevailing legal view until very recently – is set out in the article by E J Haughey at [1984] NZLJ 392. This is a view that the Treaty as a treaty is not legally binding on the Courts. This probably still has some validity. The recent fisheries cases and the land claim case have all turned, in the first instance, on statutory provisions. As was said by Cooke P in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353 at p 374:

> I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

Despite popular misconceptions lawyers have not always unanimously been denigrators of the Treaty. The first Chief Justice, Sir William Martin, after his retirement wrote a pamphlet about the Treaty which is still worth reading today. His thesis is contained in an extract quoted by Claudia Orange on page 155. In 1860 Sir William Martin wrote

> Here in New Zealand our nation has engaged in an enterprise most difficult, yet also most noble and worthy of England. We have undertaken to acquire these islands for the Crown and for our race, without violence and without fraud, and so that the Native people, instead of being destroyed, should be protected and civilised. We have convenanted with these people, and assured to them the full privileges of subjects of the Crown. To this undertaking the faith of the nation is pledged. By these means we secured a peaceable entrance for the Queen's authority into the country, and have in consequence gradually gained a firm hold upon it. The compact is binding irrevocably. We cannot repudiate it so long as we retain the benefit which we obtained by it.

Somewhat surprisingly Claudia Orange does not set out Sir William Martin's decision in the case concerning the murderer Maketu in February 1842 although she devotes some 15 lines to the case when discussing the general question of the application of British law to the Maori. In that case, which was only the third criminal trial of the newly established Supreme Court, C B Brewer, assigned to defend Maketu, argued two preliminary points. These were that Maketu was not subject to the jurisdiction of the Court because he was unaware of British law; and that if he were tried then there should be a special jury comprising equal numbers of Europeans and Maoris.

The Chief Justice ruled that Maketu was a subject of the Crown and consequently the Court had jurisdiction. The argument for a special jury was rejected by the Judge on the ground that this procedure was only available to

an alien, which Maketu was not. This case illustrates how the Court, and presumably settler opinion understood Captain Hobson's words when the Treaty was signed "He iwi tahi tatou" – "We are now one people".

The Maori attitude was not perhaps so simple and straightforward. This can be illustrated by two stories recounted by Guy Lennard in his 1961 biography of Sir William Martin. Some two and a half years after Maketu had been hanged the Chief Justice met Maketu's father Ruhe on the road. Ruhe dismounted shook the Judge's hand and then passed on in silence. Ruhe incidentally had been one of the chiefs present at Waitangi in February 1840. The second and complicating story concerns a discussion Sir William Martin had about the same time at Taupo with the paramount chief Te Heuheu. The Chief expressed his views about justice in this way:

> Why do you keep a prisoner for days and days awaiting his trial? If anyone commits a crime here, I knock him on the head at once. Then too, you put people in prison for small things. Now, Judge, listen to me! If a man were to dare to take one of my wives or my greenstone axe, I should kill him of course, at once, but if he steals little things I take no notice.

Perhaps you have to be a very powerful chief, or as rich as a Queen Street merchant banker to take such a fair, large and liberal view of the laws!

The Treaty of Waitangi is not much concerned with the actual signing of the Treaty although this is described fully, but rather with the subsequent history of the understanding of the Treaty – or its neglect. The book deals with the principle of amalgamation during Weld's term of office in the 1860s and notes that the thread of idealism continued in that even "in the midst of war and outrage, amalgamation was still seen as possible". The final chapter is entitled "A Residue of Guilt". It deals with the history of the Treaty from 1890 up to the Court of Appeal decision in *The Maori Council* case in June 1987. *The Treaty of Waitangi* is partly a revisionist history, and in that it takes its place alongside James Belich's *The New Zealand Wars*. It is generally and sometimes openly more sympathetic to a Maori than settler viewpoint.

This book is an invitation to dissent and digress as one reads it, as well as to be impressed and grateful for the learning, the generally balanced judgment, the careful analysis of issues and the historical explanation of what the Treaty has meant in the past, so that we can better understand what it can mean today. And clearly, as before, the Treaty will not mean the same thing to different people with Maoris disagreeing among themselves and the Pakeha similarly. This is a wise book to be thought about, less from a standpoint of guilt or of the exploitation of such a feeling, but more in the hope of a greater understanding. Lawyers can learn much from the book that will be of value in understanding the legal problems that the Courts and the whole legal system are now caught up in; and that will no doubt continue to be troublesome for some time yet.

A more directly legal book, and a much lighter and slighter one is *The Oxford Book of Legal Anecdotes* (OUP $52.25). No one is going to read this through at a sitting. It is for dipping into, and as a reference work for those who have to give after-dinner speeches. The entries are arranged according to that arbitrary caprice that is dictated by the alphabet, starting with a piece by Edward Abinger (1887-1927) and concluding with Wilding Wright (1840-1910) but including such luminaries as John Evelyn (1620-1706), Serjeant George Hill (1716-1808), Samuel Leibowitz (1893-1978) and Lord Elwyn-Jones who visited New Zealand as Lord Chancellor in the 1970s. The extracts range from the dull through the interesting to the funny.

The story I liked best, and which if the financial difficulties of the Accident Compensation Corporation continue unabated, (or the jurisdiction of the Small Claims Tribunal is further extended) might yet have some relevance in New Zealand, concerned a question from a Boston jury in a personal injury case. They wanted to know if they could give the plaintiff some money even if there was no legal liability. Justice Donahue sent for the jury and said he assumed from the written question that they had found there was no liability. On the foreman confirming this the Judge had the jurors sign a paper to this effect. He then said "I will now answer your question. You may retire to the jury room and pass round the hat."

The question of levity in Court is a difficult and delicate question. Sir Gervais Rentoul is quoted as writing:

> Courts of law do not lend themselves to facetiousnes. For the most part the matters dealt with are too serious. And, not unnaturally there is nothing the parties to them resent more than that they should be treated with levity.

And Evelyn Waugh describes in a letter to Nancy Mitford the attitude of a jury to the witticisms of Mr Justice Stable, in a case that he was involved in.

> The jury were not at all amused by the Judge. All the £300-a-day barristers rocked with laughter at his sallies. They glowered. This was not what they paid a Judge for, they thought.

The Oxford Book of Legal Anecdotes is not the most humorous book ever written, but in addition to some very amusing pieces there are also a number that say a lot about the meaning of law and justice. It is good to be reminded that the law is human, being applied by men to other men.

Whether Judges in England will be more conscious of their Scottish brethren now that there is a Scot sitting on the Woolsack remains to be seen. It is appropriate however, that there is in course of publication a set of the Laws of Scotland in 25 volumes as a companion piece to *Halsbury's Laws of England*. The Scottish publication is being referred to disparagingly by some wits as McHalsbury.

One of the first cases on which Lord Mackay of Clashfern has sat as Lord Chancellor is *Ogwo v Taylor* heard on 22 October 1987. The Lord Chancellor's judgment is a short one of two sentences in which he concurs with the judgment of Lord Bridge. But he then adds:

> I am glad to note that my noble and learned friend's reasoning accords with the opinion of Lord Guthrie in *Flannigan v British Dyewood Co Ltd* [1969] SLT 223.

It is amusing to note that Lord Bridge in his lengthy

judgment refers to many cases, including one from California and one from New Jersey, but makes no reference to the decision of Lord Guthrie. No doubt the English Bar will take the hint to look for precedent north of the Tweed and will all be taking out subscriptions to McHalsbury.

The differences between English and Scottish law and practice is illustrated in the newly published autobiography of a Scottish Judge Lord Wheatley, under the title *One Man's Judgment* (Butterworths, $69.30). Lord Wheatley was a Labour politician and a member of Clement Attlee's Ministry. Although not in the Cabinet he had an interesting few years at Westminster after a stint in the army during the war. In 1947 he was Solicitor-General for Scotland and 1947-51 he was Lord Advocate. He became a Judge in 1954, became a life peer in 1970 and from 1972 until 1985 held the office of Lord Justice-Clerk. He has sat occasionally on the Judicial Committees of the House of Lords and of the Privy Council.

Lord Wheatley would appear to have had an interesting life, but not what could be called an exciting one. The same is true of his autobiography. There are no scandals of a personal, judicial, or political nature recounted. It is all low key. So is his literary style. John Wheatley comes through as a careful, conscientious, decent and honest man of principle. He recognises that as a Judge he was regarded by the Bar as somewhat strict and severe.

The book is short. The life is covered in 198 pages to which there is added another 25 pages of reflections on such topics as capital and corporal punishment, legal aid, law reform and sentencing policy. One passage that will be of some interest to New Zealand lawyers is his brief description of the judicial organisation in Scotland. It differs from that in England and is much closer to our own. This is presumably because we are both relatively small jurisdictions although Scotland's population is more than double ours. The system is explained by Lord Wheatley as follows:

> The work in the Scottish Courts is not compartmented as it is in other jurisdictions. The Judges have to deal with any kind of case which can be competently brought before the Court of Session in civil matters or before the High Court of Justiciary in criminal matters. The Court is divided into two tiers – the Inner House and the Outer House. The Outer House consists of courts of first instance and the Inner House consists of two Appeal Courts which hear appeals from the Outer House and lower Courts. The Appeal Courts are the First Division presided over by the Lord President of the Court of Session and the Second Division presided over by the Lord Justice-Clerk. . . . There are four Judges in each Division, three being a quorum. In recent years, owing to the growth and pressure of work, it has become common for only three Judges to sit in the Divisions, thus freeing two Judges for Outer House work or criminal trials throughout the country, and incidentally saving the Treasury the expense of two more Judges.

It is rather difficult to determine the audience at which the book is aimed. At times Lord Wheatley explains simple legal points in ways that a lawyer reading it will find pointless and condescending. But some parts are really not likely to be of interest to a general reader.

Lord Wheatley's father – like Margaret Thatcher's – was a grocer. He had been born in Ireland, but John Wheatley was born in Scotland. At the beginning of the book he refers to his uncle John, who was a Labour Party Cabinet Minister in the 1920s. He writes that:

> Just as I was born into a Catholic family, I was born into a Socialist family. I have always held the belief that the two ran in tandem and had a common philosophy in the attitude and duties one owed towards one's fellow man.

Lord Wheatley has taken a great interest in sport, rugby, soccer, tennis and golf. Inevitably he was a supporter of Celtic against Rangers. He has also had a considerable involvement in education. His son-in-law is Tam Dalyell the Labour MP who has been so persistent in questioning Mrs Thatcher over the decision to sink the *Belgrano* during the Falklands war, although Lord Wheatley does not refer to this in the book any more than he refers to Mrs Thatcher's father. At the end Lord Wheatley sums up his life from 1908 to 1986:

> I have been fortunate and I have been blessed. Of course, there have been disappointments in that some things have not turned out as I would have liked, but that is life, and both in my public and in my private life I have been compensated as well as any man could reasonably hope to be. *Deo gratias!*

For anyone wanting a more demanding intellectual book there is the new jurisprudential work of Professor Dworkin, *Law's Empire* (Harvard $US20.00).

Professor Dworkin holds chairs at Oxford University in England and at New York University in the United States. He is a prolific writer and often contributes to *The New York Review of Books*. His recent attack in that journal on Robert Bork was disappointingly unconvincing. Be that as it may, the point about Dworkin's involvement in such an issue is that it illustrates his belief in the inter-relationship, the inter-dependence, of law and politics.

The point of *Law's Empire* is the invention of a new category for legal thinking, that he calls law as integrity. He distinguishes this from what he terms legal conventionalism or legal pragmatism. To understand his meaning for these crucial terms it is necessary to quote him at length.

> Conventionalism requires Judges to study law reports and parliamentary records to discover what decisions have been made by institutions conventionally recognised to have legislative power. No doubt interpretive issues will arise in that process: for example, it may be necessary to interpret a text to decide what statutes our legal conventions construct from it. . . . Pragmatism requires Judges to think instrumentally about the best rules for the future. That exercise may require interpretation of something beyond legal material: a utilitarian pragmatist may need to worry about the best way to understand the idea of community welfare, for example. . . .

Law as integrity is different: it is both the product of

> and the inspiration for comprehensive interpretation of legal practice. The programme it holds out to Judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with – the initial part of – the more detailed interpretations it recommends.

Having invented this new category, and having criticised the other two categories in the first part of the book, Professor Dworkin proceeds to apply it and explain it in relation to the common law, to statutes, and to the Constitution. This integrity it should be understood is a form of the moral virtue of justice because Dworkin insists

> Integrity, . . . insists that each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity therefore fuses citizens' moral and political lives: it asks the good citizen, deciding how to treat his neighbour when their interests conflict, to interpret the common scheme of justice to which they are both committed just in virtue of citizenship.

Professor Dworkin concludes his work with the statement that:

> Law's empire is defined by attitude, not territory or power or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances. . . . Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.

Well, perhaps so, or perhaps no. It probably depends on what you think Professor Dworkin means.

In conclusion three books can be noted briefly. The late Peter Mahon's delightful and gracefully written book of letters to his son *Dear Sam* (Collins $14.25) is still available in the bookshops. *All Jangle and Riot* (Professional Books $49.50) a light but entertaining look at the English Bar over the years will be reviewed in the *Law Journal* shortly. Finally, there is David Pannick's *The Judges* (OUP) which is not yet available in New Zealand, but the reviews of which indicate that it is a valuable, and sometimes sharply pointed, look at the qualities of English Judges, including some of their personal foibles.

P J Downey

Christmas message

From the Attorney-General, Rt Hon Geoffrey Palmer

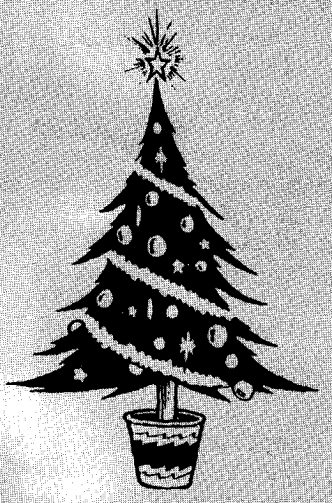
This is the fourth Christmas message that I have been privileged as Attorney-General to deliver to the legal profession.

The previous three have noted the progress of legislative reform. The pace is unlikely to ease in the coming years.

A highlight of the year was the New Zealand Law Conference in Christchurch. I expressed the view at it that the time has come for New Zealand to sever its links with the Judicial Committee of the Privy Council. Early in 1988 the Law Commission will publish a discussion paper setting out its proposals for a restructuring of the Courts.

Further legislative measures scheduled for 1988 include a thorough overhaul of the Crimes Act 1961, a new Matrimonial Property Act, and a Bill dealing with that subject of perennial controversy – the sale of liquor. There will also be a Legal Services Bill to deal with the increasingly difficult subject of access to legal services.

Merry Christmas to you all.



Case and Comment

"Extraordinary Circumstances"?

Hurst v Hurst [1987] BCL 607

Introduction

The Matrimonial Property Act 1976 was intended to recognise the equal contribution of both husband and wife to their marriage partnership. Whatever form a contribution to the marriage might take, whether it be child care or income earning, its tangible manifestation will be realised in the assets acquired during the marriage. The implementation of the Act's purpose therefore has meant an equal sharing of those assets acquired from the joint and several efforts of the parties during the marriage. Such is the policy of the Act with respect to all but domestic property.

With domestic property that policy is substantially more extensive. The matrimonial home is the cornerstone of any marriage, and together with its contents is regarded by most married couples as a shared asset. Unlike a bank account or share portfolio for example, the home is likely to be viewed by a married couple as "ours". Consequently the Act has accorded the family home and chattels a special status, both in terms of classification and the stringent grounds required to be met before equality can be departed from.

The family home and chattels are classified as matrimonial despite the origins of the property, and so a home owned by one spouse before marriage will become property to be divided equally under s 11. In contrast business assets owned by one spouse before marriage will normally retain their separate property characteristics. With respect to exceptions to the equality norm the Legislature set a more rigorous test for those seeking to avoid equal sharing of the home and chattels than for those who seek an unequal apportionment of balance matrimonial property. That rigorous test is contained in s 14 of the Act and allows the Court to exercise its discretion and depart from equal sharing of the home and chattels if there are

> extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses of any property to which s 11 of this Act applies. . . .

Those stringent words have been the subject of a substantial amount of litigation during the ten years the Act has been in force. The subsequent body of jurisprudence which has emerged from the Courts has shown a marked development in policy direction. While it initially grappled hesitantly with the equality principle, often substituting a subjective and value-laden judgment for a straightforward application of the Act's intent, (eg, see *Piper* (1978) I MPC 164; *Winter* (1977) I MPC 230; *Madden* (1978) I MPC 134) that trend has not continued. Propelled by the Court of Appeal in 1979 (see *Martin* [1979] 1 NZLR 97, *Williams* [1979] 1 NZLR 122 and *Dalton* [1979] 1 NZLR 113) and their own growing absorption of the new principles of partnership and equality the judiciary have charted a consistent pattern of principles in applying s 14. Apart from the truly abnormal circumstance of a large damages award having been injected into the domestic property, or the much less unusual situation of a claim against the life-savings of one spouse in a late and elderly marriage, the Courts have been reluctant to apply s 14. In general that section has not been invoked simply on the basis of a disparity in financial contributions to the matrimonial home: that was, until the decision of Williamson J in *Hurst v Hurst* [1987] BCL 607.

The facts of Hurst

The Hurst marriage was of some six years duration, preceded by a period of two years in which the couple lived in a de facto relationship. During the marriage a child was born, and her care was subsequently undertaken in part by the wife, and, because of the nature of his employment, in part by the husband.

At the time of the marriage Mrs Hurst already owned a flat, which she had purchased with a loan from her father's Trust. She was therefore able to provide the marriage with the first matrimonial home, while the husband made an initial capital input into the marriage of $1,500. Two years after the marriage the flat was sold, and the profit gained was applied to the acquisition of a new family home. Apart from the input of profit, the total purchase price was made up by a mortgage of $25,000 from Mrs Hurst's father's Trust, and a $20,000 mortgage from a Savings Bank. Over two years this latter mortgage was reduced to $15,000 and was subsequently discharged by a gift from Mrs Hurst's mother. Throughout this period of the marriage, the husband earned an income, the wife was in receipt of income from her father's Trust, and the couple together worked on interior improvements to the house.

Five years after the marriage the family home was sold, a section was purchased and a new house built. This matrimonial home was financed by a substantial profit from the former home, and a $25,000 mortgage from Mrs Hurst's father's Trust. A personal loan taken

out by the parties contributed to the furnishing of the home, and both the husband and wife worked on improving the property. Within a year the parties had separated. Mrs Hurst sought to invoke s 14 on the basis of her greater financial contribution to the marriage: not simply her provision of the first matrimonial home, but the subsequent profits which flowed from that home, the loans and gift from her family, and the contribution to the marriage of her income which was greater than the husband's. Could such events, in a marriage, described by the wife as comparatively short, combine to establish the extraordinary circumstances needed to satisfy the stringent test of s 14? Williamson J has no doubt that these were the sort of circumstances which would render equal sharing repugnant to justice.

The Judgment

In determining that s 14 was satisfied, Williamson J adopted the approach set out in *Fisher on Matrimonial Property* (2 ed) at 12.46. This approach, focusing on the contributions to the marriage itself stresses that intangibles must be properly evaluated and cannot easily be displaced by financial disparity. The *Fisher* approach additionally stresses the not unusual occurrence of financial inequality within a marriage, and states that even given an extraordinary disparity, "all other factors of the marriage 'fabric' must be considered" so that a s 14 order "is only justified if totality of merit assessed would make equality repugnant to public concepts of justice".

It was on the basis of these principles that Williamson J found extraordinary circumstances in the *Hurst* case. From a background in which the wife made personal financial contributions, her mother made a gift and her father's Trust provided a substantial loan, Williamson J concluded that the purchase of the matrimonial home was made in circumstances which were extraordinary. While not exceptional within the context of a longer marriage he said, such circumstances were sufficient to satisfy s 14 when considering a marriage of only six years. On finding that equal sharing would be repugnant to justice, the home, chattels and family car were apportioned on the basis of 65% to the wife and 35% to the husband. The order vested all three items of domestic property in the wife.

Comment

In the writer's view the decision in *Hurst* is out of line with the general direction of judicial opinion since 1979. Prior to that time the present decision may have found favour amongst one school of judicial thought which allowed financial disparity to satisfy s 14. For example in *Taylor* (1978) I MPC 206 extraordinary circumstances were found by O'Regan J stemming from the lavish gifts the wife received, and she was assessed as having left the marriage with "a good deal more by way of assets than she went into it". In *Winter* (1977) I MPC 230 the husband's overall greater financial contribution was determinative of extraordinary circumstances, and similarly in *Fraser* (1979) 2 MPC 59 the husband's provision of money for his wife's business plus his greater initial capital input satisfied the demands of s 14.

The finding of extraordinary circumstances on the basis of financial disparity was not an interpretation of s 14 which was unanimously adopted by the judiciary before 1979. At the outset, a second school of thought spearheaded by Quilliam J in *Castle* [1977] 2 NZLR 97 was intent on taking a policy line which was perceived to flow naturally from the strong language of the section. The extraordinary circumstances, said Quilliam J, must be such that "equal division is something the Court feels it simply cannot countenance" (p 102).

In *Martin Williams* and *Dalton* (supra) the Court of Appeal strongly endorsed the *Castle* approach and set down a rigorous test which flowed both from the strong words of the section and the basic equal sharing philosophy of the Act. All three cases showed that even a wide disparity in financial contributions would not amount to extraordinary circumstances. For example Mrs Dalton had provided and maintained the home, cared for the children, carried out household duties, and her family had educated the children and furthered the husband's career. Similarly in *Williams* (supra) the wife had provided and maintained the home from her own funds. However, both the Williams and Dalton marriages were of substantially longer duration than that in *Hurst* where Williamson J had conceded that "in the context of a longer marriage the provision of such contributions [financial] by one party would not be exceptional" (p 8). On this basis *Hurst* can be distinguished, yet alongside *Martin* its regression to an interpretation strongly disapproved by the Court of Appeal is highlighted.

In *Martin* the matrimonial home was entirely provided by the husband, as was the total family income. For her part the wife cared for the children of the marriage (two of whom were her own children from a previous marriage) and managed the household. All this occurred within a marriage of only three and a half years, yet the Court of Appeal refused to find the relatively short marriage a factor which would tip the scales in favour of s 14. By comparison the *Hurst* marriage was nearly twice as long, and although the wife provided the first matrimonial home, the husband had provided some capital, and both earned an income and carried out the domestic responsibilities.

Despite its refusal to invoke s 14 in *Martin* in the face of considerable financial disparity the Court of Appeal did not rule out the possibility that such disparity could constitute extraordinary circumstances. However, for s 14 to be satisfied in that way Woodhouse J agreed with the *Castle* line that

> only a gross disparity of a kind which simply cannot be ignored will suffice (*Castle* [1977] 2 NZLR 97.103).

In *Martin* he concluded that

> the disproportion would have to be gross indeed.

When the facts of *Martin* are considered as being illustrative of what is not sufficiently "gross" to satisfy s 14, then the degree of extraordinariness required in a given

case becomes more apparent. *Hurst* is simply not such a case. In attempting to deal with the obvious parallel supplied by *Martin*, Williamson J in *Hurst* preferred to skirt the issue. He dismissed a range of cases, including *Martin*, on the basis that

> Those cases would generally involve marriages of other than a short period (*Hurst* p 8).

Such a dismissal was unwarranted and incorrect.

The precedent value of *Martin* lies not simply in its illustrative worth, but also in the rigorous statement of principle enunciated with regard to the language of the section.

Woodhouse J stated that

> . . . the phrase extraordinary circumstances refers, I think, to circumstances that must not only be remarkable in degree but also be unusual in kind. It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare (*Martin* p 102).

The decision of Williamson J in *Hurst* indicates a failure to appreciate the philosophical basis of s 14 and the place of the home and chattels within the scheme of the Act; similarly it indicates a reluctance to apply the words of the statute. Williamson J was unable to show how the facts of *Hurst* met the test encapsulated in "vigorous and powerful language". He simply stated that it was so.

What was the true basis of his decision then? If the facts simply do not meet the criteria laid down in the statute, and the strict interpretative guidelines laid down by the Court of Appeal, does the judgment spring from some other source? In the writer's view the *Hurst* decision has all the hallmarks of a reversion to the subjective and value-laden judgments very much in evidence before *Martin*. The values are dominated by financial considerations, to the extent that Williamson J in effect was asking who contributed most to the actual property in dispute. The answer to that question was obvious; the problem is that it was the wrong question. And heaping further concern on the already apparent financial inequality was the taint of infidelity on the part of the husband. To share a home, provided essentially by the wife, with a husband who "associated with other women" and ultimately went "to live elsewhere", proved too much for the Court.

Yet s 14 ultimately involves the exercise of a discretion. Despite the strong language of the section and the guiding principles of the Act it is the opinion of the Court that is finally called for. In an area of law, so closely involved with matters which are of intimate concern to most people, the scope for imposition of personal values is great. *Hurst* is a case where the judicial values have been imposed. The judgment is characterised by those "abstract and individual notions of justice" which Woodhouse J decried in *Martin*. In order to maintain the degree of certainty for litigants that has evolved over the past eight years, the judiciary must ensure that its approach remains determinedly rigorous and objective. It must continue to adhere to that "settled statutory concept which must be taken from the Act itself" (per Woodhouse J in *Martin* p 99).

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The test for indecency — is evidence required?

The Comptroller of Customs v Gordon and Gotch (1987) 6 NZAR 469; *Collector of Customs v Hewitt,* [1987] BCL 1019.

Introduction

After considerable judicial disagreement over the correct interpretation of the word "indecent", as defined in s 2 Indecent Publications Act 1963, the issue was felt to be finally resolved by the majority judgments of the Court of Appeal in *Howley v Lawrence Publishing Company Ltd* (1986) 6 NZAR 193. In that case the majority of the Court of Appeal declared with some firmness that the ordinary dictionary meaning of "indecent" was unavailable as a test of indecency for any publications which dealt with the matters of sex, horror, crime, cruelty or violence. The majority held that publications of that nature could only be found "indecent" under the Act if they satisfied the definitional requirement of s 2. In other words it was held that material of that nature could only be found "indecent" if it dealt with the subject matter in a manner that was "injurious to the public good". This statutory concept, Woodhouse P said, required "demonstration that any relevant material has a capacity for some actual harm" (p 198).

Following that case the Indecent Publications Tribunal announced in a majority decision in *Re Fiesta magazine et al* (1986) 6 NZAR 213, 220 that the *Howley* case had created "major fetters . . . to the continued efficient operation of the Tribunal". The majority (Judge Kearney, Mr A J Graham and Ms K Hulme) argued that before the Tribunal could find there was some actual injury to the public good, some clear and explicit evidence to that effect would first have to be adduced. But the Chairman of the Tribunal, Judge Kearney then proceeded to observe that it was in fact "an almost impossible", "almost insurmountable" task to prove the injurious effect of indecent material upon the public good. And certainly in the case of the magazines before the Tribunal in this instance Judge Kearney was greatly influenced by the absence of any such evidence. In view of the dearth of concrete evidence Judge Kearney and the majority felt constrained by *Howley's* case from making the unqualified finding of indecency which they seemingly otherwise would have made. As a consequence of *Howley's* case the majority felt they could go no further than classifying the magazines as indecent in the hands of persons under 18 years old.

Judge Kearney also noted that any publication containing a representational view of women (as sexual playthings of men) which denigrated all women would have, but for the Court of Appeal's interpretation, been classified as unconditionally "indecent" by a

majority, if not all, of the Tribunal members. The minority, however, actually applied that "feminist" perspective to hold that the magazines in question were indeed unconditionally "indecent". For the minority (Mrs R Barrington and Mrs H B Dick) argued that "[i]njury may occur in the province of attitudes and perceptions".

The Comptroller of Customs appealed to the Full Court against the decision of the Tribunal, pursuant to s 19 of the Act. This was the *Gordon and Gotch* case.

Then, in a quite separate appeal from the Collector of Customs, Holland J was required to consider in the *Hewitt* case whether some videotapes, which a District Court Judge had refused to condemn as indecent under the Indecent Publications Act 1963, fell within the statutory definition of "indecent", as interpreted by the Court of Appeal in *Howley*. (It can be noted that until July 1 1987 videotapes were included within the definition of "documents" under the Indecent Publications Act.)

The reasoning of Holland J on the need for adduced evidence to establish "injury to the public good" in *Hewitt* was, at first glance, in striking contrast to the reasoning of the Full Court in *Gordon and Gotch*. But, as we shall see, the two judgments were in fact capable of some reconciliation.

The judgments

Gordon and Gotch

In the *Gordon and Gotch* case all three Judges were unanimous in allowing the appeal, and they adopted much the same reasoning in their judgments.

It was the judgment of Jeffries J which was the most comprehensive. Damning the Tribunal majority's view as "nonsensical", His Honour reasoned that the issue of "injury to the public good" was not an "adjudicative" fact which required proof by the introduction of concrete evidence. Rather, he said, it was a "legislative" fact, involving questions of policy and judgment. Thus an absence of concrete evidence on the issue did not "immobilise the Tribunal".

Jeffries J held that it was therefore mistaken for the Tribunal to apply the rules of evidence strictly, as if the hearing had been an adversarial one. In His Honour's view the Tribunal's function was to make decisions in the public interest, and the Tribunal could certainly rely on its own experience and knowledge in assessing what was "injurious to the public good".

All three Judges placed considerable emphasis on the expert knowledge possessed by members of the Tribunal. In particular Jeffries J and Greig J noted that at least two of the five members were required by s 3 of the statute to have special qualifications in the field of literature or education. Greig J thus summarised the views of all three Judges when he observed that the Tribunal's determination of whether a publication is injurious to the public good is ". . . a matter of opinion or judgment . . . based upon its understanding, experience and knowledge of the common or public good".

Rebutting Judge Kearney's contention that it had become an "almost impossible task" to show an injurious effect, Greig J noted that the very definition of "indecent" in s 2 ". . . accepts and anticipates that there will be books whose effect is injurious to the public good". His Honour acknowledged that various academic studies had failed to establish a causal link beteween the availability of pornography and an increase in violence or sexual crime, but he argued that it is nevertheless

> . . . generally accepted, to cite an extreme example, that explicit live or photographic displays of actual sexual intercourse is injurious to the public good; that it is harmful or detrimental to the common or national wellbeing.

Thus the Full Court was emphatic that the question of "indecency" was a question of opinion and judgment. Jeffries J conceded that in this case the minority of the Tribunal had in fact formed the opinion that the publications in question were "indecent", because of an alleged representational view of women which denigrated all women; but both Jeffries J and Quilliam J expressed reservations about that particular approach. Greig J stated that he agreed with those reservations.

Jeffries J expressed "the most serious doubts" about the meaning and validity of the feminist test adopted by the minority, and at one point His Honour described the test as a "logical fallacy". He stated that

> . . . to attempt to link pictorial or verbal representation of women to denigration of all women is to go too far. That concept is too illogical, too vague and imprecise to allow it as a controlling influence in classification under the Act.

Quilliam J expressed similar doubts as to how a representational view of women could be said to denigrate *all* women.

Moreover Jeffries J held that when the Tribunal exercised its functions of classification under the Act "[s]tern regard must be had to the balanced view of ordinary, everyday people in society". He then proceeded to argue that whilst ordinary men or women might find the magazines in question offensive, they would not read into those magazines the feminist viewpoint adopted by the minority. Denying that the feminist viewpoint came within the definition of legislative or judgmental facts, Jeffries J further held that procedural fairness required the minority to disclose their thinking to the parties.

On the minor issue of whether the so-called tripartite test adopted by the Tribunal was a valid test to adopt, the Full Court was content to state that the test did not seem wrong in principle. But in the light of their other findings the appeal was allowed by all Judges. The case was therefore remitted back to the Tribunal for a reconsideration of the whole matter.

Hewitt

Much of the judgment of Holland J in *Hewitt's* case dealt with the interpretation of the difficult and complex provision in s 299(1) of the Customs Act 1966, which creates an evidential presumption in favour of the Crown. But turning to the issue of how the Courts determine the indecency or otherwise of documents brought before them (such as the video recordings in the present case), Holland J was insistent that in most cases the

Courts would require some evidence before they would make a finding of indecency.

Thus whilst the clear personal view of both Holland J, and of Judge Willy in the Court below, had been that the videotapes were indecent and injurious to the public good, His Honour declared himself unable to make such a finding because of the absence of adduced evidence. Holland J openly discounted his personal view and doubted whether a Judge was qualified to determine the question of injury to the public good, in the absence of adequate evidence.

The appeal was therefore disallowed.

Comment

The two cases of *Gordon and Gotch* and *Hewitt* can in fact be reconciled with apparent ease. It can be argued that members of the Indecent Publications Tribunal are appointed to the body because of their specialist expertise, and can therefore be expected and allowed to rely upon their opinion and judgment. Conversely, it can be said that Judges do not possess that comparable expertise, and that they should therefore be expected to rely upon adduced evidence.

But such a reconciliation might not bear close analysis. After all, only two of the five-member Tribunal are required by statute to be appointed on account of "their special qualifications in education or literature", and the Chairman of the Tribunal is appointed because of his/her qualifications in the practice of law. (Both the present and immediate past Chairmen have been District Court Judges.) Even the two members who are appointed because of their particular expertise in education or literature cannot necessarily be expected to have a specialist knowledge on the question of which publications are injurious to the public good. That question can perhaps be answered with authority by pyschologists and sociologists, but not necessarily by a literary or educationalist appointee.

All Tribunal members may well be qualified to determine community standards (as indeed are Judges, as Holland J was to point out in *Hewitt's* case) but it is now clear beyond doubt that the "community standards" test did not survive *Howley's* case. Certainly there was some slight support within *Howley's* case to suggest that publications contrary to the public interest could be regarded as injurious to the public good (and this view received some reinforcement from dicta in the *Gordon and Gotch* case), but the clear emphasis in Woodhouse P's judgment in *Howley's* case was on the rejection on the ordinary dictionary meaning of "indecent". The nagging question thus still persists as to whether members of the Tribunal are in truth better equipped than Judges to determine whether a publication demonstrates a capacity for some "actual harm" or some "discernible injury".

Assuming, however, that the distinction between Tribunal expertise and judicial expertise in assessing injury to the public good is a valid one, and that it warrants a different approach to evidential requirements, the distinction does nevertheless accentuate the unfortunate statutory division of functions between the Tribunal and Courts. The Tribunal has been given jurisdiction over "sound recordings" and "books", as defined in s 2; the Court has been given jurisdiction over other "documents" (such as newspapers and pictorial calendars).

It must therefore surely be an anomalous situation if evidence needs to be led before a finding can be made that a weekly newspaper is injurious to the public good, whereas no evidence needs to be led before the same finding can be made against a monthly magazine. (It can be noted, though, that contrary to the actual outcome in *Hewitt's* case evidence will no longer be needed to establish that a video recording is injurious to the public good. The determination of indecency of videotapes is now carried out under the Video Recordings Act 1987 by a specialist body, the Video Recordings Authority.)

In the light of the *Hewitt* case one might feel that the judicial sentiments in *Gordon and Gotch* which branded the views of Judge Kearney and the majority in *Re Fiesta* as "nonsensical" were, with respect, a little ungenerous. Indeed, as Jeffries J and Greig J conceded, there were certainly some dicta within the *Howley* case to give some credence to the majority's view.

Moreover the judicial and academic authorities cited by Jeffries J to support his reasoning reveal that the evidential issue is not beyond controversy. For example, K C Davis, the American academic who provided the valuable analytical tool of distinguishing adjudicative and legislative facts, acknowledges in his writing that the distinction may often be easier to state than apply. Similarly although Jeffries J rightly cited the dicta of Dickson CJC in *Towne Cinema Theatres Ltd v The Queen* (1985) 18 DLR (4th) 1 at 18, describing any imposition of a positive requirement of expert evidence in obscenity determinations as "unrealistic", it can in fairness be noted that Wilson J and McIntyre J, dissenting on the point in the same case, regarded expert evidence as both desirable and essential. (In the United Kingdom the English Court of Appeal has also recently accepted the desirability of expert evidence in some obscenity cases; *R v Skirving* [1985] 2 All ER 705.) Thus if the majority of the Tribunal did err in *Re Fiesta*, it may be that their error could be better described as understandable rather than nonsensical.

Finally it is interesting to speculate whether the judicial views concerning the definitions and acceptability of the feminist perspective pornography will still hold in years to come. There is at present a not inconsiderable body of feminist legal jurisprudence beginning to emerge (much of it centering over the issue of pornography), and it may well be that the feminist view on pornography increasingly becomes the accepted view of ordinary, balanced, everyday people. If this were to eventuate then feminist thinking would have become a "judgmental fact". Tribunal members could then safely take it into account without notice or disclosure.

In conclusion, it would not be surprising if the Indecent Publications Tribunal welcomed the outcome, if not all of the reasoning, in the *Gordon and Gotch* case. Given the increasing public concern

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Recklessness in New Zealand

By Gerald Orchard, Professor of Law, University of Canterbury

This article deals with the issue of recklessness in the criminal law, more particularly as considered by the New Zealand Court of Appeal in R v Harney *[1987] BCL 1343. The case itself was noted in Case and Comment [1987]* NZLJ *338 by Simon France. The more extended consideration of the case in the present article looks at related cases on the concept of recklessness in England and Australia as well as New Zealand.*

In *R v Harney* [1987] BCL 1343, D had killed V by stabbing him in a street brawl. D was convicted of murder and appealed, complaining of misdirection in relation to s 167(b) of the Crimes Act 1961. This provides that culpable homicide is murder:

> if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not.

The Judge had clearly told the jury that the inquiry was as to D's actual state of mind, and that the Crown must satisfy them that D intended bodily injury which he knew was likely to cause death. But, although remarking that if this was established "then the recklessness element really follows", at one point the Judge also said:

> Recklessness is present when someone does an act which creates an obvious risk for the safety of another, *and when he does that act he either has not given any thought to the possibility of there being any risk*, or has recognised some risk involved and has nonetheless gone ahead with it. (emphasis added)

Two Views of Recklessness

This description of recklessness comes from Lord Diplock's speech in *R v Caldwell* [1982] AC 341, where the statutory definition of an offence of criminal damage required an intention to damage property, or recklessness as to whether property would be damaged. It was held that here recklessness had its ordinary meaning, which included failing to give any thought to whether a risk existed when the risk would be obvious if any thought was given to the matter, as well as a decision to take a risk which the actor recognised existed. In some contexts the Courts had previously given recklessness a similarly broad meaning, equating it with gross negligence (eg *Andrews v DPP* [1973] AC 576; cp *R v Parker* [1977] 2 All ER 37), but the weight of modern authority suggested that in such a statutory offence it should be confined to cases where D, when he acted, actually appreciated the existence of a relevant (and unjustified) risk (eg *R v Stephenson* [1979] QB 695; *R v Briggs* [1977] 1 All ER 475; cp *R v Cunningham* [1957] 2 QB 396). In rejecting this narrower meaning in *Caldwell* Lord Diplock doubted whether it was practicable to require proof of such foresight, and thought that it did not add significantly to the blameworthiness of a person who gave no thought to an obvious risk.

These views, and the scope of Lord Diplock's conception of recklessness, remain controversial, although in England the extended meaning now seems to be regarded as being of general application in the criminal law (eg *R v Seymour* [1983] 2 AC 493; cp *Kong Cheuk Kwan v R* (1985) 82 Cr App R 18).

Recklessness in s 167(b)

At first sight, *Caldwell* can hardly apply to s 167(b) because of the provision that the likelihood of causing death must be "known to the offender", which seems to be an express requirement that in inflicting the fatal injury D actually adverted to the likelihood that V would be killed. Sometimes, however, a

distinction can be drawn between "knowing" something and thinking about it: D might be said to "know" that a result is a likely consequence of conduct even if he does not actually have it in mind, provided he would be aware of it if he paused to consider the possible consequences (a test which will commonly be met in relation to obvious risks, provided D is not labouring under a material mistake as to the circumstances). But it is disputable whether this gives "known" its ordinary (or plain, or "obvious") meaning, at least when the offence is committed by an act of brief duration rather than a state of affairs which may continue through changes in D's state of mind; and it is a conception of knowledge which might sometimes be difficult to apply, especially if there is evidence that D suffered from mental deficiency, or was intoxicated.

In any event, such an interpretation of s 167(b) was rejected by the Court of Appeal in *R v Dixon* [1979] 1 NZLR 641, 647, where it was held that what is required is "a particular kind of deliberate risk-taking" – proof that the offender actually or consciously appreciated the likelihood of causing death

> rather than a degree of knowledge on his part in some lesser or vaguer sense, as for example, possession of the necessary general knowledge to have appreciated the risk if he had paused to think about it.

It was thought that the reference to recklessness may have been added to emphasise that actual foresight was needed.

In *Harney* the Court of Appeal reaffirms that this is the proper interpretation of s 167(b), and finds that this is supported by the deletion in 1961 of the words "or ought to have known" from s 167(d), and by a series of decisions which recognise that whereas s 167(a) is aimed at "deliberate killing", s 167(b) and s 167(d) are aimed at "deliberately taking the risk of killing" (citing in addition to *Dixon, R v McKeown* [1984] 1 NZLR 630; *R v Hamilton* [1985] 2 NZLR 245; and *R v Piri* [1987] 1 NZLR 66, where, at 79-82, the Court quotes an extensive passage from the Report of the English Royal Commission on Indictable Offences, 1879, which is thought to support the conclusion that this is what the Commission meant by "reckless" in its draft sections which form the basis of ss 167 and 168). It may be added that this interpretation of s 167(b) receives important support from the reasoning of the High Court of Australia in *Boughey v R* (1986) 65 ALR 609. In that case, "ought to have known" in the Tasmanian definition of murder was narrowly construed to require consideration of what D, with his particular knowledge and capacity, should have known, it being held that even under this apparently objective formula it must be established that, if the particular accused had given the thought to the matter which he ought to have, he would have foreseen that death was a likely consequence.

In *Harney* the Court therefore concluded that the Judge's inclusion of the *Caldwell* formula was in error, but the conviction was nevertheless affirmed because read as a whole the Judge's directions clearly brought home the need for actual foresight by D, and the fact that recklessness was not an important issue. This last point was in accordance with a number of statements of the Court of Appeal in earlier cases which recognise that as a general rule the reference to recklessness will add nothing to what is required by the preceding words in s 167(b). In *Harney* counsel was unable to identify any plausible way in which D could have been found to have known that the stabbing was likely to kill but was not not reckless. This will be the position in the vast majority of cases, and indeed the reports do not seem to reveal any instance where the requirement of recklessness has been important. Perhaps it would be vital in the unlikely event of D's being prosecuted for murder after he acted in circumstances of necessity which led him to intentionally cause injury knowing it to be likely to cause death (as when a stranded mountaineer amputates a colleague's gangrenous foot, in the knowledge that it could well kill but in the hope that it will allow the chance of survival). A more interesting possibility may arise in relation to excessive force in self-defence. If the jury find that D may have acted in self-defence, but used more force than was reasonable, it may be argued that if D nevertheless believed that what he did was reasonably proportionate to the danger he was not "reckless" in the ordinary sense of the word, or wholly unjustified in his conduct, even though he intentionally caused an injury he knew could well cause death, so that the crime was manslaughter only.

This, however, would introduce yet more complexity to this part of the law (and it would be a form of manslaughter available only if the jury found D's liability turned on s 167(b) rather than s 167(a); and it would have the effect of introducing into New Zealand law a limited form of manslaughter as the result of excessive force in self-defence after the High Court of Australia has experimented with, but has ultimately abandoned, such a doctrine : *Zecevic v DPP* (1987) 71 ALR 641. Hitherto the principle has not been accepted in this country : see [1978] NZLJ 478, 480.

Recklessness generally

The actual decision in *Harney* is concerned with a relatively narrow, and perhaps easy, question about the present law of murder. But the judgment of the Court of Appeal has wider significance. The Court noted that the meaning of "recklessly" may be affected by the statutory context, citing *R v Howe* [1982] 1 NZLR 618 where in relation to an offence of riotously damaging a particular class of property it was held that a presumed requirement of recklessness as to the nature of the property should be construed in the *Caldwell* sense. It seems that this decision is to be explained by reference to the nature of the particular offence (cp K E Dawkins, (1983) 10 NZULR 364, 371-375; in *Harney* Cooke P notes that the offence has been replaced by s 4 of the Crimes Amendment Act 1987, which avoids the problem in *Howe* by making irrelevant the type of property damaged).

The Court added, however, that subject to the requirements of particular contexts it inclined to the view that in New Zealand "recklessly" has usually been understood to require foresight of

the relevant consequence, plus an intention to act regardless of the risk. It noted that this was the meaning adopted by Chilwell J in *R v Stephens*, unreported, HC Auckland, 8 December 1983, T 91/83 (noted (1985) 9 Crim LJ 53), where it was held that under s 198(2) of the Crimes Act the requirement that D act "with reckless disregard for the safety of others" meant that it must be established that when he acted D was aware of the "likelihood or possibility" that someone's safety might be imperilled. The Judge said that he believed that this view "has been traditionally applied in New Zealand". Given the way that serious crimes of violence are defined in the Crimes Act this is potentially a very significant decision, and the Court of Appeal's comment is that : "This Court does not doubt the correctness of that ruling."

This seems to be a fairly clear indication that the pre-*Caldwell* understanding of recklessness is to be applied in New Zealand as a general, but not universal, rule. It remains to be seen how readily the statutory context will be held to justify an exception. In *D'Almeida v Auckland City Council* (1984) 1 CRNZ 281 Casey J (who was a party to the judgment in *Harney*, as was Chilwell J) held that on a charge of driving recklessly it must be established that D actually realised that there was a risk of injury to others or damage to property, even though the Judge thought this a somewhat unreal test which did not catch some drivers who gave no thought to the possible consequences of their actions, and who drove in a way the average person would plainly regard as reckless. Casey J, however, rejected the broader test applied to reckless driving in England (the *Caldwell* approach having been applied in the associated case of *R v Lawrence* [1982] AC 510) because in New Zealand (unlike England) there remains a separate offence of dangerous driving to which an objective test of fault applies, and because in *R v Storey* [1931] NZLR 417, 470 recklessness was contrasted with negligence and was held to require that D be "knowingly disregardful of his duty". His Honour thought that this had "set the New Zealand approach to 'recklessness' in criminal cases". On the other hand, in *Meikle v Police* (1985) 1 CRNZ 510 Heron J was persuaded that a Judge had not applied a wrong approach to recklessness under ss 13 and 24(b)(ii) of the Summary Offences Act 1981 when he said it was

> an attitude of mind which is negative. . . . A lacking in thought and consideration and not applying one's mind to the duty that is required in the circumstances and being careless in relation to it.

In that case the risks in question were no doubt "obvious", but even when that element is added it seems clear that formulae of this kind do not properly or adequately describe recklessness, unless there is something in the statutory context which suggests otherwise.

Related cases

One final point should be mentioned. Section 167(b) and s 167(d) require that D knows that death is a "likely" consequence, and s 66(2) requires that an offence be known to be a "probable" consequence.

In this context "likely" and "probable" are synonyms, and the murder provisions make it clear that in New Zealand deliberately taking the risk of killing may in some cases suffice for the mens rea of murder (as it may at common law in Australia: *R v Crabbe* (1985) 58 ALR 417; which is in contrast with the heretical view of the House of Lords that an actual "intention" to kill or cause grievous bodily harm is essential: *R v Moloney* [1985] AC 905).

This requirement will not be met if D knows there is a risk but truly regards it as "no more than negligible or remote", or "only possible", but it has been made absolutely clear that there is no requirement that D assessed the risk of the consequence as more likely than not, or, indeed, made any assessment in terms of mathematical probability. There is no single formula which is necessarily preferable or adequate, but it suffices if D knew that the occurrence of the relevant consequence was a "real" or "substantial" risk, or "something that might well happen" : *R v Piri* [1987] 1 NZLR 66; *Boughey v R* (1986) 65 ALR 609. The unqualified use of "possible" is likely to put the test too low (cf *R v Crabbe* (1985) 58 ALR 417), and even a qualified use of "chance" may be debatable (*Boughey v R*, supra). These cases concern the degree of risk which must be shown to have been deliberately taken in particular contexts, rather than the concept of recklessness generally. When there is no statutory formula it is conceivable that D may be reckless whenever the consequence is foreseen and constitutes an unjustifiable risk in all the circumstances, or it may be that there is always a requirement that the risk be regarded as more than "remote", "negligible", or a mere "possibility" (cf *Elphick v R* (1986) 71 ALR 120). □

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over pornography it was clearly imperative that the Tribunal should not, by its interpretation of the *Howley* case, have been prevented from performing its important functions.

However the judgment of Holland J in *Hewitt* is a useful reminder that the "injury" test remains a far from satisfactory test for the determination of indecency. The test of "community standards" does increasingly seem a more attractive, honest, and workable alternative. Obviously, though, legislative reform would now be needed if the Tribunal and Courts were to employ overtly the test of community standards or the test of community tolerance; but the difficulties of these two cases may well hasten such a reform.

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User pays

By D F Dugdale of Auckland

The present Minister of Justice commands universal respect. It is true that he has an unfortunate habit of appointing to judicial and other offices women lawyers, but all great men have these foibles. Did not Caligula make his horse a consul, and Sir Joh Bjelke-Petersen a senator of Flo?

Recently however the Minister has come under attack for increases in Land Registry and Companies Office fees so massive as to produce for the Justice Department a considerable profit. This it is claimed is really taxing by regulation, an unbecoming activity for one whose pose has always been that of a vestal virgin at the altar of constitutional purity. The Minister's response has been distinctly lame. On the charge of profiteering from Land Registry office fees he says it was an accident, and in relation to Companies Office fees he advances an extremely shaky defence of colour of right.

Although the Minister has plainly been naughty in this matter we should not condemn him. It is necessary to keep in mind the extent of his fiefdom and the clamour of its demands for expenditure. Condoms for convicts, gowns for District Court Judges (and, for all I know, *vice versa*). It is no wonder that the Minister has to resort to dubious expedients in order to balance his books. Our response as his loyal admirers should be to try to assist the situation by advancing constructive proposals for money-raising. It is a time for lateral thinking. It is in that spirit that the present note is written.

My suggestion is that Queen's Counsel should be required to pay to the Crown a substantial annual franchise fee in return for the privilege of so describing themselves. When a barrister is appointed a Queen's Counsel that fact receives publicity. There is publicity attaching to his swearing-in. Thereafter his description as Queen's Counsel is displayed as a sort of *Good Housekeeping* seal of approval. As marketing promotions of the individuals concerned these arrangements could hardly be bettered.

I would be dismayed if anyone were to think that those of us who seem to be able to potter on without these aids begrudge them to those who need them. What I do argue is that the spirit of Rogernomics requires that those who lean on these state-supplied crutches should henceforth be required to pay a market rate for the privilege.

If a man wishes to promote his selling of cooked pieces of domestic fowl by invoking the hallowed name of Colonel Sanders he will no doubt be required to pay substantial sums for the licence to do so. Why then should not a barrister who seeks to peddle his services with the aid of the name of his Sovereign be required to pay a comparable franchise fee? No doubt it will be argued that there are differences. It is not with finger licking that one associates ambitious barristers. The quality control of the Kentucky Fried Chicken people is very much better. But it is my contention that despite these distinctions a compelling analogy remains.

What rate of franchise fee should be payable? No doubt there is some young person in Treasury whose views the Government will accept as gospel. It may however be helpful if I record my own suggestion, which is 10% of gross professional earnings payable quarterly with (to discourage slacking) a minimum annual obligation of $30,000.00 (this figure to be subject to inflation adjustment).

If the objective of raising funds for the Justice Department is to be achieved then the matter should not stop there. I have not checked the law list lately, but I think there are still some barristers solc who have not yet been appointed Queen's Counsel. There should be a determined campaign to persuade these practitioners to take silk.

I cannot imagine anyone suggesting with anything approaching a straight face that this will result in any sort of lowering of standards. But in any event desperate straits require desperate measures. There are historical precedents. Did not James I sell baronetcies to finance the plantation of Ulster? (It is true that the plantation of Ulster has neither then nor since been viewed by the *tangata whenua* with any sort of genuine enthusiasm, but that is beside the point.)

That then is my modest proposal. There will be details that need to be sorted out. There should be provision for any Queen's Counsel dissatisfied with the new arrangement to elect to be dispatented (a process for which Sir Robert Megarry somewhere hints that an appropriate colloquial term corresponding to "taking silk" would be "getting stuffed"). There may be grumbles. But what I have proposed seems a far more satisfactory method of financing Justice Department over-expenditure than mulcting unsuspecting home buyers of excessive search and registration fees. □

Dicta

On a recent appeal against a sentence of periodic detention for a traffic offence, the decision of Wylie J contains the following passage pleasantly reminiscent of the style of the late lamented Mr Justice Mahon:

> Counsel also submitted that periodic detention should be replaced by a fine – first, because the offender preferred it that way, which would be a novel basis for varying the sentence, and secondly because he was, as she described him, "elderly and shaky". There was nothing to suggest that physically the appellant was an unsuitable candidate for periodic detention. His age, at 55, does not, I hope, put him in the category of those of advanced years whom humanitarian considerations would spare from incarceration.

Beneficial joint tenancies: some recurring problems

By Julie Maxton, Senior Lecturer in Law, University of Auckland

Problems associated with the beneficial joint ownership of property have recently been the subject of judicial and academic discussion in Australia, England and America. In this article the author seeks to determine how the current debate might affect New Zealand and, in doing so, to consider arguments for reform.

In Australia in *Delehunt v Carmody* (1986) 68 ALR 253, the High Court had to consider how the beneficial interest in a piece of land was held when the purchase price was contributed in equal shares by the parties but the conveyance was taken in the name of one party only.

It is settled law that when a purchase is made in the name of one of two or more persons who contribute to the purchase price, and no presumption of advancement arises, then the property is held on a resulting trust for the persons who pay the price: *Dyer v Dyer* (1788) 2 Cox 92. Equally clearly, where contributions to the purchase price are made in *unequal shares*, the property is held on a resulting trust for the contributors as tenants in common in proportion to the amounts each contributed: *Calverley v Green* (1984) 155 CLR 242 at 246-247, 258. But what is the position where contributions are made in *equal shares* and a resulting trust arises for the contributors?

Presumption of joint tenancy

Traditional learning dictates that where the legal estate is conveyed to all the purchasers who have provided the purchase price equally, then they will all hold the legal as well as the equitable estate as joint tenants in the absence of evidence to the contrary. Equity will not imply a resulting trust: the legal title reflects the actual contribution of the purchasers, thus "equity follows the law" and the equitable title is held in the same manner. There is no basis on which to find a resulting trust: *Lake v Gibson* [1729] 1 Eq Ca Abr 290 (21 ER 1052) affirmed sub nom *Lake v Craddock* (1733) 3 P Wms 158 (24 ER 1011); *Aveling v Knipe* (1815) 19 Ves Jun 441 (34 ER 580); *Robinson v Preston* (1858) 4 K & J 505 (70 ER 211); *Palmer v Rich* [1897] 1 Ch 134. The reason for equity's non-intervention in this situation is lucidly given in *Story's Equity Jurisprudence* 3 English ed (1920) at p 509:

> In the case of joint purchases made by two persons who advance and pay the purchase money in equal proportions and take a conveyance to them and their heirs, it constitutes a joint tenancy, that is, a purchase by them jointly of the chance of survivorship; and of course the survivor will take the whole estate. This is the rule at law; and it prevails also in equity under the same circumstances unless there are controlling circumstances, equity follows the law.

While that extract from *Story* still undoubtedly states the law, it was not directly applicable to the facts of *Delehunt v Carmody* because in *Delehunt v Carmody*, although the purchase price was provided in equal proportions by both parties, the conveyance was taken in the name of one only. Therefore, contrary to the position where a conveyance is taken in the name of all who contribute equally, a resulting trust *did* arise on the facts and the question was: how was the equitable interest to be held under the trust?

Resulting trust

The finding of a resulting trust itself indicated that the conveyance did not reflect the parties' intentions. There therefore appeared to be no reason why equity's preference for a tenancy in common should not apply to the equitable interest. Once the parties were proved to have contributed equally but not taken as joint tenants at law, the rule in *Lake v Gibson, Aveling v Knipe, Robinson v Preston* and *Palmer v Rich* had no application. Thus once equity *has* intervened to imply a resulting trust, it seems to follow that a tenancy in common rather than a joint tenancy ought (in the absence of other evidence) to be found.

It is submitted that the High Court of Australia *could* have found that the property was held under the resulting trust for the parties as tenants in common by applying these general principles. The decision, however, is primarily based

on the effect of s 26(1) of the Conveyancing Act 1919 (NSW) which states:

> In the construction of any instrument coming into operation after the commencement of this Act, a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants.

Although s 26 did not strictly apply on the facts of *Delehunt v Carmody* as there was no instrument disposing of the property to *two or more persons*, it was accepted in the High Court, as indeed it was in the NSW Court of Appeal, that the spirit of the enactment should be followed. Gibbs CJ at pp 56-57:

> It would be . . . surprising if the rules of equity required the courts to follow a rule of the common law that no longer existed and in doing so, to reach a result which equity generally tried to avoid. However, the doctrines of equity are not so inflexible. If equity follows the law, it will follow the rules of law in their current state. Where, as a result of following the law, a beneficial joint tenancy would formerly have been created, now a beneficial tenancy in common will (in NSW) come into existence. In other words, although s 26 of the Conveyancing Act has no direct application to the present case, its indirect effect is to require it to be held that there was a resulting trust for the purchasers in an interest of the same kind as that which would have resulted if the land had been conveyed to them at law, ie as tenants in common.

But this reasoning and conclusion involving the NSW Act was unnecessary on the facts. As the parties contributed equally and yet did not take as joint tenants on the face of the conveyance, on general principles a beneficial joint tenancy would not have arisen anyway. A resulting trust would have been implied indicating that the legal title did not reflect the parties' intentions. And once that was found, a beneficial tenancy in common rather than a beneficial joint tenancy could more naturally describe how the equitable interest was held. Gibbs CJ briefly adverted to this view of the law in the last few sentences of his judgment (at p 57):

> Of course . . . if it was only when there was a conveyance to purchasers who had contributed in equal shares that equity presumed that there was a joint tenancy, the result would be the same, for equity would then favour a tenancy in common and the beneficiaries would hold as tenants in common accordingly.

Whichever line of reasoning in *Delehunt v Carmody* is preferred, the result cannot be in dispute.

Beneficial joint tenancies?

The difficulties inherent in decisions such as *Delehunt v Carmody* raise other issues: for example, should beneficial joint tenancies still exist? And, if so, should unilateral declarations of severance be allowed?

The distinguishing features of a joint tenancy are the right of survivorship (whereby the longest living joint tenant ultimately takes the entire interest in the property) coupled with the presence of the four unities of possession, interest, title and time. At common law, a joint tenancy was preferable to a tenancy in common because it simplified dealings with the title. Equity, however, disliked the premium placed on longevity and favoured the tenancy in common.

In New Zealand s 61 of the Land Transfer Act 1952 provides that:

> . . . [A]ny 2 or more persons named in any Crown grant or in any instrument executed under this Act as transferees, mortgagees, or proprietors of any estate or interest, shall, unless the contrary is expressed, be deemed to be entitled as joint tenants with right of survivorship . . .

Section 61 accords with the common law principle that when land is transferred to two or more persons without words of severance, they take as joint tenants: *Wright v Gibbons* (1949) 78 CLR 313 at 324 Latham CJ:

> The [Torrens statute] does not alter the law with respect to joint tenancy. It leaves the incidents of joint tenancy standing, as they are determined by the common law, and any other relevant statute.

Section 61 does not debar the Court from inquiring as to how the land is held in equity, even although on the register the land is held in joint tenancy: *Cameron v Smith* (1910) 13 GLR 193; *Re Foley (deceased), Public Trustee v Foley* [1955] NZLR 702. It is apparent therefore, that in New Zealand, beneficial joint tenancies can still exist and that arguments for their abolition or easier severance raised recently in England and America, have relevance here.

English criticism

In England, in a recent article, MP Thompson has argued the case for the abolition of beneficial joint tenancies ([1987] Conv 29). After considering the methods of severance set out in *Williams v Hensman* (1861) 1 John & H 546, the difficulties to be found in their application and the decision in *Goodman v Gallant* [1986] 1 All ER 311, (where it was held that when a beneficial joint tenancy is severed, the tenants in common take in equal shares, regardless of the relative size of their contributions to the purchase price) the author concludes (at p 35) "that little of advantage would be lost if joint tenancies were confined to ownership of the legal estate". The only drawback he foresees is that it could not then be assumed that the survivor took under the will of the deceased, thereby terminating the co-ownership. But the advantages, he contends, would include

> ridding the law of the difficult and technical problem of determining whether severance has occurred and the concomitant possibility that the right of survivorship might operate inappropriately. Instead, the destination of the beneficial interests on death would be determined by each party's will which, one hopes, each would be encouraged to make when the property was acquired . . . [A]nd

> . . . each party would be encouraged to agree at the outset what share each would get in the event of a sale.

It is difficult to disagree with MP Thompson's conclusions. The methods of severance articulated by Sir William Page Wood VC in *Williams v Hensman* have spawned lines of difficult and inconsistent case law. And on no subject is this more apparent, nor the potential problems more real than that of unilateral declarations of severance.

In *Williams v Hensman* at p 557, Sir William Page Wood VC said:

> A joint tenancy may be severed in three ways: In the first place, an act of any one of the persons interested operating upon his own share, may create a severance as to that share. . . . Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing, sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind, without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share declared only behind the backs of other persons interested.

Whether a unilateral declaration of severance is covered by the three methods just outlined, so that such a declaration effects a severance of a joint tenancy, is a matter of some doubt. It is clear from *Fleming v Hargreaves* [1976] 1 NZLR 123, that where spouses are joint tenants, one spouse can sever the joint tenancy by a unilateral act (eg by making an absolute assignment of an interest in the joint tenancy). But does a unilateral *declaration* of severance have the same effect?

In *Hoyse v Gyles* (1700) Prec Ch 124, one joint tenant made a deed of gift of his moiety to his wife, with the expressed intention of severing the joint tenancy in order to make provision for her. As the deed was made in favour of the wife it was void at law; and the deed being made without consideration, it was held that equity could not relieve. A slightly later authority is *Partriche v Powlet* (1740) 2 Atk 54, where a person entitled as a joint tenant to a fund entered into a marriage settlement, the deed reciting that she should enjoy the fund to her separate use, and that, for want of issue of her own body, it should go to the next of kin of her own family. The other joint tenant was not a party to the deed. Lord Hardwicke LC (at p 55) held that there was severance,

> for, first here is no agreement for this purpose . . . the declaration of one of the parties that it should be severed is not sufficient unless it amounts to an actual agreement.

This statement of Lord Hardwicke LC was expressly approved by Stirling J in *In re Wilks Child v Bulmer* [1891] 3 Ch 59 at p 61. And in New Zealand in *Austin v Austin* (1908) 27 NZLR 1099 at pp 1104-1105, Cooper J took the view that

> A mere intention or declaration of a wish to sever a joint tenancy is not sufficient.

In recent years, Walton J has upheld this line of cases. In *Nielson-Jones v Fedden* [1975] Ch 222 (at p 230):

> The question . . . is, can . . . a declaration — a unilateral declaration — ever be effective to sever a beneficial joint tenancy? It appears to me that in principle there is no conceivable ground for saying that it can. So far as I can see, such a mere unilateral declaration does not in any way shatter any one of the essential unities. Moreover, if it did, it would appear that a wholly unconscionable amount of time and trouble has been wasted by conveyancers of old in framing elaborate assignments for the purpose of effecting a severance, when all that was required was a simple declaration.

Walton J criticised Plowman J in *Re Draper's Conveyance* [1969] 1 Ch 486 for following a statement of Havers J in *Hawkesley v May* [1956] QB 304, which was to the effect that a declaration by one of a number of joint tenants of his intention to sever operated as a severance. At p 236 in *Nielson-Jones v Fedden* Walton J said of those two cases in so far as they approved such a principle:

> . . .[I]n my opinion, they do not represent the law, being . . . clearly contrary to the existing well-established law, to which the attention of Havers J and Plowman J respectively, who decided them, was in neither case directed. I accordingly, regard the relevant parts of these two decisions as having been given *per incuriam*, and I do not propose to follow them.

Support for Walton J's views may be found in (1968) 84 LQR 462 (P V Baker), [1975] CLJ 28 (M J Prichard) and (1976) 50 ALJ 246 (P Butt). But the debate does not end there. In *Burgess v Rawnsley* [1975] 1 Ch 429, Lord Denning opined (at p 439) that the third category in *William v Hensman* applied not only where *both* parties enter on a course of dealing, but also where

> there is a course of dealing in which one party makes clear to the other that he desires that their share should not longer be held jointly but be held in common.

Thus the Master of the Rolls disputed Walton J's view in *Nielson-Jones v Fedden* that *Hawkesley v May* and *Re Draper's Conveyance* were wrongly decided on this point. The balance of the Court of Appeal in *Burgess v Rawnsley* comprised Sir John Pennycuick and Browne LJ. At p 448, Sir John Pennycuick declared that:

> An uncommunicated declaration by one party to the other, or indeed a mere verbal notice by one party to another, clearly cannot operate as a severance.

And at p 444, Browne LJ observed that "an uncommunicated declaration by one joint tenant cannot operate as a severance".

Statutory context

Although these remarks *appear* to follow the line of authority which was upheld in *Nielson-Jones v Fedden*, they were made when

discussing s 36(2) of the Law of Property Act 1925 and it is uncertain how far, if at all, they can be taken to apply out of that statutory context. (Section 36(2) of the Law of Property Act 1925 introduced a new method of severance in England as regards land, namely, notice in writing given by one joint tenant to another.)

Finally, in *Harris v Goddard* [1983] 1 WLR 1203, some small measure of support may be found in the judgment of Lawton LJ to the effect that severance by unilateral declaration was not a viable option without the aid of statute. In a decision dealing almost exclusively with s 36(2) of the Law of Property Act 1925, Lawton LJ said when speaking of that section (at p 1209):

> Unilateral action to sever a joint tenancy is now possible. Before 1925 severance by unilateral action was only possible when one joint tenant disposed of his interest to a third.

These sentences seem to imply that unilateral severance in the absence of provision such as s 36(2) of the Law of Property Act 1925 could only be effected in accordance with the accepted rules set out in *Williams v Hensman*. But this may not have been Lawton LJ's understanding, as later in his judgment he approves *Re Draper's Conveyance* and confesses not to share the doubts Walton J expressed in *Nielson-Jones v Fedden* with regard to aspects of that decision.

Conclusion

It may be concluded that on the authorities, the position as regards unilateral declarations of severance is unclear. It appears however, to this writer, that the weight of authority probably opposes permitting severance of joint tenancies by unilateral declaration. If this were not the case why, wonders P V Baker (84 LQR 463), is a will insufficient for the purpose and why is there any need for a category of severance by agreement?

Apart from arguments based on authority, there seem to be good policy reasons for preventing at least *uncommunicated* unilateral declarations from severing joint tenancies. These policy reasons have recently been articulated by an American legal commentator. In an article entitled "An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights" (1986) 15, *Fordham Law Review* 173, Samuel M. Fetters discusses how one joint tenant "while secure in his own survivorship right" can defraud the other joint tenant of his survivorship right with impunity. At p 175:

> Take the case of H and W, a husband and wife who own their family residence property as joint tenants. H has a child C, by a previous marriage. Without W's consent or knowledge, H executed a severance deed [ie a deed which is executed by one of the two joint tenants, has the legal effect of terminating the joint tenancy, destroying survivorship rights, but preserving spousal ownership as tenants in common], and deposits it in his safety deposit box, along with his will in which he leaves all of his property to C. Sometime later . . . W dies. H retrieves his severance deed and destroys it. Because only H knew about the severance deed and its destruction, H will have no difficulty in establishing clear title to the property as surviving joint tenant. If H dies before W however, the severance deed will be discovered and recorded. W will be unsuccessful in her claim to the property as surviving joint tenant. Rather, she and C will hold title in equal, undivided shares as tenants in common.

The potential for fraud in similar scenarios is self-evident. Consequently, if unilateral declarations of severance are to be permitted, they ought at least to require that the severing tenant(s) notify the other(s), as indeed s 36(2) of the Law of Property Act 1925 demands in England. But the better view, it is submitted, is to abolish beneficial joint tenancies altogether. Several arguments commend this course. First, litigation such as *Delehunt v Carmody* would be avoided. As would the anomaly that the result would have been different (apart from statute), if the parties had taken jointly at law. Second, legal joint tenants do not frequently express their intention to hold as beneficial joint tenants. Rather, they probably consider simply what they would like to happen to the property in the event of their deaths. On being told that it will accrue to the survivor, while all is well in the relationship, this is probably acceptable enough and a beneficial joint tenancy arises, as it were, by default. But what if the relationship breaks down? Simply leaving one's "share" of the property by will to persons other than the joint tenant will be ineffective — unless severance has taken place first. Initial advice from legal advisers to hold as beneficial tenants in common with wills in each other's favour could obviate this problem. On the breakdown of the relationship, an alteration to the wills would immediately change the destination of the shares of the tenants in common.

Thirdly, the authorities expose difficulties in determining when severance of joint tenancies has taken place. This is particularly so in respect of the question of unilateral declarations of severance. And a clear potential for fraud is inherent in uncommunicated unilateral declarations of severance were they to be permitted.

Finally, it may come as something of a shock to parties who have not considered it, that beneficial joint tenants on severance take in equal shares as tenants in common: *Goodman v Gallant* (recently followed in *Turton v Turton* [1987] 2 All ER 641). Thus the major provider of the purchase price may discover that a lesser proportion is returned on severance of the joint tenancy.

The abolition of beneficial joint tenancies would have the marked benefit of encouraging parties to discuss the incidents of co-ownership earlier rather than later, when problems arise and the pitfalls of beneficial joint ownership become apparent. In the absence of such abolition, it seems incumbent on legal advisers to discuss both types of co-ownership with their clients and to urge them to take beneficially, as tenants in common, rather than as joint tenants, where that seems more appropriate. Thereby the tide of litigation which has flowed from failures to address that issue adequately may possibly be stemmed. □

The tax adviser: Responsibilities and liabilities of the professions (II)

By Anthony Molloy QC, LLD of Auckland

The first part of this article, dealing with the responsibilities of members of the legal and other professions when giving legal advice was published at [1987] NZLJ 350. In this concluding part Mr Molloy looks at a variety of issues such as negligence, fair trading, objectivity, copyright, professional obligations and finally the professional standards required of Departmental legal officers.

The adviser and negligence

Failure to qualify advice sufficiently may pave the way for an action against the adviser in negligence by those who are "sold" on entry into the scheme by the adviser's views published in the prospectus. And the adviser is likely to find his professional reputation affected adversely by his becoming tarred with the same brush as the promoter of artificial tax avoidance schemes, or, worse, of tax fraud.

As Sir Robin Cooke observed in *Tayles v CIR* [1982] 2 NZLR 726, 728, an adviser who fails to explore for his client the fiscal possibilities as between the various approaches it is possible to take in order to achieve his commercial objectives, and fails to give him advice as to the most tax-efficient approach would be negligent. See also *Morgan v Beck & Pope* (1974) 1 NZTC 61, 225 (Quilliam J).

For negligence in this field the tax adviser clearly is liable. Although that topic requires a separate paper on its own, it may be in order to refer briefly to some of the specific tax provisions which could give trouble.

Where a client has been advised to transfer property to a trust, failure to advise also of enactments, such as Income Tax Act 1976 s 67(4)(e), which will make the proceeds of any resale, or development and resale, within a fixed period thereafter susceptible to tax, will be negligent: cf *Sacca v Adam* (1983) 33 SASR 429, 437 per Zelling J (Supreme Court of South Australia, Full Court).

Failure to make a client well aware of the fact that, if the advice given turns out not to be concurred in by the Commissioner, the client may be confronted with the need to make payment of a large tax bill immediately; and that the mere fact that an objection is entered will not, of itself, be sufficient to ensure that proceedings to enforce collection and payment of that bill are stayed pending determination of the objection: also could be actionable. The Courts certainly disapprove attempts to enforce recovery whilst the Commissioner is not dealing expeditiously with objections to an assessment, or the stating of a case, and tend to regard such activity as an abuse of power; cf *Clyne v FCT* (1982) 43 ALR 342, 344, per Mason J, "hoping" that the Commissioner's action in that case, seeking to institute recovery proceedings when the assessment was under challenge by way of case stated, was an unusual course. But the client nonetheless must be warned that the remedy of a stay of recovery proceedings is discretionary, and that a large factor in the exercise of the discretion is s 34(2)(b), enacting that the pendency of the determination of an objection, case stated, or appeal, does not, of itself, suspend the Commissioner's right to sue for payment of assessed, but disputed, tax.

The client also must be told that penalties will accrue for late payment, and at the fearsome rate of 10% compounding at six monthly rests.

Further, if the advice is being given to a client whose scheme is fraudulent, then, as well as advice discouraging him from embarking on it, the practitioner must advise that there is provision for fining on summary conviction, or indictment under the Crimes Act, and for penalties which, taken with the late payment penalties, can inflate the tax payable to over 300% of what otherwise would have been payable.

Again – and this particularly reinforces the observation as to the perils of an accountant giving advice in these areas without expressly confining his advice to opinions as to accounting practices, and suggestions as to the law and as to the practice of the Commissioner – it is often not only

the taxation questions which must be canvassed for the client. If, for example, a client is being advised to set up a trust, it must be made quite clear to him that it is of the essence of the trust that he will cease to be able to deal with the property beneficially. If a husband conducting a business is being advised to take his wife into partnership with him in the business, it must be made clear that the wife thereby becomes fully liable for the partnership debts: so that, if the business goes wrong, and the partnership becomes insolvent, the proportion of family assets which can be preserved may be significantly below that which would have been safe had the partnership not been embarked on. And, in connection with the view, advanced earlier in this paper, that a client with an artificial avoidance proposal is entitled to counsel which addresses the question "is it right?" as well as the question "is it lawful?": it must be said that this sort of counsel is not to be confused with the mere "giving of inadequate social views as to the desirability or undesirability of various causes of actions" (Spry "Aspects of Solicitors' Duties as to Revenue Law" (1982) 56 *Law Institute Journal* 578 at 580). Actionable professional negligence almost certainly will result from any confusion between such views and the correct law.

A New Zealand Law Society Seminar on "Recent Developments in Taxation" has just noted that

> In both the legal and accounting professions there is a strange reluctance to seek second opinions on many tax matters. This is a dangerous position to take. The closest analogy is the medical profession, where a general practitioner would not hesitate to seek the advice of a heart specialist. If he did not, he could justifiably be accused of professional negligence if what was considered (in his view) to be a minor problem transpired to be a transplant candidate. (Ibid pp 88-89)

The same warning has been expressed from a slightly different viewpoint by a learned Australian authority:

> [W]here a solicitor accepts retainers which extend to revenue considerations, he should take pains to ensure that his level of skill and knowledge in these regards is not less than the level which his retainer impliedly, or in certain cases expressly, provides for and that he acts accordingly. (Spry "Aspects of Solicitors' Duties as to Revenue Law" (supra))

Apart from the professional negligence risks attending advice given by the practitioner whose level of skill and knowledge is found wanting in this connection, the other consideration justifying the use, by the presenters of the travelling seminar, of the expression "dangerous", is that failure to take a second opinion, even if that opinion ultimately be found to have been wrong, involves failure to obtain what otherwise could be protection against conviction of the primary adviser on those criminal charges requiring proof of a guilty mind, or a strong argument in mitigation of penalty where a fiscal offence is committed through ignorance of the law (which, by Crimes Act 1961 s 25, is no defence).

Fair Trading Act

It is very plain that schemes are being merchandised by tax advisers in this country: complete with cyclostyled documents and explanatory memoranda. It is also evident that some of these are based on insufficient research, or are being touted as beneficial in circumstances to which they are unsuited.

Since 1 March 1987 a further question mark has been hanging over these, in the form of the Fair Trading Act 1986, enacting that:

> 9 No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> . . .
>
> 11 No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, [or] suitability for a purpose . . . of services.
>
> . . .
>
> 13 No person shall, in trade, in connection with the supply or possible supply of . . . services or with the promotion by any means of the supply or use of . . . services, —
>
> . . .
>
> (b) Falsely represent that services are of a particular kind, standard, [or] quality . . .; or
>
> . . .
>
> (e) Falsely represent that . . . services have any . . . approval, endorsement, performance characteristics, . . . uses, or benefits; or
>
> . . .
>
> (h) Make a false or misleading representation concerning the need for any . . . services . . . .

By s 2(1) "Trade" is so defined that it means "any . . . profession. . . ."

There is jurisdiction to impose fines on individuals of up to $30,000 (s 40) and for the Commerce Commission to order publication of "corrective statements" (s 42). And it appears that "conduct likely to mislead or deceive" can be established irrespective of the existence of any intent to mislead. (*Given v C V Holland (Holdings) Ltd* (1977) 1 ATPR 17,384, 17,386-17,387 (Federal Court of Australia, Franki J))

Miscellaneous offences: the tax adviser and the false return

The most common occasion on which tax advice is given may be in connection with the preparation and lodgment of returns. Deliberate or reckless lodgment of a false return is triable summarily as an offence under Income Tax Act 1976 s 416(b). A professional adviser who aids, abets, incites, or counsels a client in the making of such a return commits the offences. He can be tried summarily under Income Tax Act 1976 s 416(e), or he can be tried indictably under Crimes Act 1961 s 66(1). Adviser and client together may commit the crime, triable indictably, of conspiracy to defraud the Revenue.

The only course open for the professional adviser whose client is intent on lodging a false return is dissuasion. If this fails, there is no alternative to severance of the professional relationship so far as filing is concerned.

Even apart from the unlikelihood

that the adviser's professional body could do other than strike off its rolls a member who had been convicted of aiding, or conspiracy to commit, tax fraud; the penalties are severe. For the false return, or the aiding and abetting, s 416B(3) of the Income Tax Act 1976 provides a $15,000 fine for the first offence, and $25,000 fines thereafter. Conviction on the conspiracy charge carries up to 5 years' jail, and a Queensland chartered accountant has just discovered this after having been found guilty of that offence by a jury. ((1987) 16 Australian Tax Review 4)

The genuinely arguable return

Where the return is not false, but is truly arguable, no obloquy can attach to the omission of revenue from the returned taxable income, or to the claim for a deduction, where the position in either case is not clearcut. The taxpayer is not obliged to adopt the point of view which maximises his liability when there genuinely is another side to the question.

In those circumstances, the duty is to put the Commissioner on notice that the return omits an item which then is adequately described in relation to the return, say in supporting accounts; or that the return includes a deduction which is similarly so described.

It is a breach of duty owed to the community, by both taxpayer and adviser, if the doubtful case is not so shown. It is in any event the height of folly not to show it because the statutory time limitation period, after which amendment of assessments becomes illegal, may then be ruled out by s 25(2) of the Income Tax Act 1976.

The duties not to betray the client's confidence and not to obstruct the Crown

It is also clear that both the client and the adviser must refrain from obstructing the Commissioner: Income Tax Act 1976 s 416(c); Inland Revenue Department Act 1974 s 47(1)(d). As well as owing that duty to the Revenue, however, the professional adviser owes a duty of confidentiality to his or her client, save where this duty is expressly stripped away by the Commissioner's powers of inspection, interrogation, and the like, conferred by Inland Revenue Department Act 1974 ss 17, 18 and 19.

Those provisions are to be read subject to the privilege in respect of confidential lawyer/lawyer and lawyer/client communications in connection with the seeking and giving of legal advice for a lawful purpose. There is no doubt that the client could enforce by injunction, and action for any damages which could be shown, this right of confidentiality.

The duty not to obstruct in many cases will require that the client be advised to permit his accountant to make some degree of disclosure to the Department; and the duty of candour will positively require various forms of disclosure which, if the client will not authorise them, may require that the professional connection be severed.

Hybridising the legal and accounting functions

The accountant, of course, has a front line position in the tax field, and accounting firms are increasingly employing lawyers as part of their tax teams. In effect these are becoming tax firms, or tax divisions within larger firms. While there is undoubted pressure for this, the question whether it is a good thing for clients in the long run is an open one. Certainly, it can be said that accountants are no better equipped to give legal advice than pharmacists or nurses are equipped to give medical advice: and they act just as imprudently if they do so. On the other hand, sound tax advice requires both dimensions, and lawyers are equally ill-equipped to advise as to the whole picture.

Having said that, the fascination of tax practice for a lawyer is precisely that, if it is done properly, it involves as wide a range of the legal disciplines as it is possible to have brought together in any practice. Knowledge of, and experience in, equity and the law of trusts, company law, partnership law, the law of real and personal property, the law of assignments, the law affecting vendor and purchaser, the conflict of laws, banking law and bills of exchange law, international law, the principles of statutory interpretation, the law of negligence, the criminal law (particularly in these days when the Under-Secretary for Finance is making loud noises about the possibility of promoters of some of the recently fashionable tax avoidance schemes being indicted for conspiracy to defraud the Revenue), and constitutional and administrative law. In addition, of course, the law of evidence plays a vital role, notwithstanding that the rules as to the admissibility of evidence in cases stated, although not in administrative law proceedings, are somewhat relaxed. (cf *Anzamco Ltd v CIR* (1983) 6 TRNZ 135, 141, 142 (Barker J))

Hybridisation inevitably will be attended by the dangers inherent in creating a hot-house atmosphere built largely round the Income Tax Act. The cross-breeding will be accompanied by inbreeding. No doubt there will be great familiarity with the provisions of the Act, and with relevant accounting standards, but detachment from the world of which these other disciplines are crucial components is pregnant with the same possibilities for the creation of mutant, deformed, and dysfunctional fiscal creations as attend inbreeding amongst other species.

Nonetheless, there is no doubt a tendency for younger lawyers to enter accounting firms in search of tax law experience.

They bring to their work minds closely familiar with the Income Tax Act. But they bring also with them the drawbacks of little experience in the other disciplines which I have mentioned, and of lack of the instincts which only time, and association with other experienced lawyers, can inculcate, and which are the sine qua non of sound legal advice. The result, which is already becoming so apparent, is that their — what can only be called — naivety frequently prevents them from contributing the dimension badly needed by the accountants who employ them: the true legal "feel" of the thing.

Loss of objectivity

I have seen it suggested, in the media, by lawyers working for accounting practices, that, by adding the inhouse legal dimension, their employers are better able to give their clients "what they want".

It is precisely in this objective that

there can be seen the greatest danger to the clients of both professions: the danger of the loss of objectivity attendant on advice identified too closely with the client's stated requirements. Sir Gerard Brennan, a Justice of the High Court of Australia, has expressed the relevant concern in his very recent Inaugural Sir Leo Cussen Memorial Lecture "Pillars of Professional Practice: Functions and Standards".

> But there is a dividing line, ever so thin, between the provision of informed and practical legal guidance and the provision of a total service to answer the client's requirements. On one side of the line the lawyer maintains his professional independence; on the other there is a risk of losing it. On one side of the line, the lawyer's function is to ascertain the law and to see it impact on the client's fortunes. The independence of the lawyer is guaranteed by strict adherence to legal principle, and the client's legal interests are fully protected by the integrity of the guidance which the lawyer gives. But if a total service is offered to meet a client's requirements, legal principle is but one of the factors in achieving the desired end. What if legal principle proves to be a frustration? . . .
>
> If a lawyer undertakes to give more than practical legal guidance, he has started to identify himself with his client's cause. I venture to suggest that any experienced lawyer will have seen occasions when some loss of independence has been threatened by too close an identification with the client's cause. The objective of a total service may be seen to be the achieving of results satisfactory to the client, and that would eliminate the distance between the lawyer's duty to the law and the lawyer's interest in the client's affairs. Keeping that distance is essential to the integrity of the lawyer's conduct. To stay on the safe side of the line is to adopt a conservative approach to the provision of professional service but, in the long run, clients seek a lawyer's guidance precisely because it is independent of the client's interests and objective in its legal content. (1987) 61 ALJ 112, 116-117)

Closely related to the danger of loss of objectivity in these new developments, is the loss of standards:

> The proper standards of the legal profession cannot be set by statute or by contract; they must be set by the common understanding of lawyers themselves, disseminated by personal contact, and encouraged by professional organisations and institutes of professional training. (Ibid 118)

The giving of legal advice by accountants

One of the areas into which accounting firms are entering is the drafting of documents, such as company articles and memoranda, assignments, and trust deeds. I have seen many of these recently the backsheets of which, instead of bearing the name of a law firm, bear the name of the chartered accountancy practice which has prepared them.

Copyright aspects

The first point that is quite plain in this context is that legal documents are literary works within the meaning of the Copyright Act 1962. Unauthorised reproduction gives the owner of a copyright the right to claim damages. Thus, in *O'Brien v Komesaroff* (1982) 150 CLR 310 (Full High Court), a solicitor alleged breach of copyright by an accountant who had reproduced documents that had been supplied to him by the solicitor. The solicitor's claim was upheld, and a taking of an account of profits made by the accountant by the use of the solicitor's work was ordered.

Offences under Law Practitioners Act

Law Practitioners Act 1982 s 65(1) precludes anyone not holding a current practising certificate as a lawyer, or anyone not acting under the supervision of such a person, from preparing any deed or conveyance — save one which is prepared by the filling in of a printed form prepared by such a person, which could reasonably be expected to be within the competence of the person completing it, and for which no charge was made directly or indirectly for the drawing of that Deed or conveyance or for any service incidental to it. There is provision, in ss 190, 191, for the laying of informations and for fines upon summary conviction for offences against this prohibition. The prohibition is old: extending at least as far as Geo III 1804 c 95 s 14.

Quite clearly there are traps here into which accountants can fall unless they have on their staffs solicitors with current practising certificates, who exercise the necessary supervision. If those provisions are not satisfied, it is clear that for accountants, for example, to provide a discretionary trust deed (*Barristers Board of WA v Central Tax Services Pty Ltd* (1984) 16 ATR 115 (Supreme Court of Western Australia, Franklyn J); *Barristers Board v Palm Management Pty Ltd* [1984] WAR 101 (Supreme Court of Western Australia, Brinsden J)) or to provide an assignment document (cf *Re Universal Guarantee Pty Ltd* [1954] VLR 650 (Supreme Court of Victoria, Lowe J)), could involve offences against these provisions in the context of providing services for which a fee is charged either directly or indirectly.

Departmental advisers

Finally, it is not to be overlooked that accountants and lawyers working for the Inland Revenue Department are tax advisers also.

They are bound by the Inland Revenue Acts. Their duty is to give advice consistent with ensuring the assessment and collection of the revenue for the assessment and collection of which Parliament has provided.

But they also are bound by professional standards. No more than accountants and lawyers in private practice may they assume the role of blinkered technicians. Where there are legal options for dealing with a particular matter, and where some of the possible and permissible courses may inflict, and

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Serious violence and special circumstances:

Criminal Justice Act 1985, s 5

By W J Brookbanks, Faculty of Law, University of Auckland

The problems of sentencing have led to numerous statutory provisions which sometimes appear to be in conflict as to their underlying principle. The Courts have in effect been directed over the years in accordance with the philosophy of the Justice Department to avoid incarceration as a penalty and if it is imposed to make it for the shortest possible period. Usually of course the Courts follow the recommendations of probation officers who are Justice Department officers. More recently however, in response to public unease the politicians have taken a different view so that there is now a marked difference in the statutory provisions between crimes affecting property and crimes of violence. At [1987] NZLJ 163 W J Brookbanks considered the issue of "special circumstances" in property offences. In this article he looks at the meaning of the same term in respect of violent offences.

Introduction

In an earlier article in this *Journal*, [1987] NZLJ 163, the writer offered some comments on s 6 of the Criminal Justice Act 1985 in relation to a number of unreported decisions dealing with the section. Section 6, it will be recalled, puts in place a statutory presumption to avoid the use of imprisonment in property offences except where special circumstances show that any other penalty is clearly inadequate or inappropriate. The clear rationale of the section is to avoid the use of imprisonment in respect of property offences in all but the most serious cases. Section 5 also contains a statutory presumption in respect of violent offences. Whereas s 6 seeks to minimise the use of custodial sentences the clear legislative intent of s 5 is to require that a certain class of violent offences must attract a jail sentence in the absence of special circumstances.

Both sections reflect the philosophy behind the Criminal Justice Act that those who use serious violence will be severely punished while those who commit offences that affect the property rights of others will be required to repair the loss.

When the Criminal Justice Act 1985 was enacted, the need to protect the public was conceived as being a paramount consideration in the sentencing process, particularly where crimes of violence were concerned even though such offences, at that time, amounted to only 1-2% of all convictions.[1] That conviction has nevertheless held its ground and coupled with the statutory presumption in favour of imprisonment has meant that the punishment options for violent offenders has been severely curtailed. Arguably, no new situation has been created since, on one view, s 5 as originally enacted largely reflected the sentencing principles which have long been followed by the Courts. (Hall *Sentencing in New Zealand* 1987, 63). However, a significant change to the status quo has been effected by the Criminal Justice Amendment (No 3) Act 1987, which radically expands the ambit of s 5 providing, in effect, that virtually all offences of violence must be met with imprisonment.

The purpose of this article is to examine some of these elements of s 5 and to assess the manner in which the principle which it enshrines is being applied by the Courts. Commentary on the provisions of the 1987 amendment are necessarily speculative since, at the time of writing, the writer was unaware of any caselaw interpreting that controversial legislation.

Purpose of the section

Section 5 the Criminal Justice Act 1985 as amended by s 2 of the Criminal Justice Amendment (No 3) Act 1987, gives expression to legislative efforts to control the incidence of violent offending by limiting the options for sentencing for those who use serious violence while committing offences. The use of mandatory penalties is new in New Zealand Criminal Law and reflects the growing unease with which legislators view the emergence of violent trends in our society. Furthermore, most community concern about offending focuses upon violence. Section 5 aims, by placing special emphasis on crimes of violence, to deter would-be violent offenders and to protect the public by removing serious offenders from the community. It

follows that where the legislature has specifically mandated the use of imprisonment as a sanction, it must have had in mind only those offences involving the use of serious violence. This was certainly the original intent when s 5 was enacted, the standard for the application of the section being that the offender had "used serious violence against, or caused serious danger to the safety of" someone.

The standard of "serious violence" still pertains in the amended s 5(1). However, whereas s 5(1) of the 1985 Act required that an offender be convicted of an offence punishable by imprisonment for a term of five years or more before the section could be activated, the 1985 amendment reduces the threshold to a term of imprisonment of two years or more. In addition a new s 5(2) (Criminal Justice Amendment (No 3) Act 1987, s 2) enacted to deal with repeat offenders who use violence provides for an offender convicted of an offence punishable by imprisonment for a term of two years or more, and previously convicted of an offence involving the use of "violence against" or causing "danger to" another's safety, to be imprisoned in the absence of special circumstances.

A similar new clause is enacted to deal with violent offences committed while on bail. (Criminal Justice Amendment (No 3) Act 1987 s 2 introducing new s 5A). The amendments to s 5 were a direct legislative response to recommendations made by the Roper Committee.[2] The context in which the recommendations to amend s 5 were made concerned a discussion on sentencing and allied matters and in particular the view expressed by the Police Department that the current system lacks the ability to neutralise recidivism (ibid, 125). The Report acknowledges that there is a "complete lack of research material on the subject" (of recidivism) (ibid), but itself goes no further than to suggest that the problem of the recidivist is well worthy of further study. It, therefore, appears to be upon the basis of an impressionistic view of rising public concern about violence, rather than empirical evidence about appropriate "mechanisms" to break the cycle of recidivism, that the recommendations to amend s 5 were made.

The real danger, it seems, created by the amendments is that they must increase the pool of offenders likely to be sentenced to terms of imprisonment, and may well lead to further pressure on an already overloaded prison system.

I shall now examine the meaning of the phrases "serious violence" and "causes serious danger to" since they are constitutive in the application of s 5.

Serious violence

The meaning of serious violence arose for consideration in a case decided soon after the Criminal Justice Act 1985 came into effect. In *R v Tua* [1986] NZ Recent Law 123, the 18-year-old offender had wounded a police officer who caught him red-handed in the course of committing a burglary. The offender had a list of 27 previous convictions. The injury to the constable's wrist, inflicted by a knife, required six or seven stitches, but missed vital tendons, and involved "no serious consequences". In addressing the defendant at sentencing, the Court said: ". . . You could very easily have inflicted serious injury and serious permanent disability." (ibid, 3) There is at least an implicit statement here that the injury did not itself amount to a serious injury. Nevertheless, in absence of any special circumstances justifying the Court in not imposing a prison term, the Court dealt with the case as one involving serious violence and the offender was sentenced to three years' imprisonment on a charge of wounding with intent to injure.

Since on the basis of this analysis, serious violence may not necessarily imply serious injury, the question arises as to how Courts are to determine whether or not violence is serious. It is submitted that in the absence of statutory guidance on this question, the solution must be obtained with reference to objective criteria standing apart from the actual exercise of violence in the particular case. In *Tua*, although the injury itself was implicitly classified as non-serious, the fact that it involved an attack on the police, brought it clearly within the category of serious violence.

> The Courts must, and always have taken a very serious view of assault on police officers in the course of the execution of their duties. . . . an attack on a police officer is equivalent to an attack on the community because our police are the representatives of the community in the matter of law and order in society. (ibid)

The nature of the offence itself may also be determinative of the existence of serious violence in some cases. In *R v Dooley* [1986] NZ Recent Law 389 which involved the premeditated snatching of a briefcase containing cheques and cash from a young shop assistant en route to the bank, the Court of Appeal held that the fact that the theft was a planned and premeditated street theft was a factor justifying the sentencing Judge in imposing an 18-month jail sentence. Although the case was prosecuted as a simple theft and not robbery which would have involved the mandatory imprisonment provisions of s 5, the Court of Appeal upheld the trial Judge on the ground that

> the public's real and justified concern that persons in the street should be able to go about their legitimate business without the threat of being pounced upon . . . and having their property wrested from them was paramount.

Although s 5 was not an issue in that case, in the Court's view, the seriousness of the offence lay in the character of the theft and had it been prosecuted as a robbery, would have involved serious violence.

In *Bevan v Police* [1986] BCL 821 the appellant had pleaded guilty to a charge of burglary, an offence clearly within the ambit of s 5 of the Criminal Justice Act 1985. He had climbed through the unlatched window of a flat and while removing money from a purse in a bedroom, was surprised by the complainant. A brief struggle ensued during which the complainant lost all her long fingernails and the appellant ran out of the door. In the event no property was stolen. The appellant, aged 23, had a long list of previous convictions, including twenty for

burglary, unlawful taking and theft, and had been variously dealt with by fines, probation and periodic detention.

Addressing itself to the terms of s 5, The Court held that s 5 did not apply because there was not serious violence involved. There was no weapon and no intent on the part of the appellant to become involved in a violent situation even though he had created the situation. The Court allowed the appeal, and substituted a nine-month term of periodic detention, plus one year's supervision for the six-month jail term imposed by the District Court Judge.

A case which contrasts with the decision in *Dooley* in so far as it involved a prosecution for robbery is *R v Lowe* [1987] BCL 775. The applicant, a 17-year-old youth, had been sentenced to corrective training following conviction in the District Court on a robbery charge. He had taken the watch from the wrist of a 15-year-old schoolboy after having allegedly taken him in a headlock, punched him, thrown him to the ground, and kicked him. The applicant had claimed that he had misunderstood the boy's reply when he had requested the time and had asked to look at the watch when the complainant ran away. He said he then ran after the boy who when he stopped gave the applicant the watch. He admitted punching but denied kicking the complainant.

On an appeal against sentence the Court noted the requirement in s 5 of the Criminal Justice Act 1985 that "serious violence" be proved. The Court held that the incident, although reprehensible, did not involve the infliction of any serious injury and it doubted whether what happened could be classed as the use of "serious violence".

This approach appears to contradict the findings implicit in *R v Tua* (supra) and *R v Dooley* (supra) that serious violence need not necessarily involve serious injury, a proposition which derives some support from recent cases on sexual violation. In *R v Stoddart* [1986] 1 NZLR 264 an appeal against a four-year jail sentence for rape, it was argued that the case was not one where the offender had used "serious violence" in terms of the former s 5(1)(b). The argument was "emphatically rejected" by the Court of Appeal on the basis that it would involve placing an altogether too restrictive construction on the language of the statute. The Court said:

> . . . almost every offence of rape is an offence involving the use of serious violence against another. Even if the degree of force is not great, the violation of the victim's body can only be described in any ordinary case, as in itself serious violence.

Similarly in *R v Green*[3] the Court said of rape that

> to have intercourse with a woman who is non-consenting to that is obviously to exhibit serious violence towards her. . . .

Clearly, situations where there is no actual or serious injury may in some circumstances be equivocal as regards serious violence. However, to require that before serious violence can be established there must be some evidence of serious injury would seem to defeat the purpose of the legislation which is aimed at not simply reducing the injury that may be involved in violent crime, but to also deter those who use any violence gratuitously.

The importance of this principle is demonstrated in *R v Henderson* [1987] BCL 117. The applicant, who had been drinking in a hotel, had picked up an empty beer handle from the bar and repeatedly struck the complainant with it about the head. The glass broke almost at once, and the applicant continued striking with the broken remains. The complainant, though not greatly hurt, suffered bruising around the left eye and lacerations to the scalp, forehead and face. Dealing with the argument that the injuries caused were not serious, the Court held that while the injuries actually inflicted were minor within the scale embraced by the term grievous bodily harm, it was merely fortuitous that the complainant did not lose the sight of an eye. The case may be some authority for the proposition that "serious violence" may exist when the potential for serious injury is real though the actual injuries caused were not serious. Such an approach is likely to be reinforced where, as in *Henderson*, the assault is unprovoked and deliberate and there is present an intent to do serious harm.

"In the course of committing the offence"

> Serious violence alone will not be determinative of whether s 5 applies. It must also be established that the violence occurred in the course of committing the offence.

This phrase was considered in *Murcott v Police* [1986] BCL 741 an appeal against a sentence of two years' imprisonment imposed in relation to convictions for burglary and aggravated assault. The appellant had been confronted by police when a burglar alarm was activated and he struck a police constable with a gorse grubber soon after smashing his way out of the burgled premises. The Court accepted an argument that s 5 did not apply because the assault did not occur while the offence of burglary was carried out and was not relevant to the assault, which was punishable by a term of less than five years' imprisonment. The Court held that the words "in the course of committing the offence" must be interpreted as the period during which one or another of the essential elements of the relevant offence were carried out.

"Special circumstances of the offence or . . . offender"

The statutory presumption in favour of a full-time custodial sentence may be rebutted where the Court is "satisfied that, because of the special circumstances of the offence or of the offender, that the offender should not be so sentenced". (s 5(1) Criminal Justice Act 1985) The expression "satisfied" is not defined in the Act[4] but in so far as the phrase "unless the Court is satisfied" etc. constitutes a proviso within the section "satisfied" would appear to impose a statutory burden upon the defence to prove on the balance of probabilities the existence of special circumstances justifying the avoidance of s 5. There is clearly no duty on the Crown to prove the absence of special circumstances as part of its case.

An important question in

interpreting the phrase is whether "special circumstances" is a broad expression that could extend to all matters of mitigation that might tend to lessen guilt and reduce the punishment appropriate for the particular offence or offender[5] or whether it suggests a much narrower category of palliative factors going beyond mere matters in mitigation. Perhaps it should be noted that while any matter in mitigation of penalty may be effective in reducing the quantum of a particular penalty, the purpose of "special circumstances" where they exist, is to ensure that a particular type of penalty (namely imprisonment) is not imposed. Its concerns are thus qualitative not merely quantitative. In *Edwards v Police* [1986] BCL 615, in commenting onthe meaning of "special circumstances" in the context of s 6 of the Act Thorp J said

> before any circumstance can be brought into account it must be a "special" circumstance, not such as arises in the ordinary case.

There is no reason why a similar analysis should not apply in the context of s 5.

In *R v Tua* (supra) neither the defendant's age (18 at the time of the hearing) nor the fact that this was the first offence of violence were regarded as "special circumstances" for the purposes of s 5, although the offender's young age was a mitigating factor which influenced the Court in not imposing a "crushingly long" sentence.

Similarly in *Stoddart* (supra) the fact that the offender had alcohol and drug problems, had "family misfortunes" in his background, and was married with a child, were held by the Court not to constitute "special circumstances of the offender".

However "special circumstances" were at least impliedly present in *Fue v Police* [1986] NZ Recent Law 308. The appellant, a 16-year-old Samoan girl, had been sentenced to 18 months' imprisonment on three charges of robbery and six months' imprisonment on a charge of unlawfully getting into a motor vehicle. She had demanded jewellery from the complainant, a young girl, in the street. When the complainant walked away, she was stopped. Her sweater was taken after threats and she was punched in the face and upper body. The assault continued when she was taken into the toilet of a city restaurant. She received heavy bruising to her face and a cut lip.

The sentencing Judge decided there were no special circumstances — the case being seen as a typical street robbery requiring a deterrent sentence. However, on appeal the Court noted that there were "other considerations" to be taken into account apart from what was described as "certain mitigating factors", which affected the question of whether an imprisonment sentence should be imposed on a 16-year-old girl. These included the fact, first that the appellant had previously been dealt with only in the Children and Young Persons Court, secondly, the psychological effect of an 18-month prison sentence on a 16-year-old girl, thirdly, the reduction of the deterrent effect of sentencing if a young person is to be advanced immediately to the ultimate in deterrence (a jail sentence) and fourthly the risk of institutionalisation when a lengthy jail term is imposed on a young person. Although the Court did not identify these factors specifically as "special circumstances" it may be implied from the context that that was how they were regarded, and were differentiated from other mitigatory factors (the girl's age, guilty plea, influence of solvent sniffing, good pre-sentence report) which the sentencing Judge had also paid no attention to.

Although it is not a strong case upon which to argue the point that "special circumstances" are distinguishable from other matters in mitigation, nevertheless it may be argued that the legislature anticipates such a distinction being drawn in order to ensure that not any matter of mitigation can be advanced as a means of avoiding the full effect of s 5. "Special circumstances" implies matters of mitigation outside of the ordinary range of factors which palliate guilt.

Such factors were found to exist in *R v M* (unrep, High Court Auckland, 10 March 1987, (S 28/87) Eichelbaum J) which involved sentencing for the aggravated robbery of a suburban post office. Although the Court held that the presentation of a knife constituted "causing serious danger to the safety of any other person" in terms of s 5, the fact of a highly complimentary probation report and the potentially destructive effect of a prison term were factors held by the Court to establish special circumstances,[6] justifying supervision as an alternative to imprisonment.

The 1987 Amendments to s 5

It was suggested earlier that the justifications for the amendments to s 5 effected by the Criminal Justice Amendment (No 3) Act 1987, are not self-evident. There is no suggestion that s 5 in its original form was failing to meet the expectations of the legislature. Indeed, it may well have been a contributory factor to the recent swelling of New Zealand's prison population. The standard of "serious violence" and the threshold period of five years ensured that only the most dangerous of violent offenders would necessarily lose their liberty, leaving the Courts a broad discretion as to what types of deterrent sentences were more appropriate with regard to offenders whose conduct, while violent, did not constitute such a grave threat to public safety. The 1987 amendment with the reduction of the threshold period to two years now effectively abolishes the discretion vested in the Courts as regards violent offenders and, at least theoretically, will ensure that all offenders who use some violence in the course of committing most assaults, will go to jail regardless of the fact or degree of injury involved to the victim.

In respect of repeat offenders (those previously convicted on at least one occasion within the preceding two years of an offence of violence), the new standard of violence *simpliciter* will mean that it will be extremely difficult to avoid the presumption of imprisonment. "Special circumstances" will not be easy to establish and will offer little relief to most offenders; and granted the fact that "serious violence" may imply no injury at all, "violence" may be found to be present in respect of conduct which in other

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Part-time policing: an historical perspective

By Richard Hill, Senior Historian, Historical Publications Branch, Department of Internal Affairs

This article is of historical interest in respect of law enforcement in the old days, as a part-time occupation. The author explains the existence and the office of "district constables" and "native constables". It will be a surprise to many to learn that the offices continued to be filled up to the time of the Second World War.

Readers of my *Policing the Colonial Frontier* will have noted that the concept of the part-time policeman was introduced in New Zealand soon after the founding of the colony. It was to survive for a hundred years, and in special circumstances beyond, the last of the irregular police personnel being phased out a mere ten years ago. Throughout even the heyday of the institution of part-time police it was a scheme almost universally reviled by ordinary police of high and low rank alike.

From its beginnings the operation of the part-timer (most often called the "district constable") was devised as a stop-gap measure. Where there was a perceived need for a policing presence in a locality, but insufficient justification within available resources for a full-time policeman, a district constable would be appointed. The state (provincial governments until 1877, central government thereafter) would select a local resident to undertake any required policing functions in that area. He would carry these out, in liaison with the local JPs and with the nearest regular policeman, until an increasing problem of order in his area and/or extra state financial resources enabled his replacement by one or more permanent constables. At perhaps less than a fifth of the pay of the lowest ranked constable, it was an inexpensive solution to a temporary problem of coverage.

The concept also allowed flexibility of reponse to new policing needs. In remote areas as far afield as the Chatham Islands district constables would be appointed to aid the local JPs keep order. On the Otago goldfields a part-time "Chinese constable" superintended the Chinese miners. At various police gaols "female searchers" handled prisoners of their own sex for as little remuneration as £5 per annum.

Moreover police administrators were willing to hive off a number of inspectoral and enforcement activities upon other institutions by means of swearing in members or employees as constables. With such "special constables" patrolling wharves or botanical gardens, or inspecting "nuisances" or controlling traffic, regular police were freed for more pressing duties. In times when public disorder threatened, large numbers of specials could be sworn in to supplement the full-time police: on full pay, part-pay or mere reimbursement of expenses. Individual "specials" could be sworn in for specific policing purposes: paid £10, perhaps, to escort a prisoner to the destination they were already heading for. And in 1882 the New Zealand Constabulary Force absorbed the Native Department's institution of "native constable", the part-time Maori (or mixed race) constable who policed fellow Maoris in rural areas.

In a situation of tight limitations upon spending on policing, then, the part-timer was useful for the state. But when Inspector R C Shearman, formerly Commissioner of the Canterbury Provincial Police, characterised district and "native" constables as being nothing more than "hopeless", he was praising them vis-à-vis the views of other leading police administrators. The problem, as they saw it, was two-fold.

First, the fact that the part-time police had little or often no uniform symbolised their lack of training in policing, their lack of accountability to police regulations. Upon appointment they would normally be sworn in by the local JPs and told, without further ado, to get on with the job. Some received neither instructions nor law books. Small wonder that regular police were frequently frustrated by their performance.

Secondly, the paramilitary ethos which dominated nineteenth

century New Zealand policing elevated the "transfer principle" to a position of great importance. Because in a frontier society the police were tasked with *imposing* "correct" ways of behaviour upon the populace of both races, there could be no fraternisation with civilians, there could be no integration of constables into the community. Policemen, therefore, were required to undergo periodical transfers to new areas.

Although as the century wore on, practice on the issue of police mobility became increasingly divorced from theory, the institution of district constable had from its beginning blatantly violated the normative mode of policing in New Zealand. There was a very real fear amongst the men in control of policing activities that constables who were integrated into their local communities would not be able to carry out their duties objectively.

Most district (and to a lesser extent "native") constables were labourers, tradesmen or small farmers. They relied upon local people purchasing their wares and/or their labour in order to meet a proportion of their living expenses. Certainly their usefulness as possessors of an immense degree of local knowledge could not be questioned. On the other hand there were forever suspicions — and sometimes cases — of compromises by the part-time constable, of differential application of policing powers resulting from social, economic or tribal pressures.

All this being said, the fact remained that vast tracts of land, and specific types of policing activity, could be policed, often absurdly inexpensively, by the irregular policeman. In particular relatively peaceful country areas could be covered by a token part-time police presence, freeing up regular policing resources for districts given priority, especially those in and around the four major centres. It was the advent of increased population and improved transport and communications, legacies of the Vogelite boom of the 1870s, which signalled a turning point in the need for the district and "native" constable. More people meant more disorder; better transport and communications meant that regular constables could more easily reach areas once considered outlying.

When the New Zealand Constabulary Force emerged from the absorption by the Armed Constabulary of the provincial forces in 1877, it inherited a number of district constables from the provinces. Within three years Commissioner Reader had halted any further appointments, pending abolition of the institution. But it would not go away. District Constable Thomas Boyes' retirement early this century signalled the demise of the part-time police "dynasty", he and his father having farmed at and policed the Motueka area between them for nearly 50 years. Yet the odd part-time appointment of pakeha and Maori constables followed, and a few were clinging on by the Second World War.

All the same, with the professionalisation of the New Zealand Police Force during the reform era of 1898-1913, the seal was set upon the trend begun in the boom years of the 1870s: the part-time policeman was considered to have decreasing relevance in a modernised force. In the quarter century after 1908 less than two dozen district and "native" constables were sworn in.

Despite some highly publicised cases of spectacular incompetence, most part-time police had served their communities well. One of the last last "native" constables appointed, Te Raina Kingi of Te Kaha, provides a fitting example of duty in the service of state and community. He had provided voluntary help to the Police Force for some years, particularly in enforcing a regional prohibition upon consumption of alcohol by the Maori. When sworn to the office of constable in 1914, the "active and reliable" citizen was to be paid a salary of £30.

Apart from conventional police duties he would "attend the principal Maori gatherings between Cape Runaway and Torere, a district of some sixty miles", and conduct other specialised functions — "a considerable amount of work from the military authorities" in enforcing the state's wartime requirements, for example. Trying to run a farm as well as a policing operation, worn out and in ill health, he finally emulated a number of constables in his time by committing suicide.

This ultimate act of despair might serve to alert us to some of the dangers inherent in our earlier modes of irregular policing. Te Raina Kingi and others were caught up in a vicious circle. The small amount he received precluded policing from being his major source of income, and yet the scope of his police duties meant that it had frequently to dominate his working life. There was no possibility of limiting his role as a constable to set hours or days: his very usefulness to the state required the capacity to respond at once wherever a policing situation occurred.

Sometimes his lack of training led to an inadequate response, further adding to the problems inherent in attempting to feed, house and clothe a large family in adverse circumstances. Had he been fully restricted, had his area and/or his responsibilities been more limited, had regular police backup been readily available, things might have ended very differently. In the final analysis it was not his low salary which had been at issue — indeed it had been increased to £50 shortly before he threw himself over a cliff — for all reports showed that his motivation was that of service to what he considered to be in the best interests of his people. The real problem was that he was frustrated and depressed at being unable to provide that service within the terms of reference of his position. □

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1 For the various police forces and activites of the first century of pakeha contact see the author's *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867* (constituting parts I and II of vol I of "The History of Policing in New Zealand"), Wellington, 1986. For Maori policing modes, see the author's "Maori Policing in Nineteenth Century New Zealand", *Archifacts: Bulletin of the Archives and Records Association of New Zealand*, June, 1985. For lists and descriptions of various types of part-time police personnel, see Police Staff Books, vols I and II, New Zealand Police Centennial Museum, Royal New Zealand Police College, Porirua. Te Raina Kingi's file is at National Archives, Wellington.

Mistakes one: logic nil — or the triumph of private intentions unknowable to others:

The interpretation to date of the Contractual Mistakes Act 1977

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This article was originally delivered as a paper. It analyses the case law in respect of the Contractual Mistakes Act 1977 and is critical of the attitude adopted by the Courts in the interpretation of that legislation. The paper was prepared and delivered before its author received the August 1987 issue of the Law Journal *which contained a case note by Professor Burrows on the* Hawkins *case at [1987]* NZLJ *238. The author is conscious that there is therefore some element of overlap in respect of that decision.*

This article has two purposes. First, to show that the orthodox or "objective" theory of agreement (which consults the reasonable expectations of a party faced with the assent of an opposite party who subsequently claims to have been mistaken, or not to have intended what was outwardly agreed to) provides the best guide to a sensible and just law of mistake in contract.

Secondly, to show, further, that, in New Zealand, the Courts, considering themselves ordained by the legislature to lay aside the wisdom of the common law, have misapplied the Contractual Mistakes Act 1977, selectively disregarding it, and have wandered, without a guide, into a trackless region of discretion where confusion reigns and conflicting intentions are examined (much as palms are read in palmistry) in breach of the old injunction that the ". . . intent of man cannot be tried, for the Devil himself knows not the intent of man." (Anon, (1478) YB 17 Ed 4, Pasch fo 1, pl 2, per Brian CJ(CP))

Scheme of the article

It is proposed to look first, albeit briefly, at the common law background, that is, to the orthodox or traditional or "objective theory of agreement which will forever be identified with the dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597, at p 607. The paper will point to the chief merits of this approach, to its essential "subjective" ingredient or element, and to its reasonableness. A brief comparison will be made with the more rigidly "objective" theory associated chiefly with Lord Denning in a stream of self-confirming cases beginning with *Solle v Butcher* [1950] 1 KB 671, CA, a theory often known as the "fly on the wall" theory. [1]

Having outlined the orthodox theory of agreement, and drawn attention to its conceptual strength, the paper will then comment on where that theory was left, in New Zealand, on the enactment of the Contractual Mistakes Act 1977, and whether, in particular, the Act, as enacted, was intended to displace the orthodox theory in its reference to mistake in contract.

The last part of the paper will then address the case law (largely the reported case law), concentrating particularly on the one Court of Appeal authority to date (there having been, regrettably, as yet no appeal to the Privy Council touching the Act), namely, *Conlon v Ozolins* [1984] 1 NZLR 489, Greig J and CA.

The orthodox theory of agreement — *Smith v Hughes*

The orthodox or "objective" theory of agreement postulates that a contract will be enforceable by a plaintiff if a reasonable man in the shoes of the plaintiff (the objective element) would have believed (the subjective element) that the opposite party had assented to the contract, or made the offer in the sense accepted by the plaintiff, as the case may be. The fact that the opposite party's private intentions or silent understanding may have belied his overt acts or words or signature to a document is nothing to the case if the opposite party vouchsafes these private intentions or understanding not at all, and if the party seeking to enforce the contract believed on the objective evidence before him that the opposite party had assumed a contractual obligation in the sense which the plaintiff seeks to enforce.

The classic expression of this approach is of course the dictum of Blackburn J in *Smith v Hughes* (1871)

LR 6 QB 597, at p 607:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

That there is a subjective element in this predominantly objective approach is very clear. The two references to belief in Blackburn J's dictum (". . . a reasonable man would believe . . ." and ". . . upon that belief . . .") will be noted. As JP Vorster has commented, in giving what is both a summary and a compelling defence of the orthodox theory:

> . . . a party who wishes to enforce a contract in the sense in which a reasonable person in his position would have understood it, can do so only if he subjectively understood it in that sense. This is because an apparent contract is enforced in order to protect the expectation interest of the enforcing party. It is submitted that no purpose would be served by enforcing a contract in a sense in which it was not subjectively understood by the party seeking enforcement. ("A Comment on the Meaning of Objectivity in Contract," (1987) 104 LQR 274 at 286-7)

The subjective element in the orthodox approach has oftentimes been noted, recently, for example, by Mason ACJ and Murphy and Deane JJ in the decision of the High Court of Australia in *Taylor v Johnson* (1983) 151 CLR 422, at p 428:

> The judgments of Blackburn and Hannen JJ in *Smith v Hughes* provide support for the proposition that a contract is void if one party to the contract enters into it under a serious mistake as to the content or existence of a fundamental term and the other party has knowledge of that mistake. That approach accorded with what has been called the "subjective theory" of the nature of the assent necessary to constitute a valid contract . . .

(That case was one in which the High Court affirmed the setting aside of a contract for the sale of two adjoining pieces of land, the purchase price of which was stated in the contract to be $15,000 whereas the vendor thought she was selling the land for $15,000 *per acre*, that is, for approximately ten times as much, and where it was held that the purchaser *believed* at the time of entry into the contract that the vendor was under some serious mistake or misapprehension as to the price.)

Although the recognition of the subjective ingredient in the orthodox or "objective" theory of agreement (that is, belief on the part of the party seeking to enforce the contract that the opposite party has assented to the contract, or has made the offer forming the basis of the contract in the sense of the promise as understood by the person seeking to enforce it), it is vital, nevertheless, to stress the essential objectivity of the orthodox theory. The standard to be consulted is always that of the reasonable man in the position of the party wishing to enforce the contract, albeit that the party wishing to enforce the contract must believe that the other assented to it, or made the offer which formed the basis of the contract in the sense in which the contract is sought to be enforced by the party seeking relief.

This approach, namely, the orthodox approach encapsulated in the dictum of Blackburn J in *Smith v Hughes*, contrasts with the more rigidly objective approach which would consult only outward manifestations and discount relevant belief. The more rigid objective approach, labelled by William Howarth "detached objectivity" ("The Meaning of Objectivity in Contract" (1984) 100 LRQ 265), has many times been stated by Lord Denning. Perhaps the best statement of this approach, which requires what J R Spencer has termed a "reasonable fly on the wall" ("Signature, Consent and the Rule in *L'Estrange v Graucob*" [1973] CLJ 104 at 108), is to be found in *Solle v Butcher* [1950] 1 KB 671, CA, where Denning LJ stated, at p 691:

> . . . once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake.

As the last part of this passage indicates, the knowledge of the party seeking to enforce the contract that the other party was under a mistake at the time of contracting is discounted entirely, under this rigidly objective approach.

The obvious weakness in this more rigidly objective approach, many times noted, is that it ends up with Courts imposing contracts upon parties despite their beliefs, which may even be shared beliefs, each as to the apprehension of the other. As JR Spencer has put it so aptly:

> It may be acceptable for the law occasionally to force upon *one* of the parties an agreement he did not want; but surely there is something wrong with a theory which forces upon *both* of the parties an agreement which *neither* of them wants. If the "fly on the wall" theory does this, that is an excellent reason for rejecting it. ("Signature, Consent and the Rule in *L'Estrange v Graucob*", supra at p 113.)

The orthodox approach is the preferable approach and the reasonable approach. Although the standard is objective, the actual beliefs and knowledge, and also (where misleading is involved) the conduct, of the party seeking to enforce the contract, will be consulted to ensure that contracts are not made for parties and that injustice is not done. Hence well-known examples such as *Hartog v Colin & Shields* [1939] 3 All ER 566,

Singleton J, where it was held that the plaintiff, seeking to enforce a contract for the sale of 30,000 Argentine hare skins at a price per pound instead of a price per piece, *must have known* that there was a mistake on the part of the defendant. As Singleton J stated, at p 568:

> The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerers' real intention.

Likewise, *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564, (Lawrence J) which concerned a contract for the sale of Russian tow sold at auction, where the plaintiffs had in effect misled the defendants by there being confusing markings on samples in the plaintiffs' showrooms, the defendants believing, when they made their bid, on the basis of what they had seen, that they were buying Russian hemp (a higher-priced article).

As these and other well-known cases illustrate, the orthodox or "objective" approach emphasises above all else the reasonable expectations of the party seeking to enforce a contract. If that party knows or reasonably believes that the opposite party (despite outward assent) does not in truth agree, the contract will not be enforced; likewise, where the party seeking to enforce the contract has misled the opposite party and in that sense could not reasonably believe the other party truly to have agreed, despite whatever outward manifestation of agreement may in fact have been given, again the contract will not be enforced, indeed will be held not to exist.

Outward manifestations may of course be misleading. Courts are at times called upon to ". . . penetrate any disguise presented by the actual words the parties have used . . ." *(United City Merchants (Investments) Limited v Royal Bank of Canada* [1983] 1 AC 168, HL(E), at 190A). And of course there may often be cases, where there is no element of sham, but where the parties' subjective understandings coincide even though the written or formal manifestation of the agreement is amiss or to one side. Such a case can be accommodated within the orthodox theory of agreement but not readily within the more rigidly objective theory.

The orthodox theory of agreement is on the one hand flexible enough to take account of such cases yet on the other hand also soundly based in reason and good sense. The mere private intentions of parties, being intentions not vouchsafed or known to the party seeking to enforce the contract at time of contracting, however, are not consulted, and properly not so. For the standard has to be objective if there is to be reasonable certainty and reasonable ". . . security of contractual relationships" (to use a phrase from s 4(2) of the Act, a provision now relegated to Cinderella status).

Having examined, however briefly, the orthodox theory of agreement, represented so well by the dictum of Blackburn J in *Smith v Hughes*, if falls now to consider whether the Act, as enacted, did in fact displace the orthodox theory of agreement (in its relation to mistake) and along with it the principle in *Smith v Hughes*, as the Court of Appeal has indeed held in *Conlon v Ozolins* [1984] 1 NZLR 489, Greig J and CA.

Whether the Contractual Mistakes Act, as enacted, was intended to displace the objective approach and the principle in *Smith v Hughes*

The 1977 Act presents one of those unusual cases of legislation metamorphosed in interpretation. As enacted, it was but a modest caterpillar; as interpreted, and given wings, by the Court of Appeal, it has become a giddy butterfly, the future course of which defies prediction. The remarkable and serious aspect, however, is that the interpretation as imposed (or superimposed) appears to depart, radically, from the express words of the Act and would appear, indeed, to be directly contrary to them.

That the Act, as enacted, was not intended to displace the orthodox theory of agreement (in its relation to mistake), or, more specifically, to displace the principle in *Smith v Hughes* is, it is submitted, clear beyond doubt.

This can be seen, most obviously, from the terms of ss 5(1) and 6(1)(a). Section 5(1) spells out that the Act shall have effect in place of the rules of common law and equity, but only ". . . governing the circumstances in which relief may be granted, on the grounds of mistake . . .". It is not therefore a "code" for other, more general, purposes, and certainly not a code as to mistake generally. It may be a code as to *relief* (substituting discretion for the principles of the common law and equity) but that is all. Section 5 effects no displacement of the rule in *Smith v Hughes.*

As to s 6, that provision is clearly headed:

> *"6. Relief may be granted where mistake by one party is known to opposing party or is common or mutual".*

The provisions of s 6(1) then refer in detail to the three categories of mistake set forward in the heading.

Section 6(1)(a)(i) deals with unilateral mistake but, be it always noted, with unilateral mistake *known to the opposing party* (as was the case in *Taylor v Johnson* (1983) 151 CLR 422, High Court of Australia) to cite a recent example already given.

Section 6(1)(a)(ii) deals with common mistake as where both parties believe they are buying a painting by Goldie but, unrealised by both, the painting is in fact by Lindauer.

Section 6(1)(a)(iii) deals with the perhaps rarer case of mutual mistake as where the one party thinks he is buying a Goldie and the other believes he is selling a Lindauer but the work is in fact by Colin McCahon.

A crucial element in s 6(1)(a)(iii) is that both parties must have been influenced in their respective decisions to enter into the contract by a different mistake but one *about the same matter of fact or of law.*

As enacted, it can be seen that the Act is conservative. It retains existing categories and, indeed, in s 6(1)(a), defines them carefully in terms immediately recognisable to all common lawyers.

There is tangibly no suggestion in the Act, as enacted, that a mistake by a contracting party unknown to

the other at the time of contract was, from the date of commencement of the Act, to qualify for relief.

By the same token, it is submitted that there is manifestly no suggestion in the Act, as enacted, that the orthodox or "objective" theory of agreement (in its relation to mistake) is jettisoned or that the principle in *Smith v Hughes* is displaced.

Except as to *relief* (where existing rules are set at large and discretionary carte blanche given to the Courts), the Act, in its fundamentals, is not radical and could, without violence to its provisions, and indeed consonantly with them, have been interpreted conservatively and in accordance with the common law, as, it is submitted, was manifestly intended should be the case.

There is no space here to back up the statements just made by reference to the Report of the Contracts and Commercial Law Reform Committee entitled "Report on the Effect of Mistakes on Contracts" (Wellington, Justice Department, May 1976), which was the precursor of the Act, or by reference to the history of the legislation when it was going through its Bill stages in the House.

Suffice it to say that it is clear from those evidences, as much as it is from the terms of the Act itself, that the Act was not intended to revolutionise the substantive law of mistake and most certainly not intended to overturn the objective principle.[2]

Specifically, s 5(1) stands innocent of any such charge. Likewise, s 6(1)(a) must also be acquitted. Unilateral mistake, to afford ground for relief under the Act, must, by the express words of enactment, have been ". . . known to the other party. . . .". Reference the heading to s 6 and s 6(1)(a)(i) itself.

Yet at the hands of the Court of Appeal, the Act has been transformed by judicial interpretation. Such a feat is not often seen. The objective principle has indeed been overturned, not by the Act but by interpretation, that is, by judicial law-making plainly unintended by the legislature. It is to that story that this paper now turns.

The Act as interpreted by the Court of Appeal (and by the High Court following *Conlon v Ozolins*)

In one of the earliest cases on the Act (certainly the earliest reported case) to come before the High Court, namely, *McCullough v McGrath's Stock and Poultry Limited* [1981] 2 NZLR 428, Mahon J, and likewise in *Conlon v Ozolins* [1984] 1 NZLR 489, before Greig J at first instance, the 1977 Act was given what might be described as a cautious and careful interpretation in keeping with its terms, thus preserving, as the legislature so clearly appears to have intended, the orthodox or objective principle in relation to mistake. In *Conlon v Ozolins*, which was a case where the contract specified the sale of four lots but the vendor (an elderly widow) had evidently intended to sell only three lots, Greig J found in the High Court that only the vendor, Mrs Ozolins (whose solicitor had drawn up the agreement), was mistaken; the plaintiff, Mr Conlon, ". . . was entirely innocent of any knowledge as to the existence of the mistake". (p 494, ll 34-5) Greig J, after carefully considering the factors relevant to the exercise of his discretion to order, or not to order, specific performance, made the order sought by the plaintiff, who had not unreasonably committed himself, on the strength of his contract with Mrs Ozolins, to a townhouse development project of some scale.

Greig J specifically commented on the conduct of Mrs Ozolins as follows:

> As will be seen from what I have already said it is my view that she alone caused the mistake either directly or through her solicitor. That must count in this case powerfully against her but, in considering the just relief to be granted, it is proper, in my view, to take account of principles such as *Smith v Hughes* which are intended to provide justice and are to maintain, in the words of s 4(2) of the Act, the general security of contractual relationships. The mistake was created and supported by the conduct of the defendant and she was careless and negligent in signing the agreement which specifically provided for the sale of the four lots. It would not be just, in my view, to grant her relief. (p 495, ll 19-27).

The judgment of Greig J is, with respect, an estimable exercise in statutory interpretation and makes manifest good sense. Greig J held true to the objective principle and evidently found no difficulty presented by the provisions of the Act in so doing. Mrs Ozolins appealed.

In the Court of Appeal, a split decision resulted, with Woodhouse P and McMullin J in the majority reversing the judgment of Greig J, with Somers J dissenting. From the report, it appears that the hearing occupied only one day. Given the great importance of the case, it appears that the argument presented as to s 6(1)(a)(iii), on which provision the majority judgments turned, was not extensive. McMullin J commented, at p 505, ll 1-3:

> Whether the mistake came within s 6(1)(a)(iii) was but briefly touched on in argument in this Court, and then only after a question from the Bench . . .

Somers J, at p 507, ll 50-1, commented:

> In the instant case the vendor relies on subpara (iii). It is unfortunate that virtually no argument was directed to this, the most critical point in the case.

In essence, the majority Judges held the case to come within s 6(1)(a)(iii), notwithstanding that Mrs Ozolins' mistake was, quite patently, unknown to Mr Conlon.

In short, despite the fact that Mrs Ozolins' mistake was her mistake alone, and unknown to Mr Conlon, that is, it was a *unilateral mistake unknown to the opposing party*, a category of mistake not affording ground for relief either at common law or, on the face of it, under s 6(1) of the Act, the majority Judges were prepared to hold, and did hold, that such a mistake could qualify for relief under s 6(1)(a)(iii), which relates to *mutual mistake*, a different category of mistake altogether.

To reach this conclusion, some little sophistication, and pioneering

formulary work, was required. To reach such a conclusion with any semblance of reference to the Act involved holding that the parties ". . . were each influenced in their respective decisions to enter into the contract by a different mistake *about the same matter of fact*" (s 6(1)(a)(iii), emphasis added).

Woodhouse P came to this result on the footing that Mr Conlon ". . . mistakenly thought she [Mrs Ozolins] was consciously selling all the land at the rear of her house including the garden . . ." whereas Mrs Ozolins ". . . mistakenly thought he [Mr Conlon] was buying merely the land beyond the high fence. . ." (p 498, ll 50-2).

McMullin J reached the same conclusion on the footing that Mr Conlon's "mistake" was ". . . in thinking that the appellant intended to sell lots 1 to 4 . . ." whereas Mrs Ozolins' mistake was in thinking that she was selling only lots 1-3 (see p 505, ll 10-12).

Despite this difference in formulation, that is, as between the two majority Judges as to the operative mistake (itself perhaps significant), the approach, in essence, of both majority Judges was to hold that the private, undisclosed, intention or understanding of Mrs Ozolins qualified for relief notwithstanding:

(a) That in any objective sense Mr Conlon made no mistake, as his understanding accorded entirely with the express terms of the contract, and
(b) That, even on the majority Judges' (different) formulations, the "mistakes" made by the two parties were not in fact "mistakes" *as to the same matter of fact* (as required by s 6(1)(a)(iii)).

For, as Professor McLauchlan has so rightly pointed out, mistakes by contracting parties as to the intentions of each other are mistakes about different matters of fact. He writes:

> The parties are mistaken about different matters of fact; the seller about the buyer's intention, the buyer about the seller's intention. ("Mistake as to Contractual Terms under the Contractual Mistakes Act 1977" supra, p 153)

That the conclusions reached by the majority Judges in *Conlon v Ozolins* represented a most serious departure from accepted principle, and at the same time represented a remarkable example of the judicial rewriting of legislation, was quickly appreciated. The decision has been greeted by those who have written upon it with general dismay and misgiving.[3]

The common chord of concern has been the abandonment by the majority Judges of the objective principle and the elevation of mere variant intention (unknown of course to the opposite party) as an excuse or ground for relief, something clearly not anticipated in the Act itself, and indeed contrary to it, and a grave departure from the orthodox or "objective" principle.

As Mindy Chen-Wishart has most aptly commented:

> . . . what passes for controlled flexibility is, in truth, a floppiness which leaves each case at the mercy of judicial manipulation. ((1986) 6 Otago LR 334 at 344)

That the approach of the majority Judges raised a very serious issue was not lost upon Somers J, whose dissenting judgment repays close study. Somers J identified the concern which has been raised by commentators many times since in the following terms. He stated, at p 508, ll 15-30:

> The instant case is one which Parliament intended to be met only if the purchaser knew of the vendor's mistake — that is to say if the case fell within s 6(1)(a)(i). If the purchaser's postulated mistake — namely that he erroneously thought the vendor intended to sell him all four lots — is sufficient to bring the case within subpara (iii), there will be few, if any, cases of mistaken intent not falling within the Act. For as often as one party is mistaken in intention the other party will be taken to be relevantly differently mistaken about the same matter of fact so as to bring the case within subpara (iii). I do not consider this can have been the legislative purpose. If it were subpara (i) which requires knowledge by one party of the mistake of the other seems superfluous.
>
> If this should seem a restrictive approach it must be recalled that mistake involves an area in which the law prior to the Act, and Parliament in the Act, has had to balance the injustice of committing a party to a contract he did not intend to make and the commercial expectation of security of contract which has received special mention in s 4(2).
>
> I am of opinion that the case does not fall within s 6(1)(a) at all.

Here we have the vindication of the approach of Greig J, albeit in a dissenting judgment which nevertheless marked out the issue, and the seriousness of the departure made by the majority Judges, in the clearest terms. Here we also see the basic concern, which has been addressed so many times since, clearly identified. If mere private variant intention, undisclosed and unknown to the opposite party, is a sufficient ground of relief, as most clearly the Act did not intend, mistake could be raised in almost any contract case where one party later comes to the view that he or she or it made a bad bargain. Nothing is easier than to say later:

> Oh, I thought this or that was the case when I contracted notwithstanding that it finds no mention in the contract which I entered; I acknowledge that I didn't say anything about it or make my view known at the time; but now I see what I did, I don't like it, and I demand relief.

The scope for "mistake" of this kind (what might be called "popular mistake") is great indeed, as so many commentators, following the lead of Somers J, have identified.

That such a serious departure from established principle (that is, from the orthodox or objective principle of agreement, in its relation to mistake), and from the express terms of the Act, could, by judicial interpretation, be imposed upon the law, is indeed serious, as has been generally realised.

In what has passed since *Conlon v Ozolins*, the worst fears of commentators appear to have been

borne out. Of course it must be said that the High Court Judges who have decided cases arising since *Conlon v Ozolins* have been bound by it and have had to apply it.

Even before *Conlon v Ozolins* was decided by the Court of Appeal, however, a harbinger of what was to come presented itself in the shape of *Ware v Johnson* [1984] 2 NZLR 518, Prichard J, a case concerning principally allegations of breach of contract and misrepresention in relation to the sale and purchase of a kiwifruit orchard which the vendors had sprayed with Krovar, a herbicide inimical to kiwifruit. A defence of mistake was raised. In a passage couched in wide terms, Prichard J observed, of s 6(1)(a)(ii):

> But there does exist the requirement that both parties be influenced by the mistake. In my view this means no more than that both parties must necessarily have mistakenly accepted in their minds the existence of some fact which affects to a material degree the worth of the consideration given by one of the parties. (p 540)

The reference to parties accepting something ". . . in their minds. . ." was ominous. And so it proved. This was a pointer or prompting for Chilwell J, in a later case, *Hawkins Construction Limited v McKay Electrical (Whangarei) Limited* [1987] BCL 713, in which the matter was taken up in these terms:

> It must follow, I think, as demonstrated by *Conlon v Ozolins*, that once the Court finds influencing error in the thinking of one party about a matter of fact or of law which differs from the thinking of the other party about the same matter of fact or of law, so long as that thinking influenced each party to enter into the contract, then section 6(1)(a)(iii) will apply.

In short, differences "in thinking" about the same matter of fact may suffice to found relief if the parties are influenced to enter into the contract by their respective "different thinking". Thinking, not communication of thought, can be enough under the doctrine of *Conlon v Ozolins*.

That the majority judgments in *Conlon v Ozolins* lead to this conclusion is undoubted.

Both *Engineering Plastics Ltd v J Mercer & Sons Limited* [1985] 2 NZLR 72, Tompkins J, and *Hawkins Construction Limited v McKay Electrical (Whangarei) Limited*, supra, Chilwell J, are very clear, indeed stark, cases. The *Hawkins* case is especially so and in this respect parallels *Conlon v Ozolins*.

In the *Engineering Plastics* case, Tompkins J found that, in the case of a sale of 4000 O-Rings for a price stated to be "$644.96/c", that is, as the Judge found, $644.96 per hundred, the defendant, who had assumed that the expression "/c" had no meaning and had disregarded it, could obtain relief under the Act, grounding its claim upon s 6(1)(a)(iii) as per *Conlon v Ozolins*. The Court granted relief to the defendant in terms of s 7, varying the contract to provide for a new price of $4.00 per ring; in effect, the Court rewrote the contract.

Tompkins J, after citing *Conlon v Ozolins*, analysed the case before him in these terms, at p 82, ll 31-39:

> This analysis applies to the present case. Each party had a mistaken belief about their intentions concerning the price. That mistaken belief influenced their respective decisions to enter into the contract. The plaintiff mistakenly thought the defendant was intending to agree to buy the 4000 rings for $644.96 per hundred, plus the tooling charge. The defendant mistakenly thought that the plaintiff was intending to agree to sell the 4000 rings for $644.96, plus the tooling charge. Those mistaken beliefs were different, but they were about the same matter of fact, namely, the price each thought was payable under the contract.

The *Engineering Plastics* case is therefore a faithful application of the majority's approach in *Conlon v Ozolins* and exactly the same fundamental criticism can be made of it. It grounds relief on private, uncommunicated, intention, or upon misunderstanding, unknown to the opposite party.

The *Engineering Plastics* case does, however, have one uncomfortable twist of its own. The Judge raised but then rejected the possibility that the "mistake" in question was a mistake in interpretation, such as would have barred relief in terms of s 6(2)(a). The matter was put by the Judge in this way:

> It could be considered that the defendant, in attaching the meaning it did to the words in the contract
>
> "Price $644.96/c"
>
> made a mistake in its interpretation of the contract, but in my view that is not the mistake that gives rise to the right to relief. That, as I have indicated, was a mistaken belief by each party about the intention of the other concerning the price. That is not a matter of interpretation — it relates rather to what the parties thought the other intended when they entered into the contract. (p 83, ll 19-26)

While no doubt giving further succour to *Conlon v Ozolins*, this additional element in the *Engineering Plastics* case is of concern in itself as it effectively emasculates or denatures a specific provision in the Act, designed to prevent relief being given where interpretation (a matter of law, on which the Judge had indeed made a relevant holding) is in issue. With all due respect to the Judge, and of course recognising that, he having set out on the *Conlon v Ozolins* path, he would not unnaturally be disposed to take a further step upon that path, it would seem hard to postulate a clearer case of a mistake as to interpretation on which the Court, as a Court of interpretation, had indeed made a holding. It is suggested that the consequence required by the Act should then have followed: there should have been no relief granted, the mistake being one of interpretation and relief under s 7 being barred in such a case.

As to *Hawkins Construction Limited v McKay Electrical (Whangarei) Limited*, (supra) this too is an interesting case, chiefly because a Judge demonstrates in his judgment the fullest, indeed an unerring, understanding of the implications of the doctrine of *Conlon v Ozolins* but yet of course

was bound to follow it.

The case concerned a subcontract for electrical work where the subcontractor had tendered or quoted a price which did not include a PC item of $7,000 for a 3-phase transformer to be supplied by the Bay of Islands Electric Power Board. That the quotation, and the contract, and indeed the specification on which the quotation was based, did none of them include the PC item (and were not intended to) was beyond doubt. As the Judge held, at p 10 of his judgment:

> As was the case in *Conlon v Ozolins* the documents were perfectly unambiguous and reflected no mistake by any person.

The Judge set out the approach (that is, the *Conlon v Ozolins* approach) with stark clarity in the following passage, at p 17 of his judgment:

> If one can assume, in a clear case like the present, that one party thinks right about a matter of fact affecting price and the other thinks wrong and each is influenced in their respective decisions to enter into a contract, each is clearly thinking differently about the same matter of fact. It cannot be said that only the wrong thinker made a mistake because that begs the question: What was the correct price? This demonstrates that in a case such as the present it is unwise to make assumptions. The Judge has to abandon common law objective standards and approach the evidence in relation to proof of mistake from the subjective viewpoint of the parties to the contract.

He added, at p 18 of his judgment:

> In my judgment this case is indistinguishable from *Conlon v Ozolins*. . . What, with respect to the Judge, seems to have been a common sense decision on the evidence must yield to the new doctrine of contractual mistake.

The case, which was an appeal from the District Court, was remitted to that Court with much the same sort of order as the Court of Appeal made in *Conlon v Ozolins*.

Where does the case law leave us? The case law undoubtedly leaves us, as Chilwell J so aptly put it, with a ". . . new doctrine of contractual mistake . . ." (p 18), and with the common law objective standards abandoned, the Courts having to approach the evidence in relation to proof of mistake ". . . from the subjective viewpoint of the parties to the contract". (p 17)

What does this mean for lawyers attempting to advise clients, let alone for contracting parties? It means lack of predictive ability, lack of certainty and a general weakening of the "security of contractual relationships" (to use the disregarded language of s 4(2)).

It means discretion rather than law. It means private intentions and subjective understandings in place of the objective principle.

It means that the objective principle in relation to mistake is gone. And unquestionably, violence has been done to a conservative enactment. A conservative Act has been "interpreted" in a way that no one could have foreseen and in a way, it is suggested, clearly contrary to its terms.

In the disturbed wake of *Conlon v Ozolins*, the law of mistake is now in a manifestly unsatisfactory state. Yet statutory amendment is unlikely to put matters right as the original statute is not at fault. It is the majority judgments in *Conlon v Ozolins* which, disregarding the statute, and giving it an operation which is difficult, if not impossible, to reconcile with its terms, have wrought the violence which has been done. Why then pass a curative Act which might be disregarded in exactly the same manner?

What is fervently to be hoped is that another case will shortly present itself to the Court of Appeal which will enable the Court, this time with the benefit of full and extensive argument on the issues traversed in this paper, and likewise traversed in the many other papers which have been written on the subject, to reconsider and, it is hoped, to depart from its earlier decision and so put matters right. It is likewise to be hoped that the Privy Council will have an opportunity to pronounce, finally and conclusively, upon the Act before too much further time passes and before the new "doctrine" takes root, if root can ever be taken in the wandering sands of discretion and private intention. □

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1. See most notably, J R Spencer, "Signature, Consent, and the Rule in *L'Estrange v Graucob*" [1973] CLJ 104; William Howarth, "The Meaning of Objectivity in Contract", (1984) 100 LQR 265; and J P Vorster, "A Comment on the Meaning of Objectivity in Contract", (1987) 104 LQR 274.
2. See generally, D W McLauchlan, "Mistake as to Contractual Terms under the Contractual Mistakes Act 1977", (1986) 12 NZULR 123, especially pp 145-153.
3. See particularly S Dukeson, [1985] NZLJ 39, F Dawson, (1985) 11 NZULR 282 and [1985] LMCLQ 42, D W McLauchlan, (1986) 12 NZULR 123, and M Chen-Wishart, (1986) 6 Otago LR 334.

Privy Council and local conditions

From the judgment of the Board in the case of *Chan Hak-So v The Queen* delivered on 2 November 1987:

Their Lordships were urged by counsel for the Crown to take the view that the Court of Appeal of Hong Kong, being familiar with local conditions, was best qualified to evaluate the cogency and effect of evidence about events in Hong Kong society. This Board is always willing and anxious to give full weight to the advantages of local knowledge enjoyed by Courts exercising jurisdiction in other parts of the Commonwealth when it is appropriate to do so. But their Lordships think that the criteria by which the sufficiency of evidence in a criminal case should be judged must be purely objective and must be the same in any common law jurisdiction from which appeal lies to Her Majesty in Council.

Christmas message to the Profession

From Peter Clapshaw, President of the New Zealand Law Society

As 1987 draws to a close I am grateful to the *New Zealand Law Journal* for affording me this opportunity to send to the profession what will be my last Christmas message as President of the New Zealand Law Society.

The Triennial Law Conference in Christchurch has to be the highlight of the year for the profession. It has been acclaimed as outstandingly successful by everyone who has spoken or written to me about it, particularly our visitors from overseas. The weather was kind and vindicated the decision to hold the Conference in the spring. The organisation was meticulous and the whole event was a great credit to the Organising Committee and its many helpers.

1987 will also be notable as the year in which the structure for the new Practical Legal Training Course was put in place, the first Solicitors Property Centre established and the debate on interdisciplinary practices and partnerships commenced. These seemingly unrelated issues move me to make professionalism the theme of this end of year message.

As lawyers we are practitioners of a proud profession which carries with it both privilege and obligation. The role of the independent lawyer in society is of great constitutional significance. That role is of increased importance at a time when many long established traditions and rights are under scrutiny and attack, often on the basis of untested theoretical assumptions. The need to be efficient and competitive requires us to organise our practices on a businesslike basis. However we, and society as a whole, will be the losers if we permit those business methods to submerge our professionalism. Lawyers have traditionally commanded respect even if they have not always been popular. That respect is based upon the image of lawyers as true professionals with a sense of public duty, not as businessmen and women whose sole objective is the pursuit of commercial advantage.

Lawyers throughout the country continue to spend countless hours voluntarily serving the community in discharge of their professional responsibilities. Many of these acts of service are unpublicised and may be thought to pass unnoticed. However they are a vital part of the fabric of our profession. It is an honourable burden which should be shared by all who choose to practise law.

In 1988 there will be further challenges to the traditional role of the lawyer. Let us all adopt for the New Year a determination to resist these challenges from wherever they may come. Let us also resolve to uphold our professionalism and reject any moves which might weaken or erode it.

I wish you all a Merry Christmas and a relaxing and happy holiday season. □

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some may avoid, damage: they, too, must ask not just "is it legal?" but also "is it right?" They must see to it that the law is administered justly and fairly. They must be scrupulous to avoid acting to "punish" anyone whom they suspect to have engaged in tax avoidance, by conducting a vendetta against them, or by exercising powers adversely and for an end foreign to the purpose for which those powers were conferred.

The rapidly developing understanding of the place of the administrative law remedies in this connection can provide a corrective for human failure to meet those ideals: but that has become a big subject of its own, and is discussed fully in *Molloy on Tax Disputes, Investigations, and Crimes* (1987). □

Jury nobbling: an inside story

Lawyers in Rapid City, South Dakota, have just encountered a novel variation on the practice of jury nobbling.

Following the successful conclusion of a malpractice suit against a surgeon, one of the jurors who had helped award $350,000 in damages, approached the plaintiff's attorney Donald Shultz with an unusual offer. James Curtis, the juror, believed he had information which could help the surgeon's attorney have the jury's verdict overturned on appeal.

The information was that Curtis had a criminal conviction, for a felony arising out of a St Valentine's card fraud, which should have disqualified him from sitting on the jury. The offer was that he would not tell the defence, if Shultz was prepared buy him off.

Curtis obviously had a sense of humour as he asked for "a percentage of your fee similar to what you charge your clients". In other words, about $30,000, which was one third of the one third contingency fee Shultz himself stood to be paid for the case. Shultz however, was "not for sale" and informed the local police who in due course, with the aid of marked dollar bills and bugging microphones, arrested Curtis for attempted theft by threat.

Unfortunately, Shultz's honesty has not helped the malpractice suit, for the surgeon's attorney has now appealed, alleging that the presence of Curtis on the panel had tainted the jury's verdict. (1987) 131 SJ 36.

The process of the Courts:
The slowing effect of electronic devices

By Charles Hutchinson QC of Auckland

In this article Charles Hutchinson QC queries the value of some of the uses to which electronic devices are put in preparing material for a Court. He extends the article to look at the way in which a brief should be prepared and the proper form of presentation of a case in Court by counsel. Practitioners, particularly young practitioners, will find this a very useful statement of the basic procedures that should be followed.

It would appear that the modern world is being plagued by the overuse of electronic devices such as photostatic copies of cases, computers, and word processing machines, which often result in a mass of undigested material, much of which is of no assistance, being produced by counsel to the learned Judges. Three basic principles have proved to be successful if adopted and applied to most problems in the following order—

1 The first principle: Counsel must obtain all the facts and set them out in chronological order

The facts, if feasible, should be obtained by the instructing solicitor and given to counsel. This enables counsel to stand off and look at the facts so presented without being influenced by the lay client who recounts them. Counsel, bringing at that stage an impartial mind to those facts, is in a position to recognise discrepancies or omissions and can then require the instructing solicitor to verify or produce additional facts.

2 The second principle is for counsel to apply common sense to the facts

It should always be borne in mind that Lord Justice Farwell, in one of his judgments said: "The Common Law of England is the 'common sense' of the Nation distilled down through the centuries." There is another well known generalisation which is: "If an answer to a legal problem is not 'common sense' it is *not* good law." In *Barker v Herbert* [1911] 2 KB 633 in the Court of Appeal, the plaintiff sought damages having been injured through "a nuisance" which existed on premises adjoining the highway. Farwell L J in the course of his judgment at pp 644-5 said:

> The liability sought to be enforced here is a common law liability. The common law is, or ought to be, the common sense of the community crystallised and formulated by our forefathers. If a proposition of law is put forward by Counsel, and that proposition seems to be repugnant to common sense, I am disposed to think that the argument is at fault rather than the Law.

New Zealand inherited the Statute Law of England as it existed on the fourteenth day of January 1840 and the benefit of the interpretation of those statutes as enshrined in the Case Law of England.

In its early history, the ordinance and subsequently the statute making power of New Zealand was restrained by instructions received by the Governor for Her Majesty Queen Victoria and by Acts of the Imperial Parliament. These restraints have gradually been removed over the years. Since the passing in New Zealand of The Statute of Westminster Adoption Act 1947, there were two further Acts. In New Zealand there was the New Zealand Constitution (Request and Consent) Act 1947, followed by the New Zealand Constitution Amendment Act (UK) 1947. The result of these three Acts passed in 1947 is that the New Zealand Parliament can amend the Constitution Act as it sees fit *except* it cannot amend "The Succession to the Throne" or The Royal Titles.

3 The third principle is that:

Having decided what the "Common Sense" answer to the problem is, counsel then turns to the Law to discover whether that answer agrees with the Law and the principles laid down by leading cases in New Zealand and England and elsewhere within the British Commonwealth. Counsel first must find the principle or principles upon which he intends to rely in support of each of his propositions.

In modern times it appears that there is an increasing tendency, having found the legal principle in the leading case that applies, counsel then produces to the learned Judge photostat copies of every case in which the leading case has been applied, distinguished or discussed and hands the copies thereof up to the learned Judge. In some instances counsel then quotes extracts from these cases without referring to the facts. It is important to remember that before the invention of copying machines the learned Judges were complaining about the misuse of cases.

In the 19th century there are examples of statements made by Sir George Jessel M R in the course of his judgments. In a will case in which many cases had been cited to him by the Bar, at the

commencement of his judgment he said:

> In my judgment the principle that applies to this case was laid down in the case of *A v C* which is as follows, [He then stated the principle and went on to say] Many cases have been cited to me concerning the application of this principle but what my Brethren have done with this principle in respect of entirely different facts is of no interest, nor assistance to me whatsoever. [The above is not the exact wording of the judgment.]

In *Duke of Bedford v Dawson* L R 20 Eq 355 at 357 in the course of his judgment Sir George Jessel M R said:

> As usual, though the matter is so very clear to my mind on the facts and on the Act of Parliament, it has been embarrassed by a reference to a number of authorities.

In this century, in the case of *Martell v Consett Iron Co Ltd* [1955] Ch. 363; [1955] 1 All ER 481 in the Court of Appeal, the plaintiff sought to maintain an action for pollution of the River Derwent. The plaintiff claimed that the defendant had polluted the river to the detriment of their fishing rights. In order to succeed the plaintiffs had to rely on proving a "Common Law misdemeanour" or a "Common Law tort". Jenkins L J, later Lord Jenkins, in the course of his judgment at pp 414; 498, after referring to certain cases that had been cited by counsel said:

> But it is an abuse of authorities to extract from judgments general statements of law made in relation to the facts and circumstances of particular cases, and treat them as concluding cases in which the facts and circumstances are entirely different, and which raise questions to which their authors were not directing their minds at all.

More recently, in the case of *Lambert v Lewis* [1981] 1 All ER 1185 in the House of Lords, which dealt with contributions by joint tortfeasors, Lord Diplock in the course of his opinion at page 1189 said this:

> My Lords, the respect which under the Common Law is paid to precedent makes it tempting to the appellate advocate to cite a plethora of authorities which do no more than illustrate the application to particular facts of a well established principle of law that has been clearly stated in what, by consensus of Bench and Bar and academic writers, has come to be treated as the leading case on the subject. In those cases that are no more than illustrations, however, there are likely to be found judicial statements of the principle that do not follow the precise language in which the principle is expressed in the leading case, but use some paragraphs of it that the Judge thinks is specially apt to explain its application to the facts of the particular case. The citation of a plethora of illustrative authorities, apart from being time and cost consuming, presents the danger of so blinding the Court with case law that it has difficulty in seeing the wood of legal principle from the trees of paraphrase.

In *Manton v Cantwell* [1920] AC 781, the question to be decided was whether a casual labourer who was injured was employed "for the purposes of the employer's trade or business". Lord Birkenhead LC in the course of his opinion uttered a timely warning where he said on p 786:

> In considering whether or not the employment was "for the purposes of the employer's trade or business", we are to apply our minds to the facts of the particular case; it is neither correct or proper to travel beyond the facts of the particular case in an attempt to lay down general rules to govern cases which may or may not arise thereafter, the observations I have to make are founded on the facts of this case and ought not to be extended beyond those facts or similar facts.

Counsel should then read and note the name and citation of all subsequent cases in which the leading case has been applied, distinguished or discussed.

The duties of counsel are as follows:
1 Never wittingly misstate the facts.

2 Never misrepresent the Law. This extends to the duty of Counsel to draw the attention of the Court to any case which appears to decide contrary to any proposition or which he is intending to rely, and endeavour to distinguish it. In the case of *Glebe Sugar Refining Co Ltd & Ors v Trustees of the Port and Harbour of Greenoch* [1921] 2 AC 66 in the House of Lords, the question to be determined whether a lease of a graving dock was authorised by the Greenoch Port and Harbour Consolidation Act 1913. The decision was reserved and one of their Lordships discovered that a section of the Harbours, Docks and Piers Clauses Act 1847 which Act was incorporated in the Act of 1913 had not been brought to the attention of their Lordships by Counsel and accordingly the appeal was set down for further argument upon the effect of that section. Lord Birkenhead LC delivered a short judgment on the use and abuse of authorities, which judgment is only reported in [1921] WN 85; the following extracts appear on p 86:

> Lord Birkenhead LC said that a point of considerable general importance had arisen upon which he thought it right to make some observations. It was not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or other, which might be relevant to the issues requiring decision in the particular case. Their Lordships were therefore very much in the hands of counsel and those who instructed counsel in these matters, and the House expected, and instead, that *authorities which bore one way or the other upon the matters under debate should be brought to the attention of their Lordships by those who were aware of those authorities. That observation was irrespective of whether or not the particular authority assisted the party which was aware of it.* It was an obligation of confidence between their Lordships and all those who assisted in the debates in this House in the capacity of counsel.

His Lordship then dealt with the

duties of solicitors when instructing counsel at the last moment. He then continued as follows:

> A similar matter arose in this House some years ago, and it was pointed out by the then presiding Judge that *the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material and information which a properly informed decision required;* it was, in effect, to convert this House into a debating assembly upon legal matters, and to obtain a decision founded upon imperfect knowledge. *The extreme impropriety of such a course could not be made too plain.* The learned counsel who had addressed their Lordships were acquitted of personal responsibility in this matter, but he very much hoped that the observations he had thought it necessary to make would prevent a recurrence of that with which he had dealt. It was possible that the views which their Lordships had formed upon this point would be reflected in the order which their Lordships might think proper to make.

[Note: a photostat copy of the judgment, which is contrary to counsel's proposition and which he is endeavouring to distinguish should be included in the Brief.] It has been the practice in England when counsel does draw attention to a case against his proposition, for the learned Judge to mention in his judgment that counsel had properly brought that case to his notice notwithstanding that counsel had been unsuccessful in his endeavours to distinguish it.

3 Counsel must at all times be courteous to the Bench, his opponents and all witnesses, but firm.

4 The duty of an advocate was succinctly stated by the Irish Judge Mr Justice Crampton in 1844 in the case of *The Queen v O'Connell* 7 Irish Reports at p 313 where he said:

> He (the advocate) is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law – he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case or for any party or purpose can discharge him from that primary and paramount retainer.

5 The Law Practitioners Act 1982 Section 61 (See 1982 Statutes Vol 2 p 904) provides as follows:

> 61. Statutes of Barristers – Subject to this Act, barristers of the Court shall have all the powers, privileges, duties and responsibilities that barristers have in England.

Counsel's preparation for cases in Banco in order to speed the process of the Court in appropriate cases may adopt the following method which has been successfully used in the past. Counsel should prepare an indexed typed brief, the contents of which should be fastened into a cover with the pages numbered.

It is most important that (a) In fastening the brief to the cover there should be sufficient margin to assure that no part of the text is obscured by the binder; (b) There should be ample margins left at the far side of the papers from the binder and ample space between each paragraph so as to enable the learned Judge to make notes against the text; (c) If there are copies of accounts where the text thereof is written lengthways instead of being written up and down, then the accounts should be contained in a separate folder and the important figures highlighted, or underlined in red. A summary of the important figures should be contained in the Brief with reference to the page numbers of the accounts from which those important figures have been extracted.

Contents of the Brief

1 An alphabetical index with reference to page numbers in the Brief. An additional copy of the index should be contained in a separate folder for the learned Judge to which he can refer without having to turn back to the index in the Brief.

2 Copies of papers that have been filed in the matter (other than warrants of authority to act).

3 Copies of any documents to be interpreted by the Court and/or the relevant copies of the Statutes (if any) which affect the interpretation of the document or the interpretation of a Statute including any relevant parts of the Interpretation Section of such Act or Acts (stating the volume and page numbers of the NZ Statutes). Counsel should also put a note in respect of any section to be interpreted showing when that section was originally enacted in the earliest Statute and the volume and page reference where it is to be found. [It sometimes shows that the original language has been altered over the years and sometimes the reason for such alteration may be due to a reported case interpreting the original section.]

4 If there are affidavits containing facts, a summary of the facts in chronological order should be set out on a separate page with a reference in respect of each fact to the clause number in the particular affidavit, which should be highlighted, and the page number in the Brief where that fact is stated.

5 Where there are notes of oral evidence these should be placed in a separate folder with numbered pages using different coloured highlights for evidence-in-chief; cross-examination and re-examination. If the evidence to be used is short then the relevant extracts can be set out in separate page or pages with reference to the page in the notes of evidence and the highlight colours.

6 In some cases it is possible for all counsel to agree to all the facts. In such cases an agreed statement of facts can be included in the Brief.

7 The legal propositions which counsel intends to submit – each proposition being separate and numbered.

8 The Law relating to each proposition, setting out in full a photostat copy only of the leading case including the head note. After each leading case, so set out

references only to the name and citation of all the cases in chronological order showing whether the leading case was applied, distinguished or discussed as the case may be. [The principal object of this list of cases, applying, distinguishing or discussing the leading case, is to show that the leading case is still the Law.]

9 A copy of the relevant parts of any Statute which applies to any proposition including such parts of the interpretation section as are relevant should be contained in the Brief. [It is important for counsel to trace back the origin of the sections printed in the Brief for the following reasons — (a) It shows how long the modern sections have been the Law as enacted originally; (b) If the original counterpart is in different language from the existing counterpart, counsel should seek the reason for the alteration; and (c) If the original section was enacted last century, although the preamble to a Statute may not be cited in Court unless there is an ambiguity in the section to be interpreted, nevertheless the preamble sometimes is an aid to counsel in interpreting a particular section.] In the Brief there should be a short note showing the origin of the section and if the original wording differs from the modern section, attention should be drawn to the difference.

10 If accounts and/or Balance Sheets are annexed to an affidavit, it may be of assistance to the learned Judge and to counsel him/herself to underline those items which were relevant in red ink. [This enables reference to be made to the page number in the Brief and that the relevant item is underlined in red ink, or highlighted.]

11 It is most important for Counsel to check the whole of the Brief after it has been assembled to assure that:

(a) All references to cases, facts, etc. are correct.

(b) There are no omissions of any lines.

(c) Every word is legible and that names are correctly spelt.

Counsel's presentation of the case in Court

1 Counsel shall commence by saying that he appears on behalf of the plaintiff, first, second, or third defendant, as the case may be and the nature of his client's interest in the case where there are several parties.

2 He then proffers to the learned Judge for his assistance, the prepared Brief explaining that there is an index.

3 He then says the facts as they appear from all the affidavits are summarised on page — of the Brief and reads them.

4 He then turns to the page wherein there is a copy of the summons setting out the questions.

5 If his client's interest lies in some only of the questions, then he should say which questions affect his client.

6 If there are a number of persons in a case having the same interests, one of two alternatives should be adopted, viz;

(i) All those persons may be represented by the same counsel, or

(ii) Counsel who represent those persons should agree as to the submission to be made to the Court and agree that only one of those counsel should make the agreed submission on behalf of all those counsel.

7 He should then refer to the page in the Brief wherein the numbered propositions upon which he intends to rely are set out.

8 He then refers to the documents which it is sought to interpret. It is essential for counsel to read the document or documents as a whole, although it is often sufficient merely to refer to the subject matter of some of the clauses of the document without going into the details. There is an old rule in construing documents which Turner J, later Sir Alexander Turner P, referred to in a will construction case in the Court of Appeal in *Re Lushington* [1964] NZLR 161 at page 178 line 14, where he said:

> The first principle of construction to be applied to this will, as to all others, is that the intention of the testatrix is to be collected from a consideration of the whole will, taken of course in conjunction with any other evidence properly admissible.

In a later will construction case *Re Laurie* (deceased) [1971] NZLR 936 Turner J, later Sir Alexander Turner P, delivered the judgment of the Court of Appeal. There was no admissible extrinsic evidence and in the course of his judgment he said:

> We approached this question of construction, as all questions of the construction of wills must be approached, remembering that the will must be read as a whole, and the testator's intention ascertained from a consideration of what he has said therein. As Lord Greene M R said in *Re Hipwell, Hipwell v Hewitt* [1945] 2 All ER 476, 477:
>
> . . . the proper way to construe a will, *like any other written document*, is to construe the whole of the document, and not to place prima facie meanings on particular words but to place a final and definitive meaning upon the words arrived at by an examination of the document as a whole.

See also the judgment of McArthur J in *Re Blair (deceased)* [1972] NZLR 852 in the Court of Appeal at pp 854-5; Cooke J, later Sir Robert Cooke P, in the case of *Re Green (deceased)* [1975] 1 NZLR 475 at page 478; and Moller J in the case of *Re Laird* [1982] 2 NZLR 325 at page 328.

In the case of *Re Manley's Will Trusts, Barton v Williams & Ors* [1969] 3 All ER 1011, which concerned substitutional gifts of residue wherein counsel had put forward the case of *Sibley v Perry* (1862) 7 Ves 522, Ungoed-Thomas J in the course of his judgment at page 1021 said.

> I therefore approach the will in accordance with the judgment rather than the rule in *Sibley v Perry*. And as comparisons have understandably been made between the words in the will and those in other cases, I also have in mind, in doing so, the well-recognised approach enjoyed by Romer L J, in *Re Gorringe* (1906 2 Ch 341 at page 347):
>
> . . . I do not think it is a wise or right thing to attempt to construe one will — a will like this — by the determination put by a Judge on another will, merely because that other will is something like the present. No doubt it is tempting, if you find a will something like the will you

> have to construe already construed by a Judge, to start with the assumption that the first decision was right (which is a right assumption), and then to proceed to see how the will differs, and then to consider each difference in detail and to see whether that difference ought to lead you to a different conclusion from that arrived at by the Judge in the prior case. To my mind such a method of procedure often leads to a very erroneous conclusion as to a will taken as a whole.
>
> So I read the will in the testator's chair — as the draftsman composed it and any reader, including the testator, was meant to and would read it, that is, in the ordinary way from beginning to end and, in particular, not from end to beginning, starting with the end of the residuary gift and reading backwards.

This principle applies to any document that is before the Court to be interpreted whether it be a contract or a statute or any other document. Reference has already been made to tracing back the section of any Act to the original enactment.

9 Counsel then deals with each proposition in turn, and the case law in support of his proposition, and reads the copy of the leading case on the Brief commencing with the facts and then the ratio decidendi. [Note: Counsel should have for himself but not in the Brief, a brief note of the facts and decisions of the subsequent cases which are only noted in the Brief, so that he can answer any question that the learned Judge may ask concerning any of those cases and confute any argument advanced by his opponent in respect of those cases. Counsel, instead of a note thereon, can have photostat copies of those cases in a separate indexed folder to which he can refer, but such copies should not be in the Brief for the learned Judge; however in answer to a question or in refutation, he can say he has a photostat copy of the case and read the facts and the grounds upon which that case was distinguished from the leading case, being careful to note the page and line number in the reported case from which he is reading.]

If these steps are taken, the learned Judge from the outset knows what counsel's submission is, and is not troubled with irrelevancies, nor does he have to search through the Court documents to find the document to which reference is being made. Counsel himself is in the happy position of knowing that he himself has everything at his fingertips in his own copy of the Brief. He should, of course, have the relevant Law Reports with him as well as the Brief. □

Deference and debate

Mr Justice Staughton was recently reported in *The Times* of London as objecting to some legal phraseology commonly used by Counsel in the Courts.

The news item stated that

> The learned Judge takes exception to barristers who preface a statement to him with the phrase "With respect". What that really means, says the Judge is "You are wrong".
>
> A statement prefaced with the words "With great respect" means "You are utterly wrong".
>
> And if a barrister produces the ultimate weapon of "With utmost respect" he is really saying to the Court, "Send for the men in white coats."

This was later followed by a letter to the editor disagreeing with the learned Judge. The letter read

> Sir, with reference to Mr Justice Staughton's plea for plainer English in Courts, in my humble submission archaic dress begets archaic speech. But does Mr Justice Staughton really understand the important function of "politeness forms" if he can suggest that "with great respect" simply means "You are utterly wrong"?

Think how often we now avoid the plain English question, "What is your name?" in ordinary social or commercial encounters. Instead there is a range of oblique forms such as "Your name is. . .?" and "What did you say your name was?"

Directory Inquiries staff now commonly use the special formula "How are you spelling that?" presumably because, as recent surveys of illiteracy remind us, millions of people in Britain find any question beginning "How do you spell?. . ." confrontational and alarming.

So the "with respect" formula signals not merely disagreement but also an often costly effort to reduce the level of aggression. Dispensing with politeness forms would make legal processes even more blatantly adversarial and threatening than they are now. □

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circumstances would seem quite innocuous. For example, the physical restraint of a victim without the use of injurious force would presumably constitute "violence" for the purposes of a prosecution for assault on a child under s 194 Crimes Act 1961. Other examples could be multiplied.

The point is that by reducing the standard of conduct which will trigger the imprisonment presumption the legislature may have unwittingly created a situation where imprisonment will become an inevitable concomitant of virtually all forms of violent behaviour. On the face of it this represents a contradiction of the original purpose of the new Criminal Justice legislation, namely to minimise the use of imprisonment as a sanction of last resort, and may well lead to additional pressures being placed on other branches of the criminal justice system, notably the prisons. □

1 Criminal Justice Bill, First Reading Speech notes, Hon J McLay.
2 The Ministerial Committee of Inquiry into Violence, chaired by Sir Clinton Roper. Dept of Justice, March 1987.
3 [1985] BCL 2050, discussed in Hall, *Sentencing in New Zealand*, 1987, 65.
4 But see Hall, op cit supra at p 59 or the meaning of "satisfied" as it occurs in other sections of the Act.
5 See Hall, op cit, 65.
6 See also *R v Coleman and Corlett* [1986] BCL 892 where the negative effect of a prison sentence was a factor influencing the appellate Court's decision not to impose a term of imprisonment in respect of a charge of aggravated robbery.

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