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Law School for Waikato

The Council and the Academic Board of the University of the Waikato were reported in the newspapers towards the end of March to have approved a proposal for the establishment of a law school.

A report on this proposal entitled *Te Mātāhauariki* was prepared in February 1988. The Committee consisted of representatives of the University of Waikato Council (three), the Academic Board (two), University of Auckland Law School (one), Auckland District Law Society (one) and Hamilton District Law Society (one). The actual members were Professor D M Gilling (Chairperson), Mr G D G Bailey, Mrs M J Drayton (Pro-Chancellor), Associate Professor D Bing, Associate Professor P H Oettli, Dr W C Hodge, Mr G F Ruck and Mr K D Kilgour.

The report considered such questions as the supply and demand for lawyers in New Zealand, the role that a law school would play in enabling the University of the Waikato to serve more adequately the educational needs of the people of its region, the character of such a law school and the philosophy it should pursue, and the resource issues associated with the creation of a new law school.

From the point of view of the profession at large the two most interesting topics in the report are the question of the demand for law graduates and the character and philosophy of a new law school. According to the report there is not only an unmet demand for lawyers but there is a regional imbalance. Over 50% of the demand for legal services, it is estimated, occurs north of Taupo, but two-thirds of the law graduates come from law schools south of Taupo. As an aside it is interesting to find Taupo used as a north-south dividing line instead of the more common references to the Bombay Hills or Cook Strait depending on whether you come from Auckland or Wellington.

The report argues that the need for more law graduates — who incidentally may not necessarily enter the profession as such — reflects two types of social change. The first is what is called the nature and dynamics of New Zealand society. The second is seen to be changes in the role and impact of law in society. Consequently, it is said, there has been the emergence of new areas of law, there is the increasing complexity of the law, and an increased demand for legal services in the traditional areas coupled with a significant shift in emphasis to the commercial aspects of legal practice.

Examples of changes given in the report include the increasingly important role of the Waitangi Tribunal, the development of administrative law, of environmental law, of labour law, of human rights, of consumer rights and so on. Finally, there is the emergence of mega law firms with the emphasis on new specialisations particularly in such areas as banking, finance, intellectual property, computer and information technology and international trade.

On the subject of unfilled positions the report, at page 8, has this to say:

> For a number of years, legal practitioners in South Auckland, Waikato, Bay of Plenty, and Gisborne had experienced great difficulty in recruiting new law graduates. We surveyed a number of legal firms in these areas and discovered from the 67 replies that we received that two-thirds of the firms experienced significant difficulties in recruiting due to the lack of supply of new law graduates. The firms surveyed had recruited 120 new law graduates in the past nine years. More importantly, we found that on conservative estimates,a further 185 positions were expected to be available in total over the next five years. Our respondents, however, expected that upwards of 65 positions, or 35% of total demand, would remain unfilled.

Regarding the character of the proposed new law school the report acknowledges that the curriculum is defined and prescribed by the Council of Legal Education. Accordingly, the course will have to comply with the Professional Examinations in Law Regulations 1987.

Within the necessary constraints of the regulations the Committee expresses the hope that the law course will emphasise the relationship between law and society, the possibility of an increased number of extra-legal subjects and perhaps the taking of such courses to stage 2 or stage 3 level. The significance of these emphases for the proposal is explained at page 24 as follows:

> The University of Waikato has unique resources in its School of Management Studies, its School of Social Sciences, its Department of Maori, the Centre for Maori Studies and Research and its Mana Tokorau programme. The presence of these resources offers a real opportunity to integrate the study of legal subjects with other disciplines notably economics, marketing, accounting, sociology, psychology, politics, history and Maori, and thereby reflect the ideals conveyed in the title of this report.

A substantial section of the report is devoted to the issue of Maori involvement. In the region served by the University of Waikato approximately one in five of the population is Maori. A conscious effort has been made to create a cultural and intellectual environment where Maori students can prosper and feel at home. The title of this report, *Te Mātāhauariki* conveys the literal meaning of the horizon where earth and sky meet, and the metaphorical meaning of a meeting place of people and their ideas and ideals. The Committee saw the law school at Waikato University as enabling a further commitment to biculturalism. It should encourage more Maori students to enrol for a law degree, and enable law students to become more conscious of what is now called the Maori dimension.

The concluding summary of the report at page 27 is as follows:

> In preparing this report, we have consulted widely, undertaken a significant amount of research, and grappled with a wide variety of issues and ideas.
>
> We have found an increasing, accelerating demand for law graduates by the community, and by the legal profession. Side by side with this growing demand, there has been a perceptible slowing in the rate of production of law graduates.
>
> We have found that where the demand has increased most dramatically, in the northern half of the North Island, the growth in number of graduates has been at its lowest. The gap between unmet need and diminished supply is at its greatest north of Taupo.
>
> We have found within the University of Waikato region a huge increase in the number of students wishing to study law. In this same region we find a legal profession struggling to recruit graduates.

The report finishes with a statement that the Committee believes that the case for a law school at the University of the Waikato is unanswerable. It is well to remember, however, that more than one unanswerable report has foundered on the rocks of economics and politics. It is not only the University Grants Committee but also Treasury and Cabinet who have to be convinced, and as is common knowledge these two institutions tend to have a different perspective from that of academics.

P J Downey

Recent Admissions

Barristers and Solicitors

Kerr SA	Auckland	18 February 1988
Kingston SM	Auckland	18 February 1988
Kovacevich JIS	Auckland	18 February 1988
Kruger PF	Auckland	18 February 1988
Kwee KH	Auckland	18 February 1988
La'Cassie MH	Auckland	18 February 1988
Lamb DR	Auckland	18 February 1988
Lawson AJ	Auckland	18 February 1988
Lay JM	Christchurch	12 February 1988
Leabourn HB	Auckland	18 February 1988
Lewis AAB	Auckland	18 February 1988
Loveridge EJ	Auckland	18 February 1988
MacKinnon DA	Auckland	18 February 1988
MacLean AG	Auckland	18 February 1988
Mar BL	Auckland	18 February 1988
Maynard KA	Auckland	18 February 1988
McClew JL	Auckland	18 February 1988
McCulloch JL	Auckland	18 February 1988
McCullough CA	Auckland	18 February 1988
McGinn TJ	Christchurch	12 February 1988
McLellan DH	Auckland	18 February 1988
Meggitt WA	Auckland	18 February 1988
Mitchell SK	Auckland	18 February 1988
Mullins PD	Auckland	18 February 1988
Neutze PS	Auckland	18 February 1988
Newcomb KK	Auckland	18 February 1988
Niven JL	Auckland	18 February 1988
O'Connell JG	Christchurch	12 February 1988
Owles PG	Auckland	18 February 1988
Parker RI	Auckland	27 January 1988
Pedlow GM	Auckland	18 February 1988
Percy KL	Auckland	18 February 1988
Perkin MM	Auckland	18 February 1988
Perry DM	Auckland	18 February 1988
Phillipps MIS	Auckland	18 February 1988
Poliko E	Auckland	18 February 1988
Prouting FM	Auckland	18 February 1988
Quigley GD	Auckland	18 February 1988
Quin CM	New Plymouth	22 February 1988
Reason MJ	Auckland	18 February 1988
Reeves SSL	Auckland	18 February 1988
Reynolds PA	Auckland	18 February 1988

Case and Comment

Advice-giving: Towards a unified approach

Day v Mead [1987] BCL 1223

It is sometimes not entirely clear or predictable what theory or theories of liability Courts will apply in advice-giving situations. Breach of contractual duty of care has tended to be that most commonly applied; the tortious *Hedley Byrne v Heller* [1964] AC 465 action of negligent misrepresentation is well-established; and recent times have seen an increase in the number of decisions anchored to breach of equitable fiduciary obligation.

Arguably, Courts have tended to choose and apply whichever theory of liability the particular facts best fitted. While Judges have perhaps seen little need in having to define whether there existed any inter-relationship between these theories and their attendant rights and obligations, theorists have not been slow in offering suggestions (eg, Sheppard JC, *Fiduciary Obligations*, 1981, Canada); certainly the matters for determination are not without difficulty. New times may be ahead, for the New Zealand Court of Appeal's decision in *Day v Mead* [1987] BCL 1223 contains comments suggestive of a unified approach to determining advice-giving cases.

Day v Mead: *the facts*

The facts in *Day v Mead* are straightforward. The defendant was a solicitor. He was a director of, and shareholder in an Auckland paper-mill company Pacific Mills Ltd [PML]. He also acted as solicitor for that Company and for several of its shareholders.

The defendant had acted as the plaintiff's solicitor for many years. Though not specifically asked by the plaintiff for investment advice, the defendant suggested that the plaintiff should consider investing in PML. The plaintiff did so, purchasing 20,000 $1 shares as par in PML. These shares were purchased from PML's general manager who was leaving PML after a management dispute with the defendant and some others. The defendant acted for the plaintiff on the transfer of the shares, and rendered a bill of costs to him in respect of that work.

Several months later it become apparent to the defendant that PML was in financial difficulties and in urgent need of increased funding if it was to have any prospect of survival. The Court accepted that whilst the plaintiff may not have had an exact appreciation of PML's position at this time, he was in general aware of its financial difficulties and uncertain future.

PML's bank was informed of its financial position by the defendant and an employee of PML who was closely associated in PML's affairs. They requested further funding from the bank to enable PML to keep trading. The bank agreed to advance part of the requested funding, but only if it was given a first debenture. In order to meet that condition the plaintiff was approached by the defendant and asked to subscribe for $80,000 in new shares in PML; the plaintiff agreed. This sum was used towards the repayment of the existing first debenture loan which was from the nominee company of the defendant's firm. The plaintiff had some knowledge of the existence of the nominee company loan, but there was no finding that he knew that after the increase of capital, PML would in fact have no increase in working capital.

The defendant rendered a bill of costs to PML for his legal work in respect of the increase of capital. No bill was rendered to the plaintiff.

Subsequently PML went into receivership and the plaintiff lost his investments of $100,000. The Court accepted that at no time was the defendant employed to or asked to give investment advice.

The plaintiff alleged that the loss was caused by the failure of the defendant to fulfil his obligations to him as his solicitor. This was pleaded under negligence and breach of fiduciary obligation.

In the High Court Gallen J held that in respect of the first investment of $20,000 the defendant had been in breach of both his fiduciary obligations and his contractual obligations arising from his relationship with the plaintiff. Those obligations required the defendant to ensure that the plaintiff was independently advised, and to give the plaintiff a full and accurate account of PML's position. As to the second investment of $80,000 Gallen J found there to be

a further breach of fiduciary obligation by the defendant in his not ensuring that the plaintiff received independent advice, and in his not properly informing the plaintiff of the risks involved in investing further in PML.

The Court of Appeal found there to be a breach of fiduciary obligation, and noted that the defendant failed to do three things: firstly in not advising the plaintiff that the second investment of $80,000 was to be applied in repayment of the nominee company debenture; secondly in not ensuring that the plaintiff had independent advice; thirdly in not giving to the plaintiff total disclosure of PML's circumstances and the full nature of the discussions with the bank. Clear conflicts of interest.

That the defendant's liability was confirmed on appeal, was perhaps to be expected. Certain comments by several members of the Court were unexpected.

The concurrent duty in contract and tort

McLaren Maycroft & Co v The Fletcher Development Co Ltd [1973] 2 NZLR 100 held that an action against a professional person for professional negligence, where that person is in a contractual relationship with the client, lies only in contract. This decision continues to come under attack. In *Rowe v Turner, Hopkins & Partners* the Court of Appeal hinted at the unsuitability of *McLaren Maycroft* with Cooke and Roper JJ saying that the decision required "reconsideration . . . perhaps not far distant — when the issue arises squarely in this Court". Well, the issue didn't arise squarely before the Court in *Day v Mead*, but Cooke P again took the opportunity to examine the matter by reviewing developments within the Commonwealth jurisdictions. He did not regard the *Tai Hing* case as an obstacle in this area, restricting it to its facts. (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Limited* (1986) 1 AC 80. Time will tell whether the House of Lords intended to be so restrictive in its commentary in this case.) He concluded:

> The High Court of Australia may have occasion to deal with the question in *Hawkins v Clayton* wherein judgment is at present reserved. Subject to any further light that the High Court may throw on the question in that case *I doubt very much whether the New Zealand Courts should swim against such a strong tide.*

Somers J was a little more guarded:

> There is much to be said for concurrent liability in contract and tort, at least where the measure of the duty is the same. . . . But as we have not had argument on the issue of concurrent liability in the instant case I would reserve it for consideration on another occasion. The ultimate decision will I think be one of policy. Whether it arises in relation to the liability of solicitors or in some other or more general context it will be desirable to have information as to the availability and cost of insurance against tortious liability.

One can sense the almost inevitable march towards concurrent liability in the professional advice-giving field. Given that sixteen years has passed since *McLaren Maycroft* let us hope that the issue does come squarely before the Court of Appeal soon.

Scope of the duties

For proponents of the concurrent liability doctrine, the method of determining the scope and intensity of the tortious "duty" obligation has been the subject of debate.

The answer is and always has been quite simple; a simplicity which allows the current relationship between the implied-contract, tortious and equitable causes of action and their respective "duties" to be understood. That simplicity was, it appears, perceived by Somers J.

After discussing the duties which could arise in the solicitor-client relationship he concluded:

> I am disposed to think that the equitable and common law obligations as to disclosure, use of confidential information, and want of care discernible in the cases are now but particular instances of duties imposed *by reason of* the circumstances in which each party stands to the other and that while the particular remedy for breach of duty may depend upon the way the case has developed, equity and law are set upon the same course. What is required of a defendant, care, recommendation or insistence on separate advice, disclosure of conflicting interests or otherwise will depend on the circumstances.

While some may see this as somewhat of a superficial gloss on this complex area, there is every indication that it is soundly based and entirely in accord and consistent with the advice-giving theories of liability. Somers J got it exactly right.

Consider briefly the fiduciary principle. This principle rests on the equitable jurisdiction of the Courts to correct abuses of *confidence*: confidence is indeed "the originating principle" of the fiduciary obligation. (*Coleman v Myers* [1977] 2 NZLR 225, 276 per Mahon J [HC], approved in the Court of Appeal [1977] 2 NZLR 307, 324 per Woodhouse J.) A precise definition of the word "confidence" has always proven difficult, but when a relationship of *confidence* exists, one is in effect relying or depending on another to protect one's interests. Hence the terms *reliance* or *dependence* better express the meaning of "confidence": the fiduciary relationship is after all a relationship of inequality, one in which the power a person possesses is directly connected to the dependence or reliance reposed.

It is the *confidence-reliance-dependence* elements which are most expressive of the fiduciary relationship. What label is used to describe these elements is not important so long as Courts recognise that the *higher* degree of confidence is the only proper basis for equitable intervention. Whilst a label to define the required type of confidence may not be important, an accurate analysis and description of the confidence which is being reposed is. In holding that a fiduciary has to protect the interests of a beneficiary, one is saying that the fiduciary is under a *duty* to the beneficiary. Hohfeld correctly argues that the legal concepts of "duty" and "right" are correlative,

each implying the other. That is, a legal duty cannot exist without a corresponding right; they are essential to each other, and more importantly, they condition each other. To apply this to the fiduciary concept, the beneficiary who has reposed confidence in the fiduciary has a legally enforceable right that the fiduciary will protect the beneficiary's interest; as a corollary of this, the fiduciary is under a duty to do so. Because the right and the duty condition each other, the nature and extent of the fiduciary duty *cannot* be determined without first ascertaining the scope of the "right" possessed by the beneficiary. The "duty" is co-existent and co-extensive with the "right", and the fiduciary standards can only be applied within this framework. The dependence placed in the fiduciary by the beneficiary will be in a direct relationship to the duty required from the fiduciary.

The relationship of the parties becomes all important, because the scope and intensity of the *confidence* which the facts establish, determine not only whether there exists the required degree of confidence necessary to bring about a fiduciary relationship, but also the extent and nature of *the duty* which the fiduciary is under. This same approach can be applied to the contractual and tortious duties in the advice-giving field. It is this importance in detailing the precise nature of the relationship between the parties which was recognised by Somers J. In examining the circumstances then before the Court he stated:

> I do not think it matters whether these failures are described as a want of that prudence and care which a reasonably skilful and careful solicitor would have exercised *or* a breach of fiduciary duty.

Indeed it did not matter on the facts because the duty would be the same — the extent of the duty is set by the nature of the "relationship" which existed between the parties. Cooke P was more cautious:

> . . . I would add that a possible solution with some attraction in this field is to recognise that, subject to special contractual terms, the *same* duty of care arises in both tort and contract and has the same incidence. On this view, the duty is not to cause damage by failing to take reasonable care.

Whilst Somers J's comments are limited to "obligations as to disclosure, use of confidential information and want of care" there is, it is submitted, every reason to predict, that on a full development and extension of Somers J's approach to the entire advice-giving field, a unified approach is both logical and appropriate: whether the question arises in contract — what terms of duty will be implied; in tort — what duty arises from the proximity and character of the relationship between the parties; or in equity — what duty arises from the confidence existing between the parties, the answer will always be the same. The duty will necessarily be defined by the relationship of the parties and the circumstances surrounding that relationship. That a relationship is categorised as contractual, tortious or fiduciary would have no relevance in determining the extent of the *duty* which is to be performed.

The path taken by Somers J was unusual. He stated the traditional rule that a solicitor is a fiduciary in the sense that a solicitor must avoid a conflict between duty and interest, and account for unauthorised profits. He considered that cases, notably *Nocton v Lord Ashburton* [1914] AC 932 and *Farington v Rowe McBride & Partners* justified "a wider view of fiduciary obligations in general and those of a solicitor in particular." Whilst the scope of fiduciary obligations certainly vary depending on the type of relationship, it is not accepted that there can be any *wider* expression of the fiduciary obligation than the traditional duty-conflict rule. It is difficult to see how *Farington's* case *justifies* a wider view of fiduciary obligation. But in *Nocton v Lord Ashburton*, Viscount Haldane LC had this to say:

> Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true *that a man may come under a special duty to exercise care in giving information or advice* . . . Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may properly be treated as giving rise to a special duty of care in statement . . . Now such a duty may arise either at law or in equity. . . . Such a special duty may arise from the circumstances and relations of the parties. There may give rise to an implied contract at law or to a fiduciary obligation in equity.

The statement records that the duty, which may arise in law or equity, does so from the relationship of the parties and the surrounding circumstances. There can be no argument with that proposition, a proposition which shows the need for a functional analysis of relationships; that is, as the name suggests, an analysis concerned with functions not titles. But whether it shows a *wider* fiduciary obligation is doubtful. The decision was pre-*Hedley Byrne* and as such does not specifically consider the tortious duty of care in advice-giving situations. No specific analysis of the tortious duty is undertaken by Somers J; but the linking of advice-giving liability to the relationship/circumstances of the parties is correct. Many Courts in the post-*Hedley Byrne* era have tended to classify all advice-giving situations as "Hedley-Byrnes" that is, to analyse liabilities solely in tort, which has, to a certain extent, stifled discussion on the relationship between the theories of liability in this area.

Now whilst application of the different theories of liability may well produce the same outcome in respect of whether a breach of duty is established, the results which accrue from that breach of duty will necessarily be influenced by the theory of liability which produces the breach. The type of relationship which is established can influence the measure of damages, limitation of actions and apportionment of liability. Somers J noted:

> . . . and that while the particular remedy for breach of care may depend upon the way the case is developed, equity and law are set

upon the same course.

The test of "the way the case has developed" gives no real guide in determining what relationship is established; the analysis of the particular relationship of the parties and the surrounding circumstances which exist will show what *legal* relationship is produced.

Somers J's support of the Viscount Haldane statement shows as support, albeit perhaps unwittingly, for the principle that a duty as to exercise of *care* in advice-giving situations can give rise to a fiduciary obligation. Whilst such a proposition has not traditionally received universal support, but with the continued trend towards a unified approach, of which Somers J's comments give further impetus, little is to be gained, it appears, in attempting to exclude a duty to exercise care in advice-giving situations from fiduciary relationships. Certainly Cooke P's comments in *Day v Mead* that "whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course" shows the distinct trend towards the mingling and interacting of law and equity. (See p 15 of the judgment of Cooke P.) *Day v Mead* gives a judicial shake to the determination of advice-giving cases. The Court continues to prod at *McLaren Maycroft* and again suggests that the time is ripe for a rethink of this subject. The extent to which Somers J's comments will lead to greater cohesion in the advice-giving field is not clear and must await further judicial consideration, but the rationale certainly sets the right direction. As Courts recognise the appropriateness of accurately analysing relationships, and not simply by accepting labelled relationships or labelled courses of action, so a unified approach between the various areas of liability in the advice-giving field, and indeed other fields, emerges, and the Courts continue to bring law and equity closer together.

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Variable restraint of trade clauses

The use of variable restraint clauses has become increasingly popular in Australia and New Zealand in recent years as a means of circumventing the Courts' willingness to strike down covenants in restraint of trade.

The decision of the Australian Federal Court in *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd* (1987) ATPR 40-769, decided in March, 1987 is therefore both interesting and timely.

The case involved the sale of a ship-building business relating to the construction of luxury motor vessels. The sale agreement provided for the acquisition of the goodwill of the business and the exclusive right to use the name "Lloyd's Ships" under which the business had established an extensive reputation. In effect the business was purchased for $6,000,000.00 and a substantial amount was paid for goodwill. In order to protect that goodwill the vendors of the business, the respondents in the action, entered into a restraint of trade clause. The clause at issue was in the following form:

"39(a) In consideration of the purchaser entering into this contract and to reasonably protect the goodwill of the business the vendor, the second vendor, the third vendor, the fourth vendor, the fifth vendor and the sixth vendor and each of them do jointly and severally agree with the purchaser that subject to cl 39(b):

(i) This Clause shall have effect as if it were several separate covenants consisting of each separate covenant set out in sub-clause (ii) of this cl 39(a) combined with each separate period of time set out in sub-clause (iii) of this cl 39(a) and of each such separate combination combined with each separate area set out in sub-clause (iv) of this cl 39(a) and if any of the said several separate covenants shall be or become invalid or unenforceable for any reason then such invalidity or unenforceability shall not affect the validity or enforceability of any of the other separate covenants:

(ii) The vendor, the second vendor, the third vendor, the fourth vendor, the fifth vendor and the sixth vendor and each of them will for the period and within the area hereinafter specified without the prior written consent of the purchaser whether directly or indirectly by themselves or jointly with or on behalf of any other persons or corporation or trust on any account or pretext by any means whatsoever or though (sic) an agent or independent contractor:

(a) carry on or be engaged in or concerned with directly or indirectly (whether as proprietor, employer, servant, agent, principal, partner or in any other capacity whatsoever) or otherwise engage in the business of shipbuilding of any description or any other business of a similar nature; or
(b) procure or solicit or encourage any other person to procure or solicit the custom of any former customer of the business; or
(c) hold or beneficially own whether directly or indirectly and whether absolutely or contingently or hold options over shares in or be an adviser to any corporation doing any of the things referred to in 39(a)(ii)(a) or 39(a)(ii)(b) above.

(iii) The periods of time hereinbefore referred to are:

(a) during the period of ten (10) years from and after completion;
(b) during the period of nine (9) years from and after completion;
(c) during the period of eight (8) years from and after completion;
(d) during the period of seven (7) years from and after completion;
(e) during the period of six (6) years from and after completion;
(f) during the period of five (5) years from and after completion;

(g) during the period of four (4) years from and after completion;
(h) during the period of three (3) years from and after completion;
(i) during the period of two (2) years from and after completion;
(j) during the period of one (1) year from and after completion;

(iv) The areas hereinbefore referred to are:
(a) within the United States, Canada, Australia and/or New Zealand;
(b) within Australia;
(c) within the East Coast of Australia.

39(b) Nothing in sub-cl 39(a) shall prevent the sixth vendor from representing to any interested person or persons that he acts on behalf of the purchaser in pursuance of the commission agency agreement referred to in cl 40 hereof."

A dispute arose between the parties culminating in the purchasers of the business issuing proceedings in the Federal Court against the vendor respondents alleging that the respondents had continued to carry on the business of ship building, despite the existence of cl 39 in the sale agreement, and that the respondents' premises, situated within 1500m of the applicant's premises, were advertised under the name "Lloyd Corporation" which conduct was misleading or deceptive. A number of causes of action were alleged against the respondents including an allegation that the respondents were in breach of cl 39 of the sale agreement. The respondents denied that the applicant had a valid claim to relief and alleged that the restraint of trade clause was void either because it was uncertain, or a contravention of public policy or an unreasonable restraint of trade.

The Court began its consideration of the clause in question by drawing reference to two inadvertent mistakes made in the wording of cl 39. The first was in cl 39(a)(ii). The Court accepted that the clause should be read as if the word "not" appeared after the word "will" in that sub-clause. Further, the Court accepted that the inclusion of the words "and/or" in cl 39(a)(iv)(a) introduced a disjunctive element where none was intended. Spender J was therefore prepared to disregard the expression "/or" in that sub-clause.

His Honour calculated that cl 39 generated 120 sub-clauses, 30 of those not being defined by area and effectively creating a world-wide restraint. The remaining 90 sub-clauses consisted of restraints defined by area.

A number of observations were made by His Honour on the enforceability of variable restraint clauses and the way in which such clauses should be construed.

His Honour began by observing that a wider range of restraints will be valid where a man sells his business and his goodwill than is the case where a restriction is imposed on a former employee. Spender J also stated that the sale of the goodwill of the business provided the justification for and the measure of enforceability of the restraint. As a result, the character of the business sought to be protected must be the focus by which the validity of the restraint of trade provision was to be judged.

The respondents' primary attack on the validity of the clause was that it was uncertain. His Honour drew a distinction between a variable restraint clause which contemplated a single covenant operating from the numerous combinations of conduct, time and area which are generated and a series of clauses each operating cumulatively. If the restraint of trade provision is to operate as a single covenant then a means must be provided to determine which of the various combinations is to apply. If the answer is that the widest restraint that is enforceable is to apply this will not save the clause and it will be uncertain because in the absence of any statement as to the priority of application of the variables it is not possible to say which covenant is the widest in its effect. For example, is a restraint over a 100 mile radius for one year wider than a restraint over a 10 mile radius for five years? If the variable restraint clause contemplates all of the possible combinations applying cumulatively with severance of those found to be an unreasonable restraint of trade then no uncertainty exists according to Spender J. If there is any overlap between the clauses that is acceptable and they are not regarded as being inconsistent. Clause 39 provided for a number of separate covenants to operate cumulatively with provision that those which were unreasonable should be severed. For that reason His Honour was of the view that the clause was not uncertain.

Next, His Honour considered the reasonableness of the restraint. To be considered first were the activities carried on by the respondent vendor which His Honour held to be the construction and sale of aluminium ships ranging in length from approximately 60ft to 140ft. The clause therefore had to be considered in the light of those activities.

Then His Honour considered the geographical market in which the business was involved at the time of the sale. Under this head His Honour was prepared to take into account the reasonable prospects of future extension of the business which might be proven.

Finally, His Honour considered the duration of the restraint and observed that, ordinarily, a time restraint is intended to permit sufficient time for the former owner's connection with customers of the business to fade away. In this case, however, repeat business was unusual and the time restraint here was intended to shut the prior owner out of competing for potential new customers. In determining the length of time which was reasonable His Honour considered the size of the possible market for aluminium ships and the time frame and capacity for their construction. His Honour was of the view that a ten year restraint would, in the circumstances, seem reasonable.

The main challenge to the reasonableness of the restraint clause was, however, directed at the width of the conduct restrained.

Clause 39 purported to restrain the respondent from engaging in "the business of ship building of any description or any other business of a similar nature". The business sold related only to the construction and sale of aluminium ships. The clause would therefore, on its face, prevent the respondents from engaging in activities never engaged in by the business sold. The applicant contended that those general words had to be construed with reference

to the nature of the business which was in fact carried on at the time when the restraint was agreed to. Spender J referred to a number of authorities on this issue which lent support to the view that a Court may have regard to surrounding circumstances when construing a restraint of trade clause in order to ascertain the meaning of an expression which the parties had used. The difficulty, however, for the applicant in this case was the use of the words "the business of ship building *of any description. . .*". The use of these words did not allow the Court to read down the clause to limit the restraint to one upon the kind of business previously undertaken by the business sold. The inclusion of the words "of any description" indicated that the applicants sought to restrain the respondents from engaging in many forms of ship building which had never been part of the business sold. The clause was accordingly held to be an unreasonable restraint of trade because it was not reasonably necessary to protect the interests of the applicant.

The case establishes that variable restraint clauses are not unenforceable per se but they will have be drafted with care and circumspection if they are to be successful.

The *Lloyd's Ships* case would suggest that the following aspects should be borne in mind when drafting a variable restraint of trade clause;

(a) A Court is more likely to strike down a restraint of trade clause where the restriction is imposed on a former employee. A wider range of restraints will be valid where the restriction is imposed on the vendor of a business.

(b) Conduct sought to be restricted and the geographical and temporal limits of that restriction must be determined after taking into account the character of the business sought to be protected and the clause must be a genuine attempt to define the need for protection.

(c) The variable restraint clause should be drafted so as to expressly create a series of separate, independent covenants and not one covenant only to operate from the various combinations generated.

(d) If a single covenant is to be drafted then it must provide a means by which to choose which of the many available combinations is to apply. There must be a statement of the priority of application of the variables.

(e) If the clause is to take effect as several separate covenants consisting of various combinations of variables provision must be made for the severance of any which are invalid or unenforceable for any reason.

(f) The greater the number of variables and possible combinations and the more indiscriminate those combinations are the more likely it is that the Court will not view the clause as a genuine attempt to define the extent of the restriction needed for protection.

(g) In determining the reasonableness of any given restraint of trade clause regard must be had to:

(i) the range of activities carried on by the covenantee;

(ii) the geographical area in which the covenantee is involved, although in this context, regard may be had to the reasonable prospects of expansion of the covenantee's business;

(iii) the size of the possible market for the covenantee's business;

(iv) the time it may take for the covenantor to lose contact with customers of the covenantee;

(v) the nature of the covenantee's business and the way in which is is conducted; eg if it is a manufacturing business what are its lead-in times?

There is no reason why a carefully drafted variable restraint clause should not be a valid and effective way of protecting the legitimate interests of an employer or the purchaser of a business.

Wayne M Condon

Life Imprisonment and Murder

In a number of recent speeches, and in particular in one addressed to the Criminal Bar Association in Auckland on 30 October 1987, the Rt Hon Mr Geoffrey Palmer has stated that he intends to reform the law relating to the mandatory sentence of life imprisonment for murder. In brief he has said that degrees of culpable homicide will be substituted with a maximum sentence of life imprisonment. Very recently a jury in Hamilton adopted the humane but artificial device of finding a man guilty of manslaughter in a mercy killing of his terminally ill father. Obviously the restraint of the single sentence for murder, in circumstances such as these would have persuaded all involved to find the alternative verdict of manslaughter. I have referred in an earlier article [1986] NZLJ 389 to the problems which mandatory sentences can impose.

A recent Court of Appeal decision on this point is *R v Mason* [1987] BCL 1565, a decision of Cooke P, Somers and Bisson JJ, and delivered by Bisson J. *Mason* raises the interesting question of whether in fact the Court must impose mandatory life imprisonment or whether the Criminal Justice Act 1985 has by implication affected s 172, Crimes Act 1961. Until 1985 there was no doubt but that upon the jury returning a guilty verdict the Judge had to convict the accused and sentence him to life imprisonment. The only alternatives were at an earlier stage to find the accused unfit to plead under s 115 Criminal Justice Act 1985 (as happened on the first trial of Mason) or to be acquitted as insane under s 113.

The finding of a disability can sometimes postpone a trial as happened to Mason. In 1979 he faced trial in Invercargill for murder, abduction, rape and car conversion. At that time he was found unfit to plead. By June 1986 his condition had improved so that he was able to plead, and he was duly tried in November

1986. The verdict was guilty on all counts. His counsel submitted that instead of sentencing in terms of s 172, Crimes Act 1961, the Court should use s 118, Criminal Justice Act 1985 and order detention as a committed patient. Appropriate medical certificates were produced to the sentencing Judge (reproduced in the Court of Appeal judgment). However he felt that even if he had jurisdiction this was not a case for the use of his discretion under s 118.

On appeal to the Court of Appeal the appellant's counsel repeated his application for an order under s 118. The Crown submitted that there was no jurisdiction. The first step is to examine s 13 Crimes Act 1961. This section provides:

> Nothing in this Act shall be construed to limit or affect in any way any provision of any other Act conferring on any Court any power to pass a sentence or impose a punishment or make an order in addition to or instead of a sentence or punishment prescribed by this Act or otherwise to deal with any offender.

This section was necessary to protect the sentencing powers of the Court in dealing with the Criminal Justice Act 1954. In addition the provisions of s 2(2) of the Criminal Justice Act 1985 affects the interpretation.

> (2) References in this Act to offences punishable by imprisonment, or to offences punishable by imprisonment for a term of a specified period or more, shall be construed, in relation to any particular case, without regard to any restriction imposed by any of the provisions of this or any other Act on the jurisdiction or powers of the Court dealing with the case.

In *Mason's* case the Court eventually upheld the trial Judge and declined to make an order under s 118. They did however conclude that there was jurisdiction to make an order after reading s 13, Crimes Act 1961 and s 118, Criminal Justice Act 1985 together. The Court said (at p 13) that the words in s 118 "instead of passing sentence" relate to the words "instead of a sentence" in s 13. At p 12 the Court said:

> We are disposed to think that there is no provision in the Criminal Justice Act empowering the Court to pass a sentence other than life imprisonment for murder.

With the greatest respect to the Court I do not agree. Once an exception to s 172 Crimes Act has been established, then logically that exception is in fact much wider than simply the provisions relating to those who can be dealt with under s 118, Criminal Justice Act. The sentence of imprisonment for life is clearly a sentence of imprisonment under s 2(2), Criminal Justice Act. Further s 2(2) does not refer to sentences but to offences punishable by imprisonment. It may be that if the wording referred to sentences then the wider interpretation could not stand. Section 2(2) uses the words "for a term of a specified period or more". This clearly gives the sentencing Judge power to use the Criminal Justice Act alternatives to imprisonment, even where life imprisonment is the mandatory sentence. I believe the effect of s 2(2) is to amend by implication s 172 Crimes Act, which had no alternative to life imprisonment. From 1985 the Courts here had the option of looking at alternatives.

These alternatives can be illustrated by s 46, Criminal Justice Act. It provides:

> Where a person is convicted of an offence punishable by imprisonment, a Court may sentence the offender to supervision for such period being not less than six months and not more than two years as the Court thinks fit.

This may therefore give the Court power to impose supervision instead of life imprisonment.

Another and better example may be found in s 21 Criminal Justice Act 1985. This provides:

> Any Court before which an offender appears for sentence may . . . . . instead of passing sentence order the offender to appear for sentence if called upon . . . .

If the Court has the option of using s 118 Criminal Justice Act instead of passing sentence it clearly has the option of using s 21 Criminal Justice Act, instead of passing sentence. The Court in *Mason's* case doubted that this latter option was available because of the mandatory requirement of the sentence for murder. However, if there is one exception, then with respect there are several.

The practical effect is of course very different. It is hard to imagine a sentence lighter then imprisonment for murder especially with s 5 Criminal Justice Act imposing a burden on the Court to sentence to full-time custody violent offenders. None the less an exception may arise, and sooner than it takes Parliament to amend the Acts.

J C La Hatte

Correspondence

Sir

Subscribers to the *New Zealand Law Reports* will have recently noticed the case of *Police v Kanuta* reported in Part 5 of the advanced parts of [1987] 1 NZLR, at page 629. In short, the case reports a decision of Wylie J given in the Gisborne High Court in March 1987 to the effect that the provisions of the Trespass Act do not apply to the public bar of a hotel during the hours when the public bar is required to be open, due to the code contained in s 188 of the Sale of Liquor Act 1962.

On behalf of the Hotel Association of New Zealand, I am asked to bring to your readers' attention that *this case no longer represents the law.* As part of the Law Reform (Miscellaneous Provisions (No 2)) Bill, an amendment to the Trespass Act was introduced to overcome the decision. From 10 July 1987 the provisions of the Trespass Act *do* apply to public bars, notwithstanding the provisions of ss 187 and 188 of the Sale of Liquor Act 1962 and notwithstanding the provisions of s 13 of the Trespass Act 1980 (164/1987).

In appropriate circumstances, members of the Hotel Association will use the provisions of the Trespass Act in addition to or complementary to the provisions of the Sale of Liquor Act. Since the passing of the Amendment, the Courts have upheld them in this practice where appropriate.

A G Sherriff

Privy Council:

The Takaro Properties case

By Charles Cato LLB (Hons), BCL (Oxon) Barrister and Senior Lecturer in Law at the University of Auckland

In this article Charles Cato analyses the decision of the Privy Council in Rowling v Takaro Properties *[1988] 1 All ER 163. He criticises the decision as being cautiously restrictive of the principle stated by Lord Wilberforce in* Anns v London Borough of Merton *[1978] AC 728. He considers this case will end the role of the Privy Council as the ultimate New Zealand judicial tribunal. Many will see this as ironic since it was the Crown that funded the appeal to London presumably because the government believed the New Zealand Court of Appeal to be wrong in law and its decision unacceptable in practice. Mr Cato argues that the case illustrates the need for a second tier of appeal if in fact appeals to the Privy Council are abolished. He recommends the creation of a new ultimate Court to be called, what it will in fact be, the Supreme Court. The author completed his LLB with Honours at the University of Auckland and, as a Rhodes Scholar and New Zealand Postgraduate Scholar he attended Oxford University where he gained a first class BCL.*

The case of *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 would appear to have finally heralded the demise of the Privy Council as our ultimate judicial tribunal. It is inevitable that the passing of the Privy Council will be accompanied by sadness that the link with the proud common law tradition that Britain has given to us and many other countries will be severed. It is, however, of great concern that no adequate replacement appears to have been considered. It is argued here that serious consideration should be given to the creation of a second appellate tribunal above our present High Court to consider issues of special importance. In the absence of federation with Australia (a concept today which itself merits close examination), it is unrealistic to speak of a High Court of Australasia or of a Pacific Court. Yet, if some alternative to the Privy Council is not created, there is a real risk that we will witness in time a lowering of standards in argument and judgment. A second tier or tribunal of last resort has been considered vital amongst the senior members of the old Commonwealth such as Australia and Canada, both countries having abolished appeals to the Privy Council some time ago. It is submitted here that we would be most unwise to abolish the Privy Council until we have in place a second appellate level, a Supreme Court of five Judges, who can determine issues of special public importance after considered and well-informed debate.

Takaro, Negligence and Ministerial Discretion

Before, however, embarking on this discussion, it is necessary to consider the issue of ministerial responsibility and negligence in the context of the decision of the Privy Council in *Takaro*. *Takaro* has already been the subject of an extensive comment by Mr Stephen Todd in this *Journal* [1988] NZLR 34. (And for further articles on Negligence in New Zealand, see Cadenhead, [1984] NZLJ 262; [1986] NZLJ 303).

In March 1974, the Minister of Finance, then Mr W E Rowling, refused the statutory consent needed before Takaro Properties Limited could make an issue of new shares to a Japanese company, Mitsubishi, which was necessary if Takaro was to have any chance of surviving as a viable commercial enterprise. The Minister's decision was challenged in review proceedings and it was considered by the Chief Justice, Sir Richard Wild, and affirmed by the Court of Appeal, that he had acted in excess of his powers under the relevant legislation ([1975] 2 NZLR 62). It was established in evidence that the dominating ground for his refusal was a concern to see that the land in question reverted ultimately to the Crown. This land had formerly been acquired by Takaro from the Crown for purposes of a hunting and fishing lodge. As a result, however, of the Minister's refusal, Mitsubishi withdrew from the project so that it became pointless for any further application to the Minister pursuant to the successful review. Because Takaro was unable to find any additional capital, the company went into receivership. Takaro and its principal shareholder, Mr Stockton Rush Jnr, commenced action contending that in declining the application, Mr Rowling had wilfully abused his power or in the alternative, had

acted negligently.

The trial Judge, Quilliam J, considered that Mr Rowling had acted honestly and hence, the cause of action based on wilful abuse of power failed. Further, the action in negligence failed because although Quilliam J considered such a cause of action could lie against a Minister, there was no evidence of negligence. In a passage which was of central importance in the case, Quilliam J said at [1986] 1 NZLR 22 (p 37):

> Mr Rowling at no stage acknowledged that he knew he was not entitled to take the reversion factor into account. His evidence was to the contrary, and I must make it clear that although I believe he acted beyond his powers in certain respects, I have no hesitation in saying that I accept his evidence as having been honestly given. He said he believed then, and still believes, that he acted within his powers in taking it into account. Perhaps some force is lent to that evidence by reflecting that he pursued that belief as far as the Court of Appeal before being obliged to accept that it was wrong.

A Full Court of five members of the Court of Appeal [1986] 1 NZLR 51 held, however, that the Minister had acted negligently in refusing his consent and awarded damages to the company although not to Mr Stockton Rush. It was considered that the Minister was under a duty of care to Takaro and in taking into account the reversion factor, had exercised his discretion negligently. Woodhouse P (at p 60), with whom Richardson J agreed, appeared to consider that the Minister was aware that he could not take into account the reversion factor, a finding which the Judicial Committee considered was not ad idem with the finding recorded above of Quilliam J. The other Judges, Cooke, McMullin and Somers JJ, considered that the Minister's awareness of the fact that he was not entitled to take into account the reversion factor alone but (mistakenly) could do so, if considered with other factors, should have put him on inquiry so as to seek legal advice. Cooke J said (at p 68):

> In the present case, the Minister's evidence was to the effect that he knew that he had no right to take the reversion factor into account if it stood alone, but that on his understanding of the regulations he was entitled to take it into account, provided that he also took into account other considerations. That is such an unusual supposition that I cannot help thinking that the Minister should reasonably have seen it as crying out for legal advice. Quilliam J thought that there was no more reason to take advice on this matter than upon any others of the wide range going to the Minister for decision. On that point, with respect, I must differ from the judge.
>
> Moreover, it was conceded before this Court that if legal advice had been taken, it would have been that the reversion factor could not be taken into account. That being so, the company can rightly say that the refusal of 21 March 1974 was at least contributed to by the negligent taking into account of an irrelevant consideration.

McMullin J said (at p 72):

> If the reversion factor on its own was known to the Minister to be irrelevant as a factor which did not justify the refusal of consent, I do not think that an honest belief that other factors as well might be taken into account with it could justify a finding of no negligence. The tort of negligence is not subjective; it does not depend upon findings of dishonesty. Rather, it is objective; it depends upon a consideration of all relevant circumstances. If, therefore, the subjective view of the Minister is put aside and an objective test is applied, a finding of negligence would result.

Somers J observed (at p 74):

> I am also satisfied that the Minister was in breach of the duty of care cast upon him in the circumstances. He knew that the reversionary factor alone could not justify the decision to refuse consent but, evidently, thought that it could be brought to account with other matters. This I consider amounted to that breach of duty pleaded as being a failure to take reasonable care to ascertain the extent of his powers before coming to a decision. The Minister, acting reasonably, ought to have taken legal advice on whether he could give any weight to the reversionary factor. It was rightly conceded that he could only have been advised that such a factor could not lawfully be taken into consideration.

The Privy Council, however, in a judgment delivered by Lord Keith, considered that there was no reason to interfere with the finding of the trial Judge that the Minister was not in breach. In particular, the Board did not agree with Cooke J that the Minister's understanding of the position was such that it naturally called for legal advice. Lord Keith did not consider that the Minister's understanding was "absurd" or, as Cooke J had described it, "such an unusual supposition" as to "cry out for legal advice".

Further, the Board considered that other matters such as the fact that the Minister acted upon the advice of the Cabinet Economic Committee, and that the matter went before the Committee on three or four occasions, were factors that could legitimately be considered by the trial Judge in relation to the central issue of whether there had been any breach of duty.

The judgment of the Privy Council, therefore, turned, in the words of Lord Keith, on "the simple reason . . . that the Court of Appeal were not . . . entitled to depart from the conclusion reached by Quilliam J on the issue of the reversion factor". The Board also considered that it followed:

> . . . there was no basis for interfering with Quilliam J's conclusion that, even assuming that there was any duty in the Minister to take legal advice, there was no evidence to suggest that there was any breach of such duty for there was no more reason for the Minister to take legal advice in this case than in many other of the wider range of cases which must have gone before him for decision.

Lord Keith did not, however, go so far as to hold that negligence could not lie against a Minister for an unreasonable exercise of power; but, it is clear that their Lordships did not accept as readily as the Judges of our Court of Appeal did that the imposition of negligence in such circumstances was a relatively uncomplicated issue. Rather, Lord Keith considered that the primary remedy was judicial review which could be expected to be exercised promptly. Further, Lord Keith considered it could only be in a "rare case" that an error of law of this kind could be described as negligent. Lord Keith considered that imposition of liability might even have adverse consequences. It could lead to the danger of overkill; "The cautious civil servant may go to extreme lengths in ensuring that legal advice, or even the opinion of the Court, is obtained before decsions are taken, thereby leading to unnecessary delay in a considerable number of cases." Finally, their Lordships had difficulty on the issue of legal advice and ministerial discretion:

> . . . it is very difficult to identify any particular case in which it can properly be said that a Minister is under a duty to seek legal advice. It cannot, their Lordships consider, reasonably be said that a Minister is under a duty to seek legal advice in every case in which he is called upon to exercise a discretionary power conferred upon him by legislation; and their Lordships find it difficult to see how cases in which a duty to seek legal advice should be imposed should be segregated from those in which it should not.

At the end of the day, a Minister, when exercising a statutory discretion, so Lord Keith considered, was acting essentially as a "guardian of the public interest". Thus, in the opinion of the Privy Council, the issue of ministerial responsibility and negligence could not "be said to be free from difficulty". (Further, on this issue, see the judgment of Lord Diplock in *Dunlop v Woollahra Municipal Council* [1982] AC 158).

The remedy for review, negligence compensation and the obligation to take legal advice

It is submitted that as a general proposition, the remedy by way of review will be a sufficient remedy for correcting ministerial error. The Courts in this country, as the case of *Fiordland Venison Limited v MacIntyre* [1979] 2 NZLR 318 well illustrates, have a wide-ranging jurisdiction to remedy errors and can tailor this relief to the circumstances. In that case, for example, a licence was granted to the aggrieved applicant effectively by order of Court because of the delay that would be occasioned by the application being reheard by the Minister. But, as the case of *Takaro* illustrates, there may be exceptional cases where compensation or damages are required to accommodate an aggrieved party. In the absence of a power to award damages or compensation pursuant to the remedy for review, the tort of negligence serves a useful purpose. (See the discussion, by Dr G P Barton, "Damages in Administrative Law" contained in *Judicial Review of Administrative Action in the 1980s*, Oxford University Press (1986)).

It is difficult to accept, with respect, the proposition advanced by Lord Keith that redress in negligence should not be granted because in so far as a Minister is called upon to exercise his discretion anew according to correct principles and the discretion is exercised in the plaintiff's favour: "The effect of the delay will only be to postpone the receipt by the plaintiff of a benefit which he had no absolute right to receive." In modern administrative law terminology, a person has a "legitimate expectation" on application for a licence that statutory or regulatory powers will be exercised correctly and not ultra vires. Where a person suffers demonstrable damage as a result of a negligent or unreasonable exercise of power, albeit that it is exercised in good faith; (see Barton, supra at pp 126-135), then it would seem only right that compensation should be available. A Minister of the Crown has ample resources to call for advice and in those cases where he has doubt, or where any reasonable Minister would conclude there was doubt, then he should seek advice. If he does not, he carries the risk that an error will be viewed as unreasonable. Indeed, with respect to the Privy Council, there is much to be said for the view articulated by Cooke J that Mr Rowling's state of mind about the reversion factor (taking into account particularly the importance of the application to Takaro) was one that required him to take legal advice.

Although the arguments advanced by Lord Keith against the fettering of ministerial discretion by the tort of negligence are, with respect, weighty, it is submitted that there is a danger that the judgment will be read too generously and central government may see it as a carte blanche to exercise powers free of the necessity to seek legal advice in all but extreme cases. Whilst one cannot dispute the proposition that powers should not be fettered in such a way that their exercise becomes cumbersome, there is much to be said for the view that Ministers should be solicitous to ensure that they act within their powers, particularly when it is obvious that an unfavourable determination will have serious consequences. Indeed, the more serious the consequences of a determination, the more critically it may be argued should powers be scrutinised to ensure their proper ambit. One must view with some scepticism the argument that the taking of legal advice would unduly fetter ministerial decision making. In cases of urgency, for example, a Minister could seek priority advice from the Crown's legal advisors which it could be anticipated would be given expeditiously.

It is submitted that the remedy of review should enable a Court to grant compensation where delay or the refusal to grant an application or licence has occasioned damage and where there has been an unreasonable exercise of power albeit that there is no evidence of bad faith. That is not to say that a mere error or invalidly exercised power should per se give rise to a remedy though there is a body of opinion that it should (again see the discussion by Dr Barton, supra, at pp 145-152). But, at the very least, where the Court considers that damage has been occasioned in circumstances where a Minister or other administrative agency has acted unreasonably, then it is

submitted an aggrieved citizen should be entitled to a measure of compensation. Such relief, although equivalent to the tort of negligence, would mean that in those cases where delay has meant that no further application for reconsideration could be profitably made, compensation could be sought. It would not be necessary to further sue independently in the tort of negligence.

That is not, however, to say that the tort of negligence is not important independently of any suggested modification to the remedy by way of review. Indeed, the case of *Meates v Attorney-General* [1983] NZLR 308 demonstrates its importance. There, shareholders in a company, Matai Industries Limited, alleged they had been persuaded, by assurances and encouragement of financial and regional development assistance, by the government of the day to incorporate and invest their money in Matai Industries Limited. When it became apparent that the company was facing a liquidity and financial crisis, further negligence was claimed alleging reliance on assurances and encouragement of financial assistance by the government and help to carry the company on rather than retrench. Although the Court of Appeal was divided on the facts as to whether negligence had been established, it was held that there was a sufficient relationship of proximity within the reasonable contemplation of the government that carelessness on its part might be likely to cause damage to the shareholders. The cause of action in negligence could be successfully sustained where central government made representation or gave assurance that it knew would be relied upon. Here, it was further alleged that when the company was placed into receivership, assurances were given that "the interests of shareholders would be protected". Indeed, in a case of this kind, quite apart from the tort of negligence, modern notions of proprietory estoppel would seem to dictate that the plaintiff be granted compensation in equity for loss.

Thus, it is submitted that the remedy by way of review and the tort of negligence should co-exist independently providing a remedy by way of damages or compensation for unreasonable ministerial or government action falling short of misfeasance. It is submitted that it is important that there exist in the armoury of the law a remedy of this kind as a control on unreasonable government action, in order to ensure that such decisions do not go uncompensated, and further, to serve as a reminder to those in central government that power must be exercised reasonably with due regard for the person affected. The caveat advanced by their Lordships certainly reflects a greater measure of judicial restraint than was exhibited by members of our Court of Appeal. Indeed, one may detect in the opinion of Lord Keith something of a return on the part of English Judges to an era of judicial conservatism in their relations with the executive. Perhaps this is a reaction to the passing of the halcyon days of robust review of administrative action in which Lord Reid, Lord Wilberforce and Lord Denning MR played such an important part.

Takaro and its effect on the tort of negligence

As to the tort of negligence generally, *Takaro* did not greatly advance our knowledge of the law. The Board referred to the distinction between policy and operational determinations, a distinction which was mentioned by Lord Wilberforce in *Anns v London Borough of Merton* [1978] AC 728. This distinction had troubled Quilliam J in so far as the exercise of power by Mr Rowling was concerned. Lord Keith, however, emphasised that there were difficulties in clearly drawing a distinction rigorously between issues of pure policy and operational determinations which may also involve questions of policy or the public interest. Obviously, the greater the element of policy, the more difficult will be a judicial finding that executive power has been exercised unreasonably. As Lord Keith said, the distinction between policy (or planning decisions) and operational decisions does

> not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution.
> . . .

Anns was mentioned only briefly in the judgment and in terms similar to the pronouncements made recently in cases in the House of Lords. (See *Governor of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Limited* [1985] AC 210; *Yuen Kun Yeu v The Attorney-General* [1987] 3 WLR 776; *Currean v Northern Ireland Co-ownership Housing Association* [1987] 2 WLR 1043.) A warning was given against taking the statement of approach of Lord Wilberforce in that case too literally. In this regard, it would seem unfortunate that their Lordships today appear to be resiling from what, it is submitted, is such a clear and logical statement of principle. The alternative test posed by Lord Keith in the *Peabody* case, "just and reasonable", tells us little about how a Court should approach issues involving the application of negligence and indeed, it is open to the same criticism that supporters of a cause of action based nakedly on unjust enrichment encounter. Rather, it is submitted that the statement of Lord Wilberforce is not novel; it is merely a modern restatement of approach consistent with that advanced by Lord MacMillan and Lord Atkin in the famous case of *Donoghue v Stevenson* [1932] AC 562.

Issues of policy inevitably underlie the application of the tort of negligence in any given factual situation. Whilst certain policy considerations may, having regard to issues of damage, proximity and foreseeability call prima facie for the imposition of negligence, there may be other more important policy considerations which in the interests of society more generally tell against the imposition of negligence. Indeed, *Rondel v Worsley* [1969] 1 AC 191 is such a case. (And see the approach of the House of Lords in *McLoughlin v O'Brian* [1983] 1 AC 410.)

Further, it is unfortunate that the statement of principle of Lord Wilberforce which has been welcomed in New Zealand in a number of cases (cited by Woodhouse P in *Takaro* at p 56), and in Canada also appears to be

confined to novel fact situations. (See *City of Kamloops v Neilson* (1984) 10 DLR 64). Although Lord Wilberforce in *Anns* did circumscribe his statement by reference to a novel fact situation, it is submitted that in an appropriate case, policy considerations may dictate a change in the law so that negligence may be imposed or otherwise, in a given fact situation. The case of *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 in this country is perhaps an illustration that the common law is not immutable. This kind of approach, although appealing to Robert Goff LJ in the Court of Appeal in *Leigh & Sullivan Limited v Aliakmon Shipping* [1985] 2 All ER 44 did not gain favour with Lord Brandon who insisted that *Anns* was limited to novel fact situations. ([1986] 2 All ER, at pp 152-157.) Again, it is submitted that this reflects an attitude of judicial conservatism in the House of Lords. Whilst certainty in the law is important, stare decisis should not inexorably apply to deny an aggrieved person justice.

Takaro and the abolition of the Privy Council : The argument for a Supreme Court

It is submitted, however, here that *Takaro* raises a much more important and fundamental issue for the administration of justice in this country than any issue of law or fact in relation to negligence and ministerial responsibility. It is somewhat remarkable that five British Law Lords reversed a unanimous ruling of five members of the New Zealand Court of Appeal on so narrow a factual issue involving central government in New Zealand.

It is plainly unsatisfactory today that matters of this kind should be adjudicated upon from Downing Street. However, whilst one may agree with the expression of opinion of the Minister of Justice that the time has come to abolish appeals to the Privy Council, what should be of very great concern to lawyers and the public alike is that this statement should constitute an expression of intent in the absence of a definite proposal for replacement (text of Minister's speech is published in [1987] NZLJ 314).

Although the Law Reform Commission has embarked on a tentative consideration of this issue and published a discussion paper, no preference for any alternative has been suggested. It is of concern now that the Minister has indicated his intention this parliamentary term to abolish the Privy Council, that there has been so little informed debate amongst lawyers or the public on what is a profound legal and constitutional problem.

Until very recently, most of the debate has concentrated on the issue of whether the Privy Council should be retained or not. There is a strong body of opinion that it should be retained in the absence of a satisfactory substitute. Now, however, that those advocates of the Privy Council continuing to be the final appellate tier appear to have lost the argument, the problem of a substitute becomes pressing.

For reasons appearing below, it is strongly contended that New Zealand does require a second tier of appeal. It may be that the Privy Council did not have the opportunity to determine large numbers of New Zealand cases, but this does not mean that a second tier is unnecessary. Rather, in civil cases, the inhibiting factor was in all probability the expense associated with proceeding to London. Many fine issues and points of law may well have gone without argument because of this. In criminal cases, the procedure by way of petition as opposed to appeal which more often than not involves indigent petitioners, has rarely been successful, even in regard to matters of leave. No legal aid exists in criminal cases to the Privy Council and this undoubtedly has been an important factor restricting access to that Court; yet somewhat ironically, it is in criminal cases that there is a demand for a second tier of appeal. It is with the criminal law that important issues involving liberty and the relationship in its various ways of the State and the citizen can so often most sharply arise.

One frequently heard criticism against the concept of a Supreme Court is that there is insufficient legal talent in this country. Another is that our Judges are isolated or may be parochial and insufficiently lacking in independence of mind. As to the first objection, namely absence of sufficient talent, it is submitted that this is a very unconvincing argument. Although New Zealand may, in terms of population, be small, there is a wealth of legal talent available. For nearly three decades now, the Universities have graduated at the taxpayers' expense many highly qualified lawyers, and a considerable number of these have acquired expertise and competed successfully in the great law schools of the world; not to mention some gaining other forms of legal expertise and experience in competitive professional environments overseas. As time progresses, it is to be anticipated that the talent available will further increase and it is to the future that we must look when we consider a viable alternative to the Privy Council. As the Minister said in his Law Conference speech, "we have the confidence, the competence and the distinctiveness to rely on ourselves". The only rider is that we recognise these qualities.

As to the arguments based on insularity or absence of independence, again with respect, there is little, if any, basis for such a criticism. Our Court of Appeal, as *Takaro* and *Meates* well illustrate, is independently minded and does not bend to the executive whim. Other landmark cases are seen in the area of Crown privilege; see *EDS v South Pacific Aluminium Limited (No 2)* [1981] 1 NZLR 152. There is no reason to think that Judges of a Supreme Court of New Zealand would act differently or be any less independent than Judges of superior tribunals in Australia, Canada or the United Kingdom. Nor is there any evidence that they are insensitive to overseas developments in the common law.

Inevitably, however, the constitution of a Supreme Court of New Zealand will differ in quality from time to time as has been the experience with other Courts of final resort overseas. Equally inevitably, Judges will be appointed who have prejudices or convictions which may not be shared universally. Some may even be described as controversial. This may not be a bad thing because experience teaches us that some of the great dissenting judgments of the past, in time, have become majority opinions. The advantage of a Supreme Court of five Judges

is that on questions of major public importance, issues affecting New Zealand as a nation and its people, can be debated conscientiously and consideration given to differing opinions or views after concentrated argument.

The argument is therefore advanced here that if New Zealand is to truly regard itself as continuing to have a mature system of justice that the Privy Council should be replaced with a Supreme Court. It would be envisaged as a matter of protocol that the present members of the Court of Appeal would become the first Justices of a Supreme Court. Fresh appointments to the Court of Appeal could be made from the High Court, which perhaps with the large increase in criminal work today should sit in two divisions, although it is very arguable that this division should not be so rigorous that Judges could not sit in the other available jurisdiction of the Court when required. This argument is based on the sentiment that over-specialisation can lead to frustration and boredom and may, in the long run, be an unwise utilisation of judicial talent.

Further, now that it is becoming increasingly obvious that the District Court is attracting people of calibre and experience and the jurisdiction, particularly the civil jurisdiction, is likely to be increased substantially, it would seem advantageous that there be room for promotion to the High Court and beyond of Judges whose initial experience is at this level. Certainly, where there is a demand and the talent is available, there is no good reason in principle for denying promotion of Judges from the District Court. Also, there is an increasing wealth of academic talent in this country. Consideration should be given in a appropriate case to appointment to a Supreme Court or to the Court of Appeal of people who have extensive and appropriate academic experience.

An objection sometimes advanced against the creation of a New Zealand Supreme Court is that it would not have enough work to occupy it. This is a point noted again without comment by the Law Commission. That, it is submitted, would be a fallacy. As has been said, criminal cases rarely went to the Privy Council because no legal aid was available and the Court appeared reluctant to hear criminal cases by way of petition. It is to be anticipated that it would be otherwise where a forum existed here. Further, it is to be anticipated that many more civil cases would be taken further on appeal. New Zealanders are becoming increasingly litigious. There are new areas of litigation emerging. Matters involving the Treaty of Waitangi and, if it is ever enacted, a Bill of Rights would be of concern to the Court. Today, in New Zealand, there is an increasing amount of commercial and international litigation raising difficult issues of law which could be expected to occupy the attention of the Court. A not infrequent litigant in the Privy Council, for example, has been the Crown in the capacity of the Commissioner of Inland Revenue and it may be anticipated that issues of this kind, important as they are, would occupy the Court. If anything, there is a danger that a Supreme Court would become overworked unless it strictly invoked the threshold requirement that only matters of exceptional or special public importance should be determined by it. Indeed, it is of the utmost importance that the Court not become overburdened with litigation if it is truly to be able to give the kind of reflective and philosophical consideration to issues which may be expected of such a tribunal. Whether one agrees with the decision of the Privy Council in *Takaro* or not, what impresses most when one compares the opinion of the Judicial Committee with the judgments of our Court of Appeal is the presentation of arguments marshalled by Lord Keith against the view that the tort of negligence was available in such circumstances.

It is this measured and philosophical consideration of issues which is the hallmark of the second tier quality of legal debate. Too often, in the case of first appeals, arguments on issues are inadequate, cases are overlooked, and sometimes, judicial opinion canvasses material not referred to the parties in argument. Unless a second tier of appeal is available in matters of a serious kind, there is room for injustice if mistakes go unrectified, or arguments go unchallenged.

Although it may be argued that our Court of Appeal in cases like *Takaro* and further, in *O'Connor v Hart* [1983] NILR 280 (cf *Privy Council* [1985] 1 NZLR 159, delivered opinions which may appeal more than the judgments of the Privy Council (in regard to *O'Connor v Hart*, see comment "Mental Incapacity and Unfair Bargains in the Privy Council" [1986] NZULR 87), there can be little doubt that issues do benefit from the distillation or crystallisation of argument provided by a second tier of appeal. This was a point strongly made by the Royal Commission on the Courts (1978) at para 267. For this reason, it is submitted that as *Takaro* illustrates, it is not enough for the Court of Appeal to sit as a Full Court of five on important matters. It is not simply the number of Judges that is important to ensure quality of judicial decision making; rather, it is the opportunity for a re-ventilation of argument and fresh debate provided by a second tier that is its great advantage.

What of arguments concerning expense? It is submitted that New Zealand is indeed impoverished when it cannot afford to pay salaries for half a dozen superior Judges, staff, an additional courtroom and adequate research facilities. The Court itself need not be opulent. The Privy Council, for example, sits in an ordinary but gracious room in Downing Street. In relation to research facilities and assistance, one could envisage the Law Reform Commission playing some part, particularly in relation to access for materials and resources of that kind, should the Court sit in Wellington. It is submitted that in the absence of a viable alternative such as federation and a High Court of Australasia, to deny the creation of a Supreme Court, for reasons of economy, could be a very unwise saving for the taxpayer in the long term.

It may sadly be anticipated that New Zealand will become a country which witnesses far greater conflict than in the past as the gap between rich and poor widens, and racial antagonism becomes more clearly apparent. Although conflict may be a healthy characteristic of a democracy, it is submitted that it is

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Law Society

Interview with Peter Clapshaw, retiring President of the New Zealand Law Society

Mr Clapshaw, you have been President of the Law Society now since March 1985, a period of three years, which is the normal term, I think?

Three years is the maximum term and I have served the maximum.

Before you became President what was your experience in Law Society affairs? Did you start in District Law Society affairs in Auckland?

Yes. I first became a Council Member of the Auckland District Law Society. It must be about 15 years ago. I served as a Council Member of that Society, eventually becoming its Vice-President and ultimately the President of the Auckland Society.

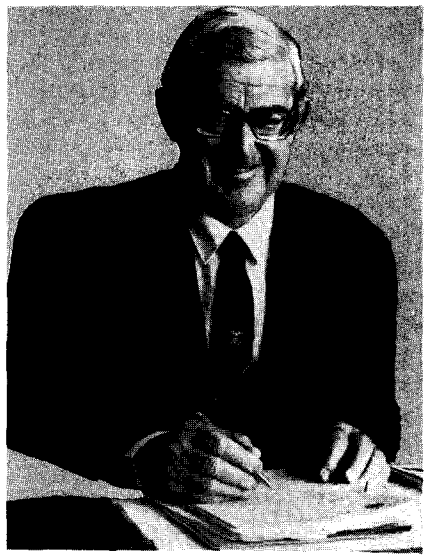
And when you were an office-holder of the Auckland Society would you also then have been serving on the New Zealand Law Society?

Yes. I spent four years as a Council Member of the New Zealand Society and then a year as New Zealand Law Society Vice-President from Auckland.

And was that continuous — when did you start?

That was continuous up until 1984. I had a period of approximately six months away from the Council of the New Zealand Law Society until I was elected President-elect in, I think, September 1984. Then I served six months as President-elect before becoming President in March 1985.

When you became President of the New Zealand Law Society did you find that it was an office that was quite distinct and different from the holding of any other office in the Law Society?



Yes, I think it is quite different. The office of President of the New Zealand Law Society really is, I suppose, the head of the profession so far as the practising profession is concerned. I regard it as an office that is a great privilege to hold but it carries considerable responsibilities. You are expected from time to time to express views which are taken as being representative of those of the whole profession. In terms of time, it is a much greater time commitment than any other office that I had previously held.

How did you find the situation in terms of living and having your practice in Auckland and so much Law Society activity perhaps involving you in Wellington. Was this a problem?

It wasn't a problem as long as you didn't mind travel. Throughout the whole time that I have been President I have spent at least one

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of the utmost importance that there exist a superior appellate tribunal which will command great and hopefully universal respect where serious issues arise. As the sad experience of Fiji indicates, we should no longer think that we are immune from the actions of demagogues in this part of the Pacific.

Finally, any decisions that are made in relation to a replacement for the Privy Council should be the subject of considerable consultation and debate as the Minister stated in his speech delivered at the New Zealand Law Society's Christchurch Conference. It is of concern that to date, there has been so little debate although the Minister's intention to abolish the Privy Council has been clearly stated. *Takaro* has concentrated the need for us to urgently address this issue. It is hoped that these remarks will stimulate some debate and that the work of the Law Reform Commission can be completed expeditiously so that its proposals may be given a public airing. At any rate, this comment is intended to question and put into sharp focus the views of those sceptics who assert that we have neither the talent, the resources, nor the need for a Supreme Court of New Zealand. □

day a week on average in Wellington, often it's been two days with an overnight stay. It would be very difficult were it not for the ease of transport these days. The other thing that has made the job a lot simpler, of course, is the facsimile machine, because a lot of communication between my office and Wellington is now done by fax. Obviously it would be easier for somebody who was actually living and working in the same city as the New Zealand Law Society office, but really, these days I think it is an office that could be quite conveniently held by anybody in New Zealand.

During the time that you were President, that is from 1985, what would you say were the major issues that came before the Society in those years?

It is a little difficult to single out what were the major issues. When I look back on it it seems to me to be almost a blur of things that required attention seemingly on a non-stop basis. But I suppose one of the issues that was pretty high in terms of public profile was the proposal by the Housing Corporation to commence a conveyancing service.

Has that matter now been resolved satisfactorily from the point of view of the profession?

I think we can say that it has been resolved reasonably satisfactorily from the point of view of the profession. At the end of it all legislation was passed under which the Housing Corporation does have power to conduct a conveyancing service. However, that conveyancing service in terms of the legislation does have to be overseen by lawyers which was one of the points that we made very strongly. And of course since the legislation was passed the Minister has announced that, notwithstanding the fact that the power exists, the Corporation doesn't propose to introduce the service at this stage. The reason for that is that she is now satisfied, and that the Corporation is apparently now satisfied, that the cost of the legal services being provided by the profession is competitive and reasonable and at a level where they feel no need to introduce the service. This, of course, was what the New Zealand Law Society told the Housing Corporation would happen right from the start and also told politicians would happen. The Society said this was particularly so once the profession had been given time to adjust to the relaxation of the rules which previously existed relating to matters such as advertising and also, of course, the conveyancing scale.

What other issues were of particular importance to you?

One of the things that has been very important over the last year or so and is still very important at the present time is the question of access to legal services generally. This is a matter which is of critical importance to the profession. It is also of great political importance because there is clearly a perception on the part of a large section of the community that the legal system does not work satisfactorily, so far as they are concerned, and that they don't have the access to justice that they believe they should have. A number of reports has been written and produced on this matter very recently and the Law Society has made submissions and representations on them all. The current position is that a Bill is in the course of preparation which hopefully will be the means of introducing a regime which will go a long way towards meeting some of the concerns expressed by those who are unhappy with the present system; and yet at the same time maintaining the things which the Society in all of its submissions has fought for very strongly. This really means a system of justice which is available to all New Zealanders, but the same system of justice for all New Zealanders; and also a system of justice where everybody has the right to be represented by a qualified lawyer.

Is the question of consultation and making submissions to various bodies, some, no doubt, government and quasi-government, a particularly significant and important part of the work in which you have been involved?

Certainly it's a very important part of the work in which the Society is involved. I have had a hand in some of the submissions that have been made on various topics over the years. But the Society makes submissions in various ways. We make a lot of submissions to select committees on items of new legislation and I can't say that I had a great personal involvement in too many of those although they all went in over my name. I perused them all before they were filed and sometimes made some minor amendments or suggestions in respect of them. However, the Society makes a lot of what might be regarded as ad hoc submissions on matters such as the Housing Corporation conveyancing issue and on some of those I have had quite a significant involvement.

Are there any other major issues that gave you great concern during your term in office?

Not necessarily so much great concern as things which were of great importance to the profession and should be matters that make us all think very deeply about the consequences that might occur. For example, I would suggest that one of the things that comes into that category is the recent opening in Wellington of a Solicitors Property Centre. If this becomes widespread it will really be quite a significant change in practice as far as the legal profession in New Zealand in concerned. We need to think clearly about some of the implications that might flow from this. Perhaps of greater concern, however, is the general question of mixed practices and the range of things that solicitors can properly do as part of their practice.

This is a matter that seems to be causing a good deal of discussion in England at the present time. Is there a reciprocal exchange of views between the Law Society and the New Zealand Law Society on issues such as this?

Yes, we are very fortunate in our relationships with overseas kindred organisations. It is certainly true that whatever happens in New Zealand has either happened elsewhere in the world or alternatively will happen. Sometimes New Zealand is first in these areas but not always. We have

a very good relationship with the Law Societies in the states of Australia and the Law Council of Australia, with the Law Society in Scotland and really with Law Societies around the world. Alan Ritchie, our Executive Director has, for his part, developed a very good relationship with his counterparts in these other Societies. We are able to get at pretty quick notice a very good supply of information on any topic that any of the other Societies has had to deal with and that of course is reciprocated.

Were there any other particular issues you would like to comment on at this stage?

I suppose the current issue that is of most importance and perhaps the issue that is of greatest importance of all, as far as the profession is concerned, is the question of deregulation particularly in so far as it applies to occupational licensing.

Is the term "occupational licensing" really a genteelism for reducing the sense of professional status and standards?

I suspect that that might be what is intended by the people who appear to be in favour of change. My position on this is really quite simple — certainly in so far as the legal profession is concerned, but I believe also in respect of most of the other occupations that are subject to occupational licensing. The reason for licensing is basically to preserve standards and to protect the consumer, to ensure that people who supply services are competent and qualified to do so, particularly in areas where people's health or property is at stake. Frankly I am amazed at the current trend to try and undo all of the things that have been done in the past. The ground seems to me to be very specious, that instead of protecting the consumer the occupational licensing regulations are said in fact to protect the people who are involved in that occupation. I accept that in some cases some of the rules may require revision and examination, but I am alarmed at the apparent trend towards wholesale overturning of occupational licensing because I believe that is totally contrary to the interests of the consumer.

To talk about matters of internal organisation within the profession, how would you describe the relationship between the New Zealand Law Society and the District Law Societies as you saw it during the past three years?

I think it is very good. The relationship between the New Zealand Law Society and the various Districts does differ depending on the size of the Districts. At one extreme you have Auckland for example which is a very large Society with a secretariat with considerable resources engaged in a good many activities on behalf of the practitioners in the Auckland area. At the other extreme you have one or two of the very small District Societies who have no staff of their own and who because of their size are able to provide very little in the way of services to their members. So I guess that means that the relationship that the New Zealand Law Society has with Auckland is rather different from that it has, for example, with Westland.

How did you find that worked in practice?

I think it would be fair to say that some of the smaller Societies are a little jealous of Auckland and the services that it is able to offer. But at New Zealand Law Society level I believe quite sincerely that the representatives — and I am really talking about Council Meetings now where every Society is represented — I believe that every representative speaks and votes at Council Meetings in accordance with what they believe to be the best interests of the New Zealand Law Society and the New Zealand profession as a whole. Factional or geographical interests are not really taken into account to any significant extent when we make decisions at the New Zealand Council table.

From your experience, did you feel there was any need for amalgamation of some of the smaller Societies or do you think there are historical and other reasons why the Districts are divided up the way they are, and that that should be left alone?

There are certainly historical reasons for the situation being as it is. I don't believe myself that those reasons are good reasons to maintain the status quo. However, I am not somebody who advocates change for the sake of change. I am realistic when we are talking about change and I don't believe that it is realistic to expect dramatic and substantial change to be achieved rapidly. The New Zealand Law Society has for a number of years, even before my time as President, been undergoing what could be regarded as an ongoing review of its constitution, its activities, and its set-up generally. That is being continued again at the annual meeting of the Society this year. There is a day set aside, as there was last year and I think the year before that, just to discuss the future of the Society and the way in which it conducts its affairs. As a result of that ongoing review a number of quite significant changes have been made to improve the set-up of the organisation.

Are you referring to internal administrative changes or structural changes in terms of the relationship between the Societies?

It is mainly administrative change that has actually taken place but there has been a number of discussions about possible boundary changes, and possible amalgamation of smaller Societies. While there is an understandable resistance on the part of some Societies to this, I think the fact that the matter is being discussed and often agreed as being desirable in principle is a step in the right direction. I don't personally anticipate that there will be any wholesale boundary changes in the near future, but I think we may see one or two of the smaller Societies deciding to get together. I think the climate that is being created by these review discussions encourages that. It is something that really has to be allowed to happen with the volition of the practitioners concerned rather than have the New Zealand Law Society trying to impose it upon them, because I am satisfied that that isn't going to work, and that is not the way to do it.

As a slightly flippant question you don't think there is any suggestion that Auckland should be divided

into two in the way in which it is has been done in the rugby world?

No, I don't think there is any suggestion of that. I think there are problems arising from Auckland's size but I think on balance the advantages of having a very strong Society like Auckland outweigh any of the problems that might be created otherwise.

One of the matters that is of great interest and curiosity to a lot of people relates of course to the question of judicial appointments. As President of the New Zealand Law Society are you involved in consultation in respect of such appointments?

Yes, certainly at the District Court level I am involved in what is really quite a formalised procedure. I would say that during my term of office that procedure has worked pretty well and I have been consulted, religiously almost, in respect of every appointment that has been made.

Would this be so concerning the High Court?

No, that comment relates to the District Court. So far as the High Court is concerned, the procedure is not quite so well formalised. While I have been consulted about appointments to the High Court I would have to say that in some cases the consultation could be regarded — by somebody more sensitive than myself — as being a last minute advice before the announcement was made.

What about complaints concerning members of the Judiciary? Do they ever come to New Zealand Law Society level to be dealt with, or looked at, or considered, by the President, or have these tended to be dealt with at District Law Society level?

I don't recall any occasion during my term as President where we really had to deal with anything in the nature of a complaint relating to Judges. The procedure for dealing with those complaints really is for the District Society to take them up with the senior Judge at their district level. That seems to work satisfactorily. It doesn't normally surface at the New Zealand Law Society level.

The other thing that has happened very recently has been the establishment of the Courts Consultative Committee.

Is the President of the New Zealand Law Society ex officio a member of that Committee?

No. The New Zealand Law Society has two representatives on it and I have been one of them. I cease to be a representative as I cease to be the President. I believe that the Committee is one where the President, even though he may not have a litigation practice background, probably should be one of the members because it is a Committee that potentially is very influential when you look at the constitution of it. I believe that it is now doing some work which will be very valuable in terms of improvement to the Court structure and workings generally. It will have the ability to deal with matters which in the past have perhaps gone by the way because there has really been no suitable organisation to which to refer some difficult issues relating to Courts and their management.

Who is actually on that Consultative Committee?

That Consultative Committee consists of the Chief Justice as Chairman, another High Court Judge, the President of the Court of Appeal, the Chief District Court Judge, and the Chief Family Court Judge; there are also representatives from the Department of Justice, two representatives from the Law Society and also two members of the public as well.

During your term of office you would have had consultations and discussions with politicians from time to time. How have you found that side of the activity from the point of view of the status of the legal profession and personal relationships with Ministers?

Most of our dealings have been of course with the Minister of Justice. I have found all of my dealings with him to be very satisfactory. He has been and has made himself available to me at all reasonable times and I have had a fairly regular series of meetings with him.

Some unreasonable times too, possibly?

I wouldn't say any unreasonable times. There have been the odd occasions when appointments have not been able to be kept because of the pressures of parliamentary office. But no, I would have to say that I think the Society has been fortunate in the current Minister of Justice in that I believe that he does have a real regard and a real appreciation of the importance of a strong and independent legal profession. I think that it is extremely important, particularly in the light of some of the proposals that are afoot at the moment, that the Minister of Justice does have this appreciation and is prepared to speak up on behalf of the profession at a political level. I believe that the current Minister does have that very much at the front of his mind and I hope he is able to maintain that position.

You referred earlier to the question of deregulation but your last comment raises the broader one of professionalism. During the past three years have you been aware of difficulties arising in relation to attitudes to professionalism in general and, in particular, to the law as a profession?

Yes. There is growing commercial pressure, caused probably as much as any thing else by inflation. Years ago lawyers were able to do their work, and seemed without necessarily having to make it their primary concern, to earn a satisfactory income. These days the costs of running a practice, particularly a city practice, are such that one has to be concerned about recovery of proper fees for all of the work that is done. I have a concern that in some areas the commercial approach, which we all now have to take in practice, can become so dominant that it submerges to too great an extent the professional element of our work. I believe that

we can't afford to allow this to happen. We must remember, first of all that we are lawyers, that we owe a duty to the law, and that being a member of a profession, particularly a member of the legal profession, carries with it an element of service. It would be a sad day for the profession if financial matters become so important that we lost sight of that very important fact. That would certainly affect the status of the profession in the eyes of the public and it would certainly affect our ability to carry out, what I believe, is a very important constitutional role in looking after individual rights and liberties. The statement which can perhaps be regarded as a bit of a cliche, a strong and independent legal profession, is I believe, dependent on lawyers who regard themselves as practising a profession first and foremost rather than being businessmen.

From your point of view as President during the past three years did the implementation of the Gold Report look to be an essential element in raising or preserving and protecting professional standards of excellence, to the extent that this can be achieved?

I am not sure to what extent the implementation of the Gold Report will necessarily help to achieve standards of excellence in the practice of the law, but it is something which was a significant development during my term of office. I must say that I am quite pleased to have been President while this particular training scheme was introduced. For many years the profession has put up with a system of practical training, or no system of practical training would be a better way of describing it, with the result that graduates have been very well qualified academically but on arrival in the office to commence work they have had little or no idea of how an office works or how the theoretical learning that they have acquired at university can be put into practice. The scheme for practical legal education which is now being instituted and commenced this year in 1988 as a result of the report obtained from Professor Gold, I believe, is a giant step forward for the profession. While there has been some concern about it on the ground of its cost and also on the fairly significant time involvement of 13 weeks which the students are required to put in to attend the course, I believe that the result will be that when graduates who have been through the course come to the legal office to do their work, they will be much better qualified and much more practically oriented than they have been up until now. I believe that overall the standard of practical qualification will be much higher and much more even than has been the case previously. Up until recently the level of practical training has been very much dependent on how well the particular firm that employs you carries that task out. Obviously, there have been some firms that have done it very well, equally obviously there have been some firms that have done it not very well at all.

Now that your term as President has expired, when you look back over it how do you see the state of the legal profession in New Zealand at the present time?

I think by and large the profession at the present time is in very good heart. I think we were united as a profession perhaps in a way we hadn't been previously over issues such as the Housing Corporation conveyancing issue. That was one matter which perhaps captured the attention of many more practitioners and drew their attention to the work done by the Society. Some of the current issues such as deregulation and occupational licensing are similar issues which will ensure that the profession presents a united front as I am sure it has to do. I think a strong and unified profession is of critical importance but I believe at the moment we have that. So far as the Society itself is concerned, I think the administrative side of the Society does a remarkable job given the comparatively limited resources that it has at its disposal. I cannot speak too highly of the excellent job done for the New Zealand Law Society by Alan Ritchie the Executive Director and his assistants. I have been continually impressed by the quality, loyalty and stickability, if that is an appropriate word, of the Law Society staff. There is very limited staff turnover. They all make a very good contribution and I would think that every member of the staff of the Law Society would be highly prized by any practitioner in New Zealand. □

Recent Admissions

Barristers and Solicitors

Richmond MJ	Christchurch	12 February 1988
Roberts MR	Auckland	18 February 1988
Rose AC	Christchurch	12 February 1988
Rose JA	Auckland	18 February 1988
Rush EJ	Auckland	18 February 1988
Salmon CA	Auckland	18 February 1988
Scott SD	Auckland	18 February 1988
Shaw RJ	Auckland	18 February 1988
Shenkin AP	Auckland	18 February 1988
Shim TK	Auckland	18 February 1988
Sibun SE	Auckland	18 February 1988
Simpkin LCE	Auckland	18 February 1988
Sinclair EC	Auckland	18 February 1988
Slight DJ	Auckland	18 February 1988
Smellie RP	Auckland	18 February 1988
Steele AJ	Auckland	18 February 1988
Stitt SC	Auckland	18 February 1988
Stolberger KFT	Auckland	18 February 1988
Style LA	Auckland	18 February 1988
Sumich AC	Auckland	18 February 1988
Sunderland AM	Auckland	28 January 1988
Swan BB	Auckland	18 February 1988
Szigetvary MN	Auckland	18 February 1988
Tappenden JE	Christchurch	12 February 1988

Implying terms into the contract of employment:

Damages for wrongful dismissal in New Zealand

By Margaret A Mulgan, Senior Lecturer in Law, University of Otago

In this article the author analyses and criticises the rule in Addis [1909] AC 488 (HL) *which is commonly referred to as denying general damages for intangible or non-pecuniary loss in cases of dismissal. She concludes that various interpretations of the* Addis *decision are possible and that the possibility of an award of damages — even exemplary damages — is still open to argument.*

1 Introduction

The rights and remedies available to dismissed employees in New Zealand can vary considerably, both in and between the private and the public sectors.[1] In the former, employees who are members of a union registered under the Labour Relations Act 1987 have access to the personal grievance provisions therein provided,[2] they have opportunities for hearing, explanation and consultation at various stages; if the dismissal is established as "unjustifiable", they may be reinstated in the job and/or obtain reimbursement of lost wages and compensation, including compensation for humiliation and injury to feelings and loss of any benefit, not necessarily of a monetary kind. In s 227(c) these "heads" of compensation are specifically mentioned: (cf the more general wording of the previous s 117.)

By contrast, employees whose sole recourse is to the Common Law have historically enjoyed no procedural rights prior to dismissal except that to reasonable notice. (*Re African Assoc Ltd v Allen* [1910] 1 KB 396; *Richardson v Koefod* [1969] 3 All ER 1264 at 1266; see A Szakats *Introduction to the Law of Employment*, 2 ed, 1981, para 212.) There has been virtually no likelihood of reinstatement in the job by way of declaratory or injunctive relief.[3] And the right to damages is severely limited.

In this context damages can be classified as special or general damages. First, special damages: the employee is entitled to claim the equivalent of wages for an agreed or reasonable period of notice and other contractually agreed benefits. But special damages for benefits which may have been expected to accrue but were not clearly part of the contract are not recoverable.[4] Secondly, there are general damages, that is damages for intangible or non-pecuniary loss. In the context of a dismissal action such a claim would include damages for loss of reputation or for mental distress, caused either by the fact or by the manner of dismissal. These are refused, following, it is said, often without further comment, the rule established by the House of Lords in *Addis v Gramophone Co Ltd* [1909] AC 488 (HL). (See Szakats, op cit paras 227, 228.) It is this type of claim which is referred to as "general" damages throughout this paper.[5]

This paper will focus on the last point, the limitation on damages for wrongful dismissal at Common Law, a limitation which has been criticised by both Judges and academic writers,[6] especially when it is considered in the current industrial climate and contrasted with the breadth of the statutory remedies.

It might be argued that such criticism of the Common Law rule is misplaced: that the solution to the anomaly complained of is to concentrate on a statutory remedy, on "compensation", sidestepping the limitations imposed by the contractual model, recognising that these are part of a wider pattern. For example, the coverage of personal grievance procedures could be increased so that few, if any, employees remain subject to the limitations of the Common Law (cf, eg, in the UK legislation: Employment Protection (Consolidation) Act 1978 s 54). Such a solution would not be difficult and, arguably, might be preferable.

Alternatively, change might be effected by explicit notice being taken in legislation of the employment aspect of the contract: for example, the *Addis* rule, insofar as it applies to employment contracts, could be abolished or modified by an amendment to the Labour Relations Act 1987 or, given the willingness to legislate in the contractual sphere in New Zealand, to, for example, the Contractual

Remedies Act 1979. This might be reinforced by the transfer of cases involving contracts of employment to the jurisdiction of the new Labour Court.

There seems little present likelihood of any of these legislative developments, although the Law Commission has now foreshadowed a possible legislative change to the *Addis* rule: see report in *Law Talk* 276, 4 (10.2.88). This paper offers an alternative thesis and a narrower focus. It suggests ways in which any blanket refusal of general damages for wrongful dismissal may be modified, in appropriate circumstances, within the boundaries of the Common Law of contract. This will not mean that the employment aspect will be ignored: on the contrary, the kind of contract under consideration may prove crucial in the argument. The interaction of recent developments in contract, employment and tort law will be considered. Particular attention will be directed to one recent development in the law relating to employment contracts, the implication of a duty of mutual trust and confidence into the employment relationship. Our study will begin with a consideration of the *Addis* case itself.

2 Addis v Gramophone Co Ltd

The plaintiff had been employed by the defendants as their manager in Calcutta and was dismissed by them with six months' notice, as required by his contract. However, the defendants appointed his successor during that period and prevented the plaintiff from working out his notice. He claimed an account and damages for breach of contract for lost salary and commission during that period but also for the harsh and humiliating way in which he was dismissed, both apparently for its effect upon his reputation and upon his own feelings. The matters of account were referred to arbitration; the causes for breach of action were tried before a Judge and jury and the jury awarded £600 in respect of the wrongful dismissal and £340 in respect of excess commission. No more will be said here on the question of special damages; attention is focused on the award of general damages for intangible loss, where the jury had clearly taken into account the manner of dismissal and the consequences flowing from it. The majority of the House of Lords (affirming the Court of Appeal) refused to uphold the award to the extent that it represented compensation for the manner, and possibly for the fact, of dismissal.

The views of the majority of the House are usually represented as summed up in the statement of Lord Loreburn LC, which has since acquired almost legislative authority: (*Addis* supra at 491 and quoted, for example recently, in *Shove v Downs Surgical plc* [1984] 1 All ER 7 at 10; *Klarwill v CED Distributors Ltd* (unrep, HC Ak, 14.4.86, A150/85) at p 7.)

> I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case.
>
> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. The cases relating to a refusal by a banker to honour cheques when he has funds in hand have, in my opinion, no bearing. That class of case has always been regarded as exceptional. And the rule as to damages in wrongful dismissal, or in breach of contract to allow a man to continue in a stipulated service, has always been, I believe, what I have stated. It is too inveterate to be now altered, even if it were desirable to alter it.

Despite the decisive note of this passage, it is necessary to go beyond it when arguments both for and against the retention of the *Addis* rule are reconsidered eighty years later. First, Lord Loreburn makes clear that the principle which he states is intended to be one of general and not specialised application, although he confines himself to the employment context; that it would be the same whether this were a claim for wrongful dismissal or for some other breach of contract by the employer. That the rule is seen as being of even more general application to breaches of contract is evident in the judgments of Lords Atkinson and Gorrell. (For the development of a ban on the awarding of general damages for breach of contract see below Part 3(a).) Such a general rule is supported by Lord Atkinson (supra, at 494-5) on the ground that

> to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice;

and by Lord Gorrell (ibid, at 501-2, see also Lord Shaw at 504) by reference to the necessity of having regard to "the money loss to the plaintiff of losing the benefit of the contract". Lord Gorrell links the existence of this general rule to another limitation on damages in contract, namely that they are too remote. This limitation is not on any particular head of damage but addresses the question how far the contract-breaker should be liable for those consequences which flow naturally from his breach. At the time *Addis* was decided this question was answered by reference to the rule in *Hadley v Baxendale* (1854) 9 Ex 341; (for later developments on remoteness see below Part 3(c).) Lord Gorrell employs a formulation very similar and, reasonably, finds it not satisfied on the facts.

Secondly, an important theme in the rejection of the jury's award was that these damages represented not compensation for the plaintiff but punishment for the behaviour of the defendants, that is that they were truly exemplary damages. (On aggravated and exemplary damages see below Part 4(b).) Neither aggravated nor exemplary damages were held to be available for breach of contract, in contrast to tort actions. (*Addis*, supra at 494, per Lord Atkinson, at 492, per Lord James.) Thirdly, it was stressed that there should be no confusion of this action with one for defamation which had not been pleaded and which would, in suitable circumstances, be separately available (ibid, at 496, per Lord

Atkinson, at 503, per Lord Shaw).[7] Lord Collins, dissenting on this aspect, was not convinced that he was compelled (ibid at 500-501.)

> to curtail the power of the jury to exercise what, as Mr Sedgwick points out, is a salutary power, which has justified itself in practical experience, to redress wrongs for which there may be, as in this case, no other remedy. Such discretion, when exercised by a jury, would be subject to the now unquestioned rights of the Courts to supervise, just as is done every day, where the form of action is tort.

Thus, three lines of argument emerge from the judgments and are not clearly differentiated. General damages for intangible loss are not recoverable in contract, being contrary to precedent, difficult to estimate and likely to lead to uncertainty; damages for loss of reputation are recoverable only in a tortious action for defamation; aggravated and exemplary damages are available in a tort action but not for breach of contract.

The second and third arguments in particular tell against any award of damages for the manner of dismissal, whether resulting in hurt feelings or in injury to reputation. The thrust of the judgments in *Addis* appears confined to this aspect. But it is possible to argue that the case also indicates, as the first line of reasoning would support, a denial of recovery for any intangible losses caused by the fact of dismissal, however delicately handled.[8] This distinction will be returned to later.

3 Interpretations of the *Addis* restriction

The "rule" established in the *Addis* case has been variously interpreted, explained and re-examined within the contract and employment contexts. Several interpretations will now be considered, alongside developments in those contexts. Reference will be made to caselaw and to academic writings, but reconciliation of the cases in this area proves to be very difficult. Three, perhaps four, interpretations can be identified.

(a) *There remains a rule that general damages are not recoverable in contract.*

Until comparatively recently this continued to be the prima facie approach (albeit with exceptions allowed) of Judges and commentators to claims in contract for non-pecuniary loss, including therefore injury to reputation or to any kind of mental distress or vexation.[9] Such a ban on non-pecuniary damages was evident in English contract law from the mid-nineteenth century. It is clearly formulated in *Hamlin v Great Northern Railway Co* ((1856) 1 H & N 408, 156 ER 1261). In this case the plaintiff had claimed damages for the defendant company's failure to run a train as advertised in their timetable. The plaintiff had incurred the cost of an additional fare but was also put to expense to maintain his customers' orders and goodwill and to considerable vexation and annnoyance. The trial Judge had directed the jury to limit the total damages to five shillings. An application for a new trial on the ground that the jury had an inherent power to award a sum for general damages, including damages for inconvenience and mental injury, was refused. Pollock CB, in delivering the judgment of the Court of Exchequer, stressed the contrast with the role of the jury in a tort action and continued: (ibid, at 411, 1262.)

> . . . it may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot be stated specifically, and the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.

The ruling appears to be based on public policy, a policy particularly applicable in the commercial setting, although in *Hamlin* it was clearly not confined to that, counsel there having attempted to extrapolate to "personal" contracts from the recognised exceptional cases of breach of promise to marry. A similar refusal to recognise such "sentimental" damages occurred in in *Hobbs v London and SW Railway Co* ((1875) LR 10 QB 111 at 122 per Mellor J. For the exception recognised in this case see below), and has been maintained in recent cases. The ban operates before any question of remoteness can arise.

In this context, *Addis* is seen as an influential case, following in the line of *Hamlin* and cementing that rule and of general application to breaches of contract, beyond the particular field of employment, or even more narrowly, wrongful dismissal. Sometimes a policy reason will be articulated, often along the lines established in the judgments of *Addis* analysed above.

Even the most enthusiastic supporters of this theory, however, and the judgments in *Addis*, admit certain exceptions to the general rule. In *Addis* itself these are confined to actions for breach of promise of marriage (now obsolete);[10] and to actions against a banker for refusal to honour cheques when funds are available. (*Addis* (ibid) and see H McGregor, *McGregor on Damages* 14 ed, 1980, para 17. A third exception mentioned in *Addis*, when the vendor of real property fails to make title (on which see McGregor op cit paras 204, 696-703), does not constitute an example of *increased* damages.)

Other cases, still classified as exceptions to that general rule, have developed or been categorised or rationalised subsequent to *Addis* (and were of course not at issue in that case, although Lord Atkinson at least was against the ramification of exceptions). Thus, exceptions have been recognised where actual pecuniary loss can be established as resulting from injury to reputation (see eg, *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393; *Aerial Advertising Co v Batchelors Peas Ltd (Manchester)* [1938] 2 All ER 788; see also McGregor op cit para 72.) – this might suggest that the problem is only one of quantification – or where pain and suffering accompanying actual physical harm can be established as a foreseeable consequence of the breach (McGregor op cit, para 68; note that the rules as to remoteness still apply. In New Zealand of course the Accident Compensation Act 1982 may bar such a claim.) Thirdly, an exception was early established in *Hobbs* case (supra) to allow

recovery for physical inconvenience which went beyond mental distress (see also *Burton v Pinkerton* (1867) LR 2 Ex 340; *Bailey v Bullock* [1950] 2 All ER 1167.)

Another potentially wide exception has recently been articulated, and illustrated in a variety of factual situations: where either freedom from mental distress, or, more commonly, actual enjoyment, was one of the things, or the very thing, contracted for. (The origins of this exception might be seen in earlier cases, for example those cases where the enhancement of reputation is seen as something which is contracted for (eg, *Clayton and Waller v Oliver* [1930] AC 209; and cf the "apprenticeship" cases eg, *Dunk v George Waller* [1970] 2 QB 165; see Szakats, op cit para 228)). Into the first category fall such cases as *Heywood v Wellers* ([1976] QB 446; see also *Silberman v Silberman* (1910) 10 SR (NSW) 554, *Byrne v Auckland Irish Society* [1979] 1 NZLR 351) where a solicitor negligently failed to protect his client from molestation and distress, which was the very thing he had contracted to do. This line of cases might include, for example, *Newell*, (*Newell v Canadian Pacific Airlines Ltd* (1976) 74 DLR (3d)) where the plaintiffs recovered damages for distress on the death and illness of their two dogs which the airline had insisted on carrying in the baggage section, despite the requests and obvious concern of the plaintiffs – although the case appears to be decided purely on remoteness (ie, contemplation) grounds (ibid, at 589). In the employment context, this exception could cover the Canadian case of *Pilon (Pilon v Peugeot Canada Ltd* (1980) 114 DLR (3d) 378, 29 OR (2d) 711). Here the employee was dismissed on inadequate notice and thus in breach of contract. It was clear that there was an understanding of long-term security in the job, supported by lower remuneration, so that this could have been said to have been contracted for, although the decision seems based rather on remoteness grounds (the plaintiff's mental distress was within the contemplation of the parties and *aggravated* by the defendant's conduct), than on an exception to the *Addis* rule (ibid, at 714, 716 per Galligan J. Note the emphasis on the requirement of an actionable breach of contract: see below).

The second category is most typically exemplified by the line of "spoilt holiday" cases, of which *Jarvis* (*Jarvis v Swans Tours Ltd* [1973] QB 233; see also eg, *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Hunt v Hourmont* (1983) CLY 1983) provides an example. In this case the plaintiff's fifteen-day holiday might be said, in contrast to the description in the defendants' brochure, to have been a dead loss. The Court of Appeal considered the contract one in which the defendants had specifically undertaken to provide a holiday of a certain quality, so that mental inconvenience on breach might be contemplated; that the limitations in *Hamlin* and *Hobbs* did not therefore apply here (and possibly no longer at all, per Lord Denning); and that damages for breach could properly take into account inconvenience, disappointment and distress. The plaintiff recovered £125, twice the cost of his holiday (On the quantum of damages see further below Part 4(b)).

Further exceptions may be in the process of formation. Thus Dawson suggests, (op cit, pp 234, 258-60) on the analogy of recent developments in tort, recovery for "mental distress of a medically significant nature". There have also been indications of allowing recovery for mental distress consequent upon physical inconvenience, again with reference to such recovery in tort.[11]

There has also been continued reference, often as an explanation of the "contracted-for" exception outlined above, to a difference between "commercial" and "personal" contracts. This distinction is not, of course, new (it appears, for example, in *Hamlin*) and it will be discussed further below. It could be utilised to provide an exception to the general rule based on the *nature* of the contract, with "personal" contracts more likely to allow recovery for mental distress; and with employment contracts increasingly seen as on the "personal" side of the divide.[12]

On this first interpretation of *Addis*, then the prima facie rule against recovery of general damages for non-pecuniary loss in contract remains (so that in a wrongful dismissal case, damages will be refused for vexation, mental distress, loss of reputation, caused either by the fact or the manner of the dismissal); but this may be displaced in a proper case according to a number of exceptions, which arguably provide sufficient flexibility. This approach appears to be the basis of the most authoritative recent New Zealand case, *Vivian v Coca-Cola Exports Ltd* [1984] 2 NZLR 289; (for other possible explanations of this case see below Part 3(b); for the tort claim see below Part 4(b)) where the plaintiff, who had been dismissed from his position of manager, claimed damages in contract for difficulty in finding another job and for mental distress; and also for damages in tort for breach of a duty of care. Prichard J, relying on the line of authority cited above, in a careful judgment which takes account of the exceptions, none of which apparently applied in this case, struck out these claims. A similar approach appears to underlie several unreported New Zealand judgments *Bertram v Bechtel Pacific (supra); Blake v LWR Gent Ltd* (unrep, HC ChCh, A46/79, 18.2.86; *Gee; Klarwill (supra);* and *Caddick v Griff Holdings Ltd* (unrep, HC Wgtn, CP565/86, 15.5.87) where such general damages for intangible loss have been refused, often with little discussion, on the authority of *Addis* or, latterly, *Vivian.* Similarly, the rejection of general damages in the most recent English case, *Bliss,* (fn 9 eg, see also below Part 4(a)) although it contains little discussion of the issue, can also be seen as resting on a general application of *Addis,* again with exceptions recognised.

Nevertheless, it must be admitted that some of the decided cases are accommodated within this framework with some difficulty and were in fact not decided on these grounds. (eg, *Newell, Pilon* (supra); *Cox* (below) Other possible explanations will therefore now be considered.

(b) Addis *establishes a narrower rule that general damages for intangible loss are irrecoverable either (i), particularly, on wrongful dismissal or (ii), more generally, in cases of breach of a contract of employment.*

(i) The first of these explanations, based on the facts of *Addis,* on the

narrow ratio of that case and frequently on the words of Lord Loreburn quoted above, interprets *Addis* as establishing or confirming a particular limitation on damages for one kind of breach of contract, namely an employer's wrongful dismissal of an employee. Whatever may be the case for other breaches of contract, whether an employment contract or otherwise, a policy restriction remains in force against general damages in this particular area, and applies, presumably, to damages arising from either the *fact* or the *manner* of dismissal. This theory has the advantage of answering a possible criticism that the exceptions to a general ban are becoming too many for the rule to be sustained and of remaining outside any move to recognise only limitations based on remoteness. This theory accommodates the difficult case of *Cox v Philips Industries Ltd* [1976] 3 All ER 161. In this case the employee had been promised a position of greater responsibility, but was actually demoted (although his salary remained unaffected), left with vaguely defined duties and eventually driven by distress and ill-health to resign. He was paid his contractually agreed five-month salary in lieu of notice so that there was no wrongful dismissal. In awarding him damages for mental distress, the Judge stressed that this was not an action for wrongful dismissal, in which the plaintiff would have recovered nothing at all, but for an earlier breach of contract, and decided the case according to contemplation principles alone (ibid at 166). This theory could also arguably explain *Pilon* (supra), where there could be said to have been an implied term of long-service employment and breach of it.

It is possible to derive judicial support for this approach from a number of cases: it appears to be the basis of the other recent English decision affirming *Addis, Shove v Downs Surgical plc* [1984] 1 All ER 7, where *Cox* was distinguished. It is one alternative explanation of the decision in *Vivian,* some of the recent unreported decisions appearing both to consider this the basis of the decision in *Vivian* and to apply it in their own contexts:[13]

The main difficulty with this theory, which must presumably be based on policy grounds or on a "policy" explanation of *Addis,* is that it is difficult to justify such a distinction. While it may be true that a case of wrongful dismissal will rarely come within the exceptions outlined above or, alternatively, within the contemplation requirements, this does not seem a sufficient argument for refusing general damages in principle for what is after all only a particular kind of breach of contract – unless it is because it is a breach of a particular kind of contract, the contract of employment.

(ii) A more tenable explanation would be this differentiation on the basis of the *kind* of contract. Despite the pressure of the commercial contract model, there has often been a willingness to recognise that different rules apply to different kinds of contracts, a willingness which has manifested more at some periods than at others. It might be said that the development of a ban on general damages for intangible loss in contract, through *Hamlin, Hobbs* and *Addis,* marks a low point in that recognition. In other areas of contract, however, a differentiation may have been more consistently recognised – the implication of terms, discussed in the following section, provides an example where variations may depend on the nature of the relationship established by the contract. These variations are often said to approximate to, or at least are supported by, a distinction between "personal" and "commercial" contracts. (See references in fn 12. This is not the only possible explanation however. It would not explain, for example, the implication of terms in the relationship of landlord and tenant.) The position of employment contracts is not easy to describe. Earlier indications that employment contracts were sui generis, are now generally rejected; for example the traditional reluctance to grant specific performance of a contract of service (see Szakats, op cit para 231, and Mulgan, op cit fn 1) and the related doctrine that, in employment contracts, a unilateral, unaccepted repudiation would, in law as in practice, serve to bring the contract to an end![14] They cannot be used to establish the special position of employment contracts. And there are cases where an argument that a particular rule does not apply in the employment context will be unsuccessful![15] On the other hand, in other areas there is increased recognition of different treatment being necessary for a contract of employment, particularly if its personal nature is stressed and/or the employment aspect is emphasised and placed alongside developments in the legislative sphere.

There would be nothing difficult in theory therefore in interpreting the ban in *Addis* as applicable only to breaches of contracts of employment. It is suggested that this would be solely an interpretation, for, although it can be supported from the words of Lord Loreburn, the tenor of the judgments in *Addis* and its timing would suggest that this was not the intention at the time. It seems an attractive interpretation; the main obstacle to it is that it is difficult to support it clearly from the caselaw. Although it could provide an explanation of *Bliss,* (supra, fn 9) especially if *Cox,* (supra) is, as there, viewed as wrongly decided, and an alternative explanation of *Vivian,* (supra, where Prichard J at 296 refers to "service contracts") it cannot be said that either of these, or any other cases, were clearly decided on this ground.

(c) Addis *is an example of the practical application of the rules as to remoteness in assessing contract damages*

As we have seen, one of the judgments in *Addis,* that of Lord Gorrell, refused general damages because they did not flow naturally from the breach nor could they have been supposed to be within the contemplation of the parties at the time the contract was made. So, subsequently, the general ban has been explained away, (despite the actual holding in *Addis*), simply on the ground that, generally speaking, such damages are precluded because too remote. The question as to what constitutes too remote is usually answered by reference to the "rule" in *Hadley v Baxendale,* (supra, and see Lord Gorrell's judgment in *Addis* supra) as subsequently clarified and refined in later cases, particularly *Victoria Laundry (Windsor) Ltd v Newton,* [1949] 2 KB 528 (CA) at 539-40, and *Koufos v C Czarnikov Ltd,* [1969] 1 AC 350,

and might be summarised as follows: the contract-breaker will be liable in damages for the consequences of his/her breach only to the extent that these were within the contemplation of the parties at the time the contract was made as not unlikely to result from that breach (see McGregor, op cit, paras 180-189; and S M Waddams, *The Law of Damages*, 1983, paras 1116-1124.) Discussion of the difficulties of this formula, especially as it relates to the test of reasonable foreseeability in tort, is not possible here, but attention should be drawn to the importance attached to the parties' agreement, awareness and reliance at the time of the making of the contract. The question of how far this reflects an assumption of risk is difficult, and, it is suggested, not helpful in the employment context, unless one were to say that the employee has traditionally been assumed to take the risk and that this assumption might now be challenged. (On all these aspects see McGregor, op cit, Waddams, op cit, paras 1125-1136, 1147-1149.)

If this explanation of *Addis* is accepted, then in a proper case, ie when the remoteness rules are satisfied, damages for breach of a contract of employment, including a wrongful dismissal, could be awarded. Many of the cases discussed in (a) above as providing exceptions to a general ban could equally have been decided on remoteness grounds. Such an early exception as physical inconvenience in *Hobbs* (supra) clearly makes use of the rules of remoteness, mental distress being arguably rejected in the same case on the same grounds. The lines of argument in the cases on what was actually contracted for tend to blur between an exception coupled with remoteness rules and a straight application of the latter. And some of the otherwise more "difficult" cases are clearly decided solely on their satisfying the test of remoteness: for example, *Newell, Cox* and *Pilon*. This approach has both academic[16] and judicial support. In addition to the cases mentioned, it is the basis of the obiter comments in the Canadian case, *Brown v Waterloo Regional Board of Commissioners of Police*;[17] and it is supported in New Zealand in the careful judgment of Hardie Boys J in *Osmond v Anchor-Dorman Ltd*, (unreported, 3.11.81, HC Nelson, A32/79) although he held against the plaintiff on the issue of general damages, finding the remoteness tests not satisfied on the facts. And of course such a failure to satisfy the remoteness test will often occur, particularly given the emphasis on the time that the contract was made. But if in a particular case the mental distress which results can be said to have been within the contemplation of the parties at that time, then damages can be recoverable. There seems no valid reason why damages for loss of reputation because of the manner of dismissal might not in appropriate circumstances be awarded.[18] Moreover, if it can be established that it was within the parties' contemplation that distress or difficulty in getting a new situation, beyond the normal case, was caused by the fact of dismissal, then, again, damages should be recoverable.

All of these theories and interpretations of *Addis*, with the possible exception of (b) ii, can be supported from the reasoning, argument and/or results of the caselaw; and (a) and (c) in particular from academic commentary. It is not the intention of this paper to choose between them, but to proffer some suggestions to create greater flexibility for the recovery of general damages for intangible loss, whatever interpretation of *Addis* may be adopted. Many of these suggestions are based on a recent development in the laws relating to the contract of employment which will now be considered.

4(a) The Contract of Employment: Development of an implied term of mutual trust and confidence.

The significant development has occurred in the implication of contractual terms. In the context of the general rules of contract the Courts have remained wary of implying terms where the parties have not clearly expressed them, still preferring to base them on some presumed intention of the parties or as required to give "business efficacy".[19] However there is, alongside this, recognition of terms which are implied because of the nature of the contractual relationship;[20] the law of landlord and tenant provides examples. In the employment relationship, the Common Law has recognised as implied terms duties on both the employer and employee. (Szakats, op cit, paras 124-147.) Recently these have been augmented by, or subsumed under, a more general mutual duty to display trust and confidence, leading to a duty to act reasonably and responsibly. There are indications of such a general duty in the Common Law context in the judgments in the *ASLEF* case (*Secretary of State for Employment v ASLEF (No 2)* [1972] 2 All ER 949, particularly in the judgment of Denning M R). These have been taken up and developed in the context of the UK unfair dismissal legislation (Employment Protection (Consolidation) Act 1978 s 55). In order to invoke the protection of that legislation the employee must establish that he/she has been dismissed or resigned in circumstances that amount to a constructive dismissal.[21] In a number of cases (*Sharp; Hughes* (supra); *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666 (EAT); *Lewis v Motorworld Garages Ltd* [1986] ICR 157 (CA)) the UK Industrial Tribunals and Courts have recognised the concept of an implied duty on the employer to act in a reasonable manner, and have held that breach of such an obligation, provided the breach is sufficiently serious to be repudiatory, will allow the employee to treat the contract as at an end; so that it is the employer, not the employee, who has ended the contract. A clear statement of this term and its effect is to be found in the judgment of the Employment Appeal Tribunal in *Woods* case (supra at 670-672).

> In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any

repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin* [1978] IRLR 322 and *Post Office v Roberts* [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts*.

We regard this implied term as one of great importance in good industrial relations. . . .

Experience in this appeal tribunal has shown that one of the consequences of the decision in the *Western Excavating* case has been that employers who wish to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort to methods of "squeezing out" an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal.

It is for this reason that we regard the implied term we have referred to as being of such importance. In our view, an employer who persistently attempts to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee's terms of service does act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such an employer has therefore breached the implied term. Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract: see *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84.

Recently, the English Court of Appeal has shown a willingness to utilise the implication of such a term in an ordinary, ie, common law contract of employment. In *Bliss'* case [1985] IRLR 308 (CA), the employment authority, after a history of friction in the department, had requested the plaintiff to undergo a psychiatric examination and suspended him from duty when he refused. The circumstances did not constitute the reasonable cause required for such an examination under a staff circular then in force. The authority was held in breach of the implied duty and consequently to have repudiated the contract. This recognition of an implied duty in the Common Law context may be strengthened not only by its analogy to the statutory context, but by the increased recognition of fiduciary obligations in different contexts which, while they can exist independently of a contractual setting, can be implied into a contract when one is in existence.[22]

There has been similar recognition and development of a mutual implied term in New Zealand. In the context of establishing an unjustifiable dismissal under s 117 of the Industrial Relations Act 1973, the Arbitration Court and the Court of Appeal in a number of recent decisions have adapted the English cases on constructive dismissal to the New Zealand statutory context. (The principles are summarised in *Wellington etc Clerical etc IUW v Greenwich* (1983) ACJ 965 at 971-986.) The Court of Appeal has recently proceeded from this to consideration of the duty of the employer both in this statutory context and beyond. In *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA), after an exhaustive review of the English cases and of the tests for establishing and defining that duty there considered, the Court formulated the term narrowly to fit the facts of the particular case, as "a duty binding an employer, if conducting an inquiry into possible dishonesty by an employee, to carry out the inquiry in a fair and reasonable manner," and remitted the case to the Arbitration Court to reconsider whether that term had been breached. They also however went further: the particular term they clearly envisaged as part of a wider duty to be implied in the context of s 117 dismissals, and this has been reiterated in another recent decision of the Court, *Marshall Cordner v Canterbury Clerical Workers' IUW* (unrep CA 32/86 19.8.86) and taken up in another statutory context, the Human Rights Commission Act 1977, in *H v E* (1985) 5 NZAR 333. Although the Court of Appeal left the exact content or definition of such a wider term to the Arbitration Court to determine or advise on, "so as to serve the needs of industrial relations in New Zealand" the Court appears to favour the approach of the Employment Appeal Tribunal in *Woods* case quoted above; and indicates that the term may encompass both the maintenance of trust and confidence and reasonable, decent treatment in the circumstances.

Moreover, in the *Woolworths* case the Court introduced their discussion of the implied term in a much wider context (at 376):

> It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity (see *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243). No formulation of duties in general terms can relieve a tribunal from assessing the overall seriousness of the particular conduct about which a complaint is made. And the seriousness of any breach of an employer's duties will often be important in deciding whether a resignation was in substance a dismissal. But the term favoured by the Employment Appeal Tribunal in England is, with respect, at least somewhat less nebulous than Lord Denning's later wording. In this case, however, we do not have the benefit of the Arbitration Court's view on how best to define an implied term so as to serve the needs of industrial relations in New Zealand. Therefore it is preferable that we should not

now state a final opinion on that general question.

What can be said without doubt is that there must be an implied term or a duty binding an employer, if conducting an inquiry into possible dishonesty by an employee, to carry out the inquiry in a fair and reasonable manner. We so hold. It may be seen as part of a wider duty as already discussed, or as an application of natural justice to contemporary industrial relations, or perhaps most naturally as combining both ideas.

Again, in *Marlborough Harbour Board v Goulden,* [1985] 2 NZLR 378, the Court returned to the implied term in a case in a different context, that of "public" employment. The case was concerned with the requirements of fairness in that context but the Court prefaced their conclusion with this obiter statement, (at 383) reiterating the possible wider application mooted in the *Woolworths* case:

> Turning to the application to this case of principles to be found in the modern authorities, we think that the position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty. Consider Lord Wilberforce's "I do not wish to assume that this is inevitably so" in *Malloch* at p 1294, and note the recognition by Sir John Donaldson MR in the *East Berkshire* case at p 431 that natural justice may apply in the essentially contractual sphere.

In *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 this Court accepted that in the sphere governed by the Industrial Relations Act 1973 the relationship of confidence and trust that ought to exist between employer and employee imports duties on both sides, including a duty on the part of the employer, if carrying out an inquiry preceding a resignation or dismissal (in that case on the ground of possible dishonesty), to do so in a fair and reasonable manner. Perhaps a similar implication might quite readily be found in private contracts of employment not subject to the 1973 Act. Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in a contract of service.

If such a term can be implied into the common law contract of employment in New Zealand, then breach of it could sound in damages. The implications of such a term in the context of the *Addis* rule will be considered in the final section of this paper.

4(b) Other Developments in Contract and Tort

The implied term discussed above will provide the main thrust of our argument as a solution to the difficulties of the *Addis* rule. There are some other points in the development of contract and tort which must be briefly mentioned as bearing upon the question of damages for wrongful dismissal, although they cannot be developed in any detail here. (The implications of *Day v Mead* [1987] BCL 1223 have yet to be worked out, but without going into detail or particular points, it could at least be said it supports the overall theme of this paper.)

(i) First is the question of the assessment of damages for breach of contract. Although it is true that there has often been a readiness to award damages based not solely on the expectation interest,[23] the Courts have shown increasing recognition of alternative bases of assessment, particularly when exceptional cases are being considered. There is increasing willingness to award damages based on the reliance interest, for out-of-pocket losses similar to those recoverable in tort (although these bases are seldom articulated), particularly in cases where the expectation interest would afford little or no recompense on the particular facts. [24] There are also examples, *Jarvis* (supra) is one, of an award of damages for the value to the plaintiff of the contractual performance over and above its market value, ie, recognition of what has been called the "consumer surplus" principle.[25]

Also in a few cases (eg, *Jackson's* case, supra; see also *McCall v Abelesz,* fn 11) allowance has been made in contract for distress caused to third parties (somewhat surprisingly in view of the strength of the privity doctrine). In New Zealand the greater flexibility provided by the existence of the Contracts Privity Act 1982 would make this issue worth exploring. In all these aspects of assessment the Courts have stressed that difficulties of estimation should no longer in contract, as they are not in tort, be allowed as a bar to any recovery. (See the references collected in Waddams (op cit, paras 1053-5).

(ii) One of the prominent themes in *Addis* was the relationship between contract and tort and the necessity of keeping the lines between them clearly defined. It is beyond the scope of this paper to do anything more than refer to the difficult question of the overlap of tortious and contractual actions and remedies; but both in New Zeland and in other Commonwealth jurisdictions the position has changed radically since the *Addis* decision, rapidly within the last decade and is still, in many respects, uncertain.[26] In New Zealand the extent of the effect of the decision in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100, appears lessening but remains unclear *(Gartside v Sheffield Young & Ellis* [1983] NZLR 37; *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 179; see C French "The Contract/Tort Dilemma" (1983) 5 OLR 236).

In our particular context, an attempt was made to found a claim in tort in two recent cases: in *Vivian* (supra) the claim was struck out on the ground that the contractual nexus alone did not establish the necessary duty of care; this reasoning was applied also in *Gee* (supra) (although a claim in tort by the employee's wife was allowed to proceed). In all this uncertainty one point is clear: the clear-cut divisions which were applied, and to a certain extent established, in *Addis,* can no longer be relied on; inter-action and

some blurring of the boundaries seem likely to continue.

Two results might follow: firstly, if the duty implied into contracts of employment could be argued, as well it might, to establish the requisite duty of care between employer and employee, then an alternative route to damages for intangible loss, an action in tort, might be opened to the wrongfully dismissed employee in the kind of action which failed in limine in *Vivian*. This would solve many of the problems associated with contractual damages discussed above, at a stroke. Secondly, and less radically, the blurring of the rigid boundaries between the two actions could lead to some points associated with the awarding of damages in tort becoming relevant in contract. The award of damages for mental distress in tort has already been mentioned as of potential influence in contract. A more difficult problem, but one which cannot be ignored in this context, not least because of its prominence in *Addis* itself, is the awarding of aggravated and of exemplary damages, traditionally, as there, confined to actions in tort.

In *Addis* itself much of the argument centred on the rejection of an award of either aggravated or exemplary damages on a breach of contract. The issue of aggravated damages is not treated at any length: Lord Atkinson (*Addis*, supra at 494-6) argues for the confinement of circumstances of aggravation to tort cases (it is possible also to so interpret the judgments of Lord James and Lord Shaw); and it could be said that the whole tenor of the rejection of damages for the manner of dismissal reflects a rejection of aggravated damages. But in *Addis*, as in the majority of cases and academic literature until the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129, little emphasis is placed on aggravated damages, at least partly because the line between these and exemplary damages is not clearly drawn. The categories have become more defined with the clarification of the distinction and the enunciation and confinement of the principles of exemplary damages in that case, with the consequent re-identification of many instances of earlier cases as awarding aggravated rather than exemplary damages (ibid, at 1221-33, per Lord Devlin).

In New Zealand, the position in tort actions has been clarified in two decisions of the Court of Appeal, *Taylor v Beere* [1982] 1 NZLR 81, and *Donselaar v Donselaar* [1982] 1 NZLR 97. In these two cases the principles of aggravation are clarified and the point emphasised that an award of aggravated damages is to be considered first, and will often prove sufficient (*Taylor v Beere* at 95 per Somers J; and *Donselaar* at 104, per Cooke J and *Rookes v Barnard* (supra) at 1221, 1228, per Lord Devlin. See also Waddams, op cit, references in paras 513, 521). Nevertheless, the, admittedly somewhat anomalous, concept of exemplary damages [27] is retained, in a rare but proper case, as " a useful weapon in the legal armoury" (*Donselaar*, supra at 107, per Cooke J); and is not confined in New Zealand to those categories, either of a particular class of defendants or a particular kind of motive, which found favour with the House of Lords in *Rookes (Taylor v Beere*, supra, at 92-3, per Richardson J; in particular they are not limited to the "public" arena *Donselaar*, supra at 103-4, per Cooke J. There has been a similar rejection in Australia: see *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590).

These cases are concerned with the awarding of aggravated and exemplary damages in an action in tort, not upon breach of contract. For the purposes of this paper the following points might be made: in circumstances where an award of general damages seems appropriate in contract, there seems no reason in principle why the principle of aggravation should not apply to increase the sum awarded in a proper case. (Lord Devlin in *Rookes*, supra at 1221 refers to circumstances "where the damages are at large"). In most cases this would be sufficient.[28] But it is suggested that there should not be a blanket refusal of exemplary damages in a rare case where they are considered appropriate in the circumstances of a wrongful dismissal. It might be argued that exemplary damages have not been, and should not be, available on breach of contract. (For a recent re-statement of this position see *Caddick v Griff Holdings Ltd*, supra at p 3). But it might be argued that exemplary damages are anomalous, whatever the action; and that the arguments for flexibility in the Court of Appeal both in the sphere of exemplary damages, in *Taylor* and *Donselaar*, and in the field of employment, in *Woolworths* and *Goulden*, and the blurring, in other areas, of the contract/tort distinction, all suggest that, in those cases where the circumstances appear to cry out [29] for an exemplary element, it should not be unavailable.

(These comments on exemplary damages are further supported by the interim judgment in *HMAG for the UK v Wellington Newspapers Ltd* (CA 203/87, 21.12.87) at pp 13-14 per Cooke P and *ACC v Blundell* (CA 102/85, 2.10.86). Reference might also be made to the award of exemplary damages in an action for conspiracy, where there were also breaches of contract in the *Lintas* case *(SSC and B: Lintas NZ Ltd v Murphy* [1986] BLC 713.)

5 Conclusion: Awarding general damages on wrongful dismissal in New Zealand

In this final section an attempt will be made to draw together the various threads of this paper, focusing on the possible interpretations of *Addis* analysed above.

(a) If the first view is accepted, that *Addis* reflects a ban on the recovery of general damages in contract, then such damages might be recoverable if a particular case of wrongful dismissal can be brought within a recognised, or a newly-developed, exception to that general rule. First, if a mutual duty of trust and confidence, and general reasonable behaviour, along the lines suggested above, be implied into the employment contract, then observance of such a duty could be seen as one of the things contracted for, (especially if the contract is seen as more personal than commercial) analogous to those cases where freedom from mental distress was so regarded. In a proper case, depending for example on the nature of the employment relationship and the employer's conduct, damages might be recovered for mental distress caused by the manner of dismissal and even possibly for loss of reputation.

Similarly, mental distress due to, eg, relegation or demotion could be compensated. For mental distress or loss of reputation due to the fact of dismissal to be compensated under this exception either special circumstances, as are suggested, eg, in *Pilon*, or a complete change in policy would be required.

Secondly, a claim for loss of reputation caused by the manner or the fact of dismissal might be allowed by extension from those cases where quantifiable pecuniary loss traced to damage to reputation has been allowed, the kind of contract involved justifying a policy shift here. Finally, similar policy arguments might establish employment contracts as an exception to the general ban, subject still to the remoteness requirements.

(b) If *Addis* is interpreted as a particular limitation in cases of (i) either wrongful dismissal or (ii) employment, then, it is suggested that it might be discarded on the ground that the first distinction is untenable and the second undesirable, given the current general trend of employment law as represented in the cases discussed in 4(a). This might require a decision of the Court of Appeal, since *Addis*, though not technically binding, has been followed for a long time in New Zealand.

(c) If *Addis* is viewed as simply a practical application of the remoteness rules, then the implied term of trust, confidence and reasonable behaviour might again be invoked, since it would be clear to the parties at the time the contract was made, that breach of it, whether it took the form of a dismissal which was technically wrongful or not[30] or of some lesser penalty, could result in mental distress and, in appropriate circumstances, harm to reputation. Damages for mental distress or harm to reputation caused by the fact of dismissal would not be absolutely barred but might be recoverable in appropriate circumstances.

In any of the above situations the possibility of an award of damages being aggravated by the employer's conduct should not be discounted; nor, it is suggested, should an award of exemplary damages be ruled out entirely.

An alternative possibility which is only suggested here but which might bear further investigation is that an aggrieved employee might seek redress in an action in tort, for breach of a duty of care, this being established by the term of trust and confidence and mutual responsibility implied into contracts of employment. □

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1 Consideration of the rights and remedies available to employees in the public sector is generally beyond the scope of this paper; at Common Law procedural protection may be afforded by the requirement that the rules of natural justice be observed; many state servant statutes contain procedural protection and remedies unavailable at Common Law. (For the position until recently see A Szakats and M A Mulgan *Dismissal and Redundancy Procedures* (Butterworths, 1985) Part VI; M A Mulgan "Toward a uniform law of dismissal in New Zealand" (1987) NZULR 12, 384.) It appears that the position of many state servants may now be similar to that in the private sector: State Sector Bill 1987, Parts VI, VII, VIII.

2 Labour Relations Act 1987 Part IX, ss 209-229; the corresponding section in the Industrial Relations Act 1973 was s 117; for the case-law on this section see Szakats and Mulgan (op cit) Part III; Szakats, *Introduction to the Law of Employment* (2 ed), chs. 22-28)

3 The "exceptional" cases, until recently and arguably still are, those where there exists in addition to a contract of employment some statutory framework or additional protection. See *Ridge v Baldwin* [1964] AC 40 (HL); *Vine v the National Dock Labour Board* [1957] AC 488 (HL); *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578; for the application of these cases and the present position in New Zealand see *Fraser v SSC* [1984] 1 NZLR 116; *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378; Szakats, op cit, paras 230, 231; Mulgan (op cit fn 1).

4 *Clark v Independent Broadcasting Ltd* [1974] 2 NZLR 595. In the cases cited later in this paper, claims for redundancy payments and insurance benefits were struck out in *Bertram* and for a part in a share allocation scheme in *Klarwill*, where an allowance was admitted; in *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176 (CA) a share in profits was allowed.

5 Damage which cannot be easily assessed and is usually concerned with non-pecuniary or intangible losses is explained in the second meaning of special and general damage in H McGregor, *McGregor on Damages* 14 ed, 1980, para 17):

> The second meaning of general and special damage concerns proof: it has more connection with tort, but the clearest statement comes in a contract case, *Prehn v Royal Bank of Liverpool* (1870) LR 5 Ex, 92 at 99-100 where Martin B put the distinction thus: "General damages . . . are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man. . . . Special damages are given in respect of any consequences reasonably and probably arising from the breach complained of." This type of general damage is usually concerned with non-pecuniary losses, which are difficult to estimate, the principal examples being the injury to reputation in defamation and the pain and suffering in cases of personal injury. Pecuniary loss is also occasionally general damage within this meaning, both in tort and in contract. In tort there is the loss of business profits caused by the defendant's inducement of breach of contract or passing off, while in contract there is injury to credit and reputation caused by the defendant's failure to pay the plaintiff's cheques or honour his drafts, pecuniary losses which it is difficult to estimate at all accurately.

See F Dawson "General damages in contract for non-pecuniary loss" (1983) 10 NZULR 232, where this passage is also relied on. (General damages for *pecuniary* loss in contract are also given for eg, personal injuries caused by breach of warranty of quality of goods, in jurisdictions not affected by the Accident Compensation Act.)

6 See eg, *Bertram v Bechtel Pacific Corp Ltd* (unrep 3.8.78 HC Whangarei A6/78) at p 3 per Barker J; reiterated in *Gee v Timaru Milling Co Ltd* (unrep HC Ak A387/85 4.2.86) at p 7; A Szakats' editorial comment *Mazengarb's Industrial Law Bulletin* (1987) pp 18, 38. Even in the *Addis* case itself, Lord Shaw, although he delivered a concurring judgment, lamented the "limitations of the legal instrument" in this and similar cases (ibid, at 502-3).

7 Doubts may still arise on this question: for example, should the defendant be able to raise all the traditional defamation defences? It is suggested that in the circumstances of a wrongful dismissal fears of disadvantage to the defendant are easily exaggerated.

8 See the passage from Lord Loreburn at 491, quoted above. This view is adopted in *Dunk v George Waller & Son Ltd* [1970] 2 QB 163, where apprenticeship cases are seen as exceptional.

9 See eg, McGregor (op cit) para 70; it may be noted that the classification of the refusal of damages for mental distress as a separate head based on public policy which appeared up till the 13th edition has

continued on p 140

Which cases are eligible for the Commercial List?

By J Kovacevich, Judges' Clerk, High Court, Auckland

The Commercial List in Auckland has now been in use for over twelve months. In this article the author considers the caselaw in New Zealand, England and Australia that treats of the cases that should or should not be included in this List.

The first Commercial List was established at the office of the High Court at Auckland on 1 April 1987. The New Zealand legislation was influenced by the Commercial Court of England and the Commercial Lists of New South Wales, Queensland and Victoria; see:

> The Rules of the Supreme Court, Order 72
> Supreme Court Act 1970, s 53(3E) (NSW)[1]
> Commercial Causes Act 1910, s 3 (Qld)
> Chapter II Order 14 r 2 (Vic)

The jurisdiction of the Commercial List is provided by ss 24A to 24G of the Judicature Act 1908 as inserted by s 4 of the Judicature Amendment Act 1986. The purpose of the Commercial List may be said to be to provide:

> a service which is acceptable to commerce in two main respects – speed and the availability of a skilled and experienced decision-maker. *(Report of the Working Party on the Establishment of a Commercial List at the Auckland High Court* (1986) Chairman: The Hon Mr Justice Barker, 17 para 3.13)

Similarly as Megaw J put it in a Practice Note [1962] 3 All ER 527:

> The purpose of the Commercial Court, as it is commonly called, is to provide a service to the commercial community by enabling commercial disputes to be decided as quickly and as cheaply as circumstances allow.

Section 24B(1) specifies the classes of proceedings eligible for entry on the Commercial List. They are:

(a) Any proceedings arising out of or otherwise relating to:
  (i) The ordinary transaction of persons engaged in commerce or trade or of shippers:
  (ii) The carriage of goods for the purpose of trade or commerce:
  (iii) The construction of commercial, shipping or transport documents:
  (iv) The export or import of merchandise:
  (v) Insurance, banking, finance, guarantee, commercial agency, or commercial usages:
  (vi) Disputes arising out of intellectual property rights between parties engaged in commerce:
(b) Applications to the Court under the Arbitration Act 1908:
(c) Appeals against determinations of the Commerce Commission:
(d) Proceedings under any of the provisions of ss 80, 81, 82, and 89 of the Commerce Act 1986:
(e) Cases stated by the Securities Commission and civil proceedings under the Securities Act 1978:
(f) The following proceedings in relation to companies registered under the Companies Act 1955:
  (i) Applications for directions by liquidators and receivers:
  (ii) Defended applications under section 209 of the Companies Act 1955:
  (iii) Disputes relating to takeovers:
  (iv) Disputes between shareholders or classes of shareholders of companies (other than companies registered under Part VIII of the Companies Act 1955):
(g) Proceedings of a commercial nature required or permitted to be entered on a commercial list by or under any Act or by or under the High Court Rules or any rules made under s 51C of this Act.

In addition Rule 446D(3) of the High Court Rules provides for other cases otherwise ineligible under s 24B(1). It reads:

> (3) Where the statement of claim in a proceeding which is of a commercial nature but which is not within any of the classes of proceeding specified in paragraphs (a) to (f) of section 24B(1) of the Act is filed in an office of the Court at which a commercial list is established any party to the proceeding may, at any time after the filing of the statement of claim but not later than 14 days after the day on which a statement of defence in the proceeding is filed, make the application to a Commercial List Judge for the entry of that proceeding on the commercial list.

Where an application is made under Rule 446D(3) the Commercial List Judge is given a discretion under Rule 446D(4) to enter the proceedings onto the List or not.

What constitutes an appropriate case for the Commercial List may be of as much interest to the business community at large as to the legal fraternity. None have gone as far as Lord Halsbury KC in *Sea Insurance Co Ltd v Carr* (1901) 1 QB 7, 10 as to say that:

> It may be true that there is no definition of what is a commercial cause.

Rather, what is or is not a proper case, though undefined with any degree of specificity, is definable in general terms and by reference to its caselaw.

In *United Development Corporation Pty Ltd v Coffs Harbour Rutile NL* (1957) 75 WN (NSW) 218, 220 Walsh J said: (quoted in *Chandler House Ltd v Peter Mack Ltd* [1987] BCL 993)

> What has to be ascertained is whether there is a trading transaction in the sense that it can be recognised as something which forms part of or is an essential incident of, the commercial activities of the community.

In *Malleys Ltd v Horton Investments Ltd* (1961) WN (NSW) 1128 Walsh J again said:

> In order to decide whether an action is or is not a commercial cause the judge must seek to form a judgment as to the nature of the issues which will have to be determined: see *Sea Insurance Co Ltd v Carr* (1901) 1 QB 7, and *Farmer & Co Ltd v Moss* (1952) 69 WN (NSW) 325.
>
> Next, having formed his conclusions as to the issues involved, the judge must advert to the critical words of the section and ask himself whether or not it is true to say that an action involving those issues is an action "arising out of the ordinary transactions of merchants and traders". If the answer is "No", the application must be refused, even if the parties happen to be merchants or traders. If the answer is "Yes" the application may be granted whether or not the parties are merchants or traders, but it may still be refused in the exercise of a discretionary power to do so: see *Smith v Jamieson* (1957) 75 WN (NSW) 427.

Rogers J in *TSF Engineering Pty Ltd v Hill* (1980) 2 NSWLR 105 stated the following principles of determining whether a matter was a "commercial cause": (quoted in *Chandler*, supra, p 3)

(a) It is not essential that either party to the the action should be a merchant or a trader[2] or
(b) It is not necessary that the transaction should be one which is common or usual in the course of business in which the parties are engaged;
(c) The critical questions to be solved are:
  (i) What is the nature of the issues which are involved[3] and
  (ii) Do the issues arise out of ordinary commercial transactions?

Hunt J in *NRMA Insurance Ltd v Flanagan* (1982) 1 NSWLR 585 took the view that in considering whether a case was appropriate for the exercise of the discretion to refuse entry to the list the following matters were relevant:

(a) The remoteness of the relationship between the proceedings and the ordinary transactions between merchants and traders;
(b) The need for some positive benefit to the parties resulting from entry to the list[4] through inter alia:
  (i) Immediate access to the Court;
  (ii) The avoidance of expense and delay by dispensing with pleadings;
  (iii) The likelihood of trial without a jury;
  (iv) The possible exercise of additional powers eg in relation to discovery and evidence at trial, and
(c) Delay in making the application.

In New Zealand Mr Justice Henry has formulated the "commercial flavour" test.[5] In *Barry v Lion Corporation Ltd* (Unrep, High Court Auckland CL 38/87 19 August 1987) the defendant unsuccessfully attempted to remove a proceedings from the commercial list on the ground that a contract for services was not a "commercial document" within the meaning of s 24B(1)(a)(i)-(v). In the course of his judgment His Honour stated (at 5):

> In each case the question to be asked is whether the proceedings arise out of or otherwise relate to the construction of a commercial document. . . . That document does not constitute an ordinary contract for the supply of services but is more in the nature of a contract made between traders. . . . It concerns the establishment of markets, the advertising of products, and the payment of commission on sales of exported products. Accordingly it must in my view have a sufficient *commercial flavour* to make it a "commercial document".

His Honour observed (at 4) that:

> Although that part of the legislation (s 24B(1)(a)(i)-(v)) has its origin in the English definition, it must still be remembered that the limited definition was deliberately opened to allow entry of cases

> which would not, for historical reasons, be litigated in the Commercial Lists in England and Australia. It must follow that our s 24B(1) is to receive a liberal construction consonant with the spirit and intendment of the 1986 amending legislation, and the need to serve the requirements of the commercial community.

In *Petley v State Insurance Office* (Unrep, High Court, Auckland CL 46/87 18 September 1987) His Honour stated (at 2):

> It is still important for the Court to look at the true nature of the dispute to see whether it is one that properly should be and remain on the Commercial List.
>
> The purpose of the List is to deal with matters which do have a *commercial flavour* and which require, for that reason, some urgency in their disposal.

Similarly in *McDonald v Waste Control Systems Ltd* [1987] BCL 1440 he stated (at 2):

> In my view the true enquiry is as to whether the document in question has a sufficient *commercial flavour* to it, to warrant the procedures of the Commercial List.

Again in *The Pavillion Restaurant Ltd v Dominion Breweries Ltd & Anor* (Unrep, High Court Auckland CL 58/87 22 October 1987) in an unsuccessful attempt by the plaintiff to have the proceeding removed from the Commercial List pursuant to Rule 446K, His Honour in holding that a dispute regarding the lease of a luncheon restaurant was an "ordinary commercial transaction" added (at 3) that:

> There is also present a sufficient *commercial flavour* to come within the general purpose and intendment of the legislation. (*Petley v State Insurance Office*, supra)

This approach may best suit the needs of both the New Zealand business and legal communities, for it maintains a great degree of flexibility while retaining an appropriate degree of judicial discretion in its exercise. For as Lord Chancellor, Earl Halsbury put it in *Sea Insurance Co v Carr* (1901) 1 QB 7, 10:

> It would not, I think, be easy to define precisely what is really a matter of description with regard to the particular circumstances of a case, or to apply any definition to such a collection of facts as may be involved in the question whether a cause is a commercial cause or not. But on the other hand, I think that there are causes which few in business would hesitate to pronounce are not to be commercial causes.

The English practice

The English experience may be an indication of what might eventuate in New Zealand. There, after a short period of "settling in", the new Commercial Court came to be accepted, such that once a proceeding was commenced as a commercial cause, rarely if ever was its eligibility challenged. Order 72 rule 1(2) defines what constitutes a "commercial action" prima facie eligible for hearing before the Commercial Court of the Queen's Bench Division.

> [It] includes any cause arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage.

The definition is not exhaustive and cases which may not fall into its scope have from time to time been treated as fit to be tried in the Commercial Court, for instance: an action for a declaration that the Secretary of State for Trade could not revoke or suspend an airline's operating permit because of the payment of more than the maximum agency commission agreed by IATA was brought before the Commercial Court:

> *Pan-American World Airways Ltd v Dept of Trade* (1975) 2 Lloyd's Rep 395.

In England, if it is a commercial action which from its nature can be more speedily, more economically and more satisfactorily tried by the Commercial Court, it may be transferred from the ordinary list:

> *Baerlein v Chartered Mercantile Bank* (1895) 2 Ch D 488.

If not, it may be refused in the Judge's discretion:

> *Thompson v Henry Bath & Son Ltd* (1920) WN 355; *Hudson's Bay Co v J P Byrne* (1920) 2 Ll L Rep 192.

All disputes relating to the carriage of goods by sea, air and land are heard by the Court, as are disputes relating to the sale, chartering or hire of ships, aircraft and commercial road vehicles, including those designed to carry passengers rather than goods. The Commercial Court does not hear claims in respect of their baggage or personal injuries unless the case raises the issue of the construction of an international agreement or statute:

> *Fothergill v Monarch Airlines Ltd* (1978) QB 108.

Disputes as to contracts of marine and aircraft insurance, and the insurance of commercial property will be heard. Disputes as to the construction of other types of insurance will occasionally be heard:

> *Rigby v Sun Alliance & London Insurance Ltd* (1980) 1 Lloyd's Rep 359.

Contracts for the sale of all types of goods between dealers will be heard, but not normally where the dispute relates to retail sales. Banking disputes are frequently brought before the Court including actions in tort for negligence:

> *Box v Midland Bank* (1979) 2 Lloyd's Rep 391.

Disputes as to ordinary contracts of employment are not normally heard. Shortage of space prevents me from going into cases otherwise ineligible for the Court, but because of exceptional circumstances, have been heard before it. May I

recommend generally: Colman, *The Practice and Procedure of the Commercial Court* (2 ed) 1986, 25.

Although an appeal to the Court of Appeal will lie with the leave of the Commercial Court Judge or of the Court of Appeal, appeals from a decision of the Commercial Court Judge as to whether an action ought to be tried in the Commercial Court are virtually unheard of in modern times. The parties are almost always content to accept the decision of the Commercial Judge as conclusive. It is very rare that an application is made to transfer the case from the Commercial List once it has commenced there and such applications are frequently opposed. See:

> *Barrie v Peruvian Corporation* (1896) 1 QB 209 (CA); *Sea Insurance v Carr* (1901) 1 QB 7.

However in a later case the Court of Appeal made it clear that it would only interfere with the exercise of the Commercial Judge's discretion on an application to transfer, in only the most exceptional circumstances:

> *Hudson's Bay Co v JP Byrne* (1920) 2 Ll L Rep 192.

In that case Bankes LJ said (at 192):

> the question of whether permission should be given to enter an action in the Commercial List is a question entirely for the discretion of the learned Judge for the time being in charge of that List. I can hardly imagine a case in which it would be the duty of the Court of Appeal to interfere with the exercise of the learned Judge's discretion.

The Australian practice

In deciding whether the proceedings are properly entered onto the list, the relevant questions are: what is the nature of the issues involved, and whether those issues arise from the ordinary transactions of commerce or traders. If they do not, the proceedings may not be listed. But if they do there remains a discretion to refuse entry:

> *Smith v Jamieson* (1958) 75 WN (NSW) 427,

and mere convenience cannot give jurisdiction to allow entry:

> *FTS O'Donnell & Co Ltd v Celebrity Circuit Ltd* (1957) 74 WN (NSW) 490.

It is the nature of the issues involved in the proceedings themselves and not the issues raised by the pleadings which must arise out of the ordinary transactions of merchants and traders:

> *Malleys Ltd v Horton Investments Ltd* (1961) 78 WN (NSW) 1128, 1132.

And it must be recognised as something which forms part of or is an essential incident of the commercial activities of the community:

> *United Development Corporation Pty Ltd v Coffs Harbour Rutile NL* (1957) 75 WN (NSW) 218, 220.

The form of an action (eg negligence) cannot conclusively determine its eligibility for inclusion in the Commercial List:

> *Farmer & Co Ltd v Moss* (1952) 69 WN (NSW) 324, 325; *NRMA Insurance Ltd v Flanagan* (1982) 1 NSWLR 585, 591.

In each case there must be a positive benefit to the parties that will result from the entry onto the List that is otherwise unavailable in ordinary civil proceedings:

> *Retravision (NSW) Ltd v Threlfo* (1968) 88 WN (Pt 1) 189, 190; *TSF Engineering Pty Ltd v Hill* (1980) 2 NSWLR 105, 110; *NRMA Insurance v Flanagan* (1982) 1 NSWLR 585, 592.

The New South Wales practice is to refuse applications not made as soon as practicable after the commencement of proceedings. Delay in making an application under their Rules of Court is prima facie a bar to its success, even though the delay can be explained:

> *Witten v Lombard Australia Ltd* (Unrep NSWSC 25 May 1967, Macfarlan J) quoted in *Lachlan Producers Co-op Ltd v BP (Australia) Ltd* (1966) 84 WN (Pt 1) (NSW) 113, 114.

On the other hand Rogers J in *Galong Investments Pty Ltd v Biddulph* (1980) 2 NSWLR 677 took the view that the Court's discretion to transfer matters to the Commercial List should not be fettered by mere delay in seeking the transfer, nor by the existence of another pending action in the general list involving the same issues but a different plaintiff. With automatic entry onto the New Zealand Commercial List in certain prescribed circumstances, delay may only arise as a factor where proceedings have been begun in the ordinary way and later a party chooses to transfer to the List.

In Australia, neither party need be a merchant or trader: *Farmer & Co Ltd v Moss* (supra). However as Rogers J observed in *TSF Engineering Pty Ltd v Hill* (1980) 2 NSWLR 105, 108:

> It will be difficult, if not impossible to find a case between parties, neither of whom is a merchant or trader, but which yet satisfies the call of the section. However, so long as the action arises out of some trading transaction, the fact that neither of the parties to the action is a merchant or trader will not be a bar.

Further, His Honour said (at 109):

> I think it is important that this Court should take a liberal view of the scope of ordinary commercial transactions lest it should fail to serve the evolving needs of the mercantile community.

Macfarlan J observed in *Witten v Lombard Australia Ltd*, (supra), quoted in: *Retravision (NSW) Ltd v Threlfo* (supra) and *TSF Engineering Pty Ltd v Hill* (supra) that:

> The object of the establishment of the Commercial Court in England in the last decade of the nineteenth century was, and continued to be, that it should provide a forum for the litigation and resolution of disputes

between merchants and traders who desired *and were prepared to undertake* an early opportunity of having their disputes decided.

Thus the transaction need not be common or usual for the parties: *Malleys Ltd v Horton Investments Ltd* (1961) 78 WN (NSW) 1128; need not be usual in the trade: *Trubenised Ltd v Dobrinski* (1957) 74 WN (NSW) 492; there must be a commercial element but it need not be between the parties: *Farmer & Co Ltd v Moss* (supra); and the fact that the transaction involves the supply of services rather than the sale of goods is not itself a bar to entry in the List: *United Development Corporation Pty Ltd v Coffs Harbour Rutile NL* (supra).

In New South Wales proceedings have been entered where one of alternative claims is eligible; *Delfino v Trevis (No 2)* (1961) 80 WN (NSW) 1248; [1963] NSWR 194; and even where a cross-claim was raised that itself could not be entered onto the List: *Trubenised Ltd v Dobrinski* (supra).

Proceedings have been entered even though framed in conversion where the plaintiff's title to the goods depends upon the construction of shipping documents: *Farmer & Co Ltd v Moss* (supra); or in negligence in relation to the supply of industrial plant: *Electrolytic and Smelting Co of Australia Ltd v Commonwealth Industrial Gases Ltd* (1972) 1 NSWLR 257; or even if a charge of fraud is made against a stranger to the proceedings: *Commonwealth Trading Bank of Australia v Galong Pty Ltd* (1957) 75 WN (NSW) 126.

Proceedings have been entered where they relate to the sale of a business carried out by the means of the sale of shares: *Malleys Ltd v Horton Investments Ltd* (supra); and licensing agreements: *Trubenised Ltd v Dobrinski* (supra).

Proceedings on a foreign judgment have not been entered even where the judgment arose out of a commercial transaction:

Delfino v Trevis (No 2) (supra).

In general proceedings related to retail sales are not considered appropriate for the Commercial List:

United Development Corporation Ltd v Coffs Harbour Rutile NL (supra); *FTS O'Donnell & Co Ltd v Celebrity Circuit Ltd* (supra).

On the other hand proceedings relating to warranties upon a retail sale of goods have been entered:

Dumas Hotels Pty Ltd v York Motors (Sales) Pty Ltd (1970) 1 NSWR 115.

Proceedings relating to the services of a ship owner or carrier may be entered but not proceedings relating to professional or unskilled services:

United Development Corporation Ltd v Coffs Harbour Rutile NL (supra).

In that case Walsh J said (at 220):

> If the services rendered are, on the one hand of a professional kind, or on the other hand, are those of an entirely unskilled worker the rendering of them should not *in general* be regarded as "trade" in applying the terms of the definition.

Thus the services of electrical contractors have been held as inappropriate for the Commercial List:

FTS O'Donnell & Co Ltd v Celebrity Circuit Ltd (supra),

as have proceedings relating to a contract for the supply of professional entertainers: *Gastel v Smith* (1968) 1 NSWR 361. Actions for damages for professional negligence are not eligible for entry onto the List unless the real issue can be described as arising from "an ordinary commercial transaction". Hence actions against a firm of accountants have been entered: *TSF Engineering Pty Ltd v Hill* (supra), and against solicitors: *Galong Investments Pty Ltd v Biddulph* (supra), arising out of investment advice supplied. Rogers J in that case said (at 679):

> It is no longer appropriate to discard from the Commercial List actions which are brought against persons commonly regarded as professional men simply because of their occupation. The criteria or guide for admission to the list must lie in the answer to the question, whether or not the particular matter which is tendered for resolution by the Court is one which can properly be described as arising from an ordinary commercial transaction as distinct from one which is arising simply from a professional practice properly so called, carried on by the person in question.

If the requisite commercial transaction does not exist then it may be held to be an inappropriate proceeding for the Commercial List. For as Rogers J put it (at 679):

> If an action is brought against men for negligence in the performance of their professional duties, that prima facie is not within the definition provided by the Act. He draws attention to the age-old dichotomy that has been perceived to exist between merchants and traders on the one hand, who of course are the beneficiaries of the creation of a Commercial List, and on the other hand, professional men whose activities have historically been dealt with in the general list of the Court.

Quoting these two passages Clarke J in *Poforo Pty Ltd v Allman* (1984) 3 NSWLR 429, 432 came to the conclusion that an action against an accountant for negligent performance of auditing duties should not in general be regarded as appropriate for entry into the List unless the dominant or major issues involve the resolution of, or are intertwined with, disputes which are of a commercial nature:

Pacific Acceptance Corporation Ltd v Forsyth (1970) 92 WN (NSW) 29.

Defamation proceedings are not appropriate for the Commercial List:

NRMA Insurance Ltd v Flanagan (1982) 1 NSWLR 585.

The construction of a document recording the dissolution of a partnership is not a mercantile document warranting entry onto the Commercial List:

Branicki v Brott (1983) VR 423

If the commercial context is quite remote or the major issues are not properly regarded as commercial, entry onto the List may be refused:

Bilfield v Herman (1960) 78 WN (NSW) 628

As a general rule interrogatories will only be allowed in the Commercial List if the Court is satisfied that the answers are necessary and will, or may, provide relevant information which the interrogating party has been unable to extract from its opponent:

Coal Cliff Collieries Pty Ltd v CE Heath Insurance Broking (Australia) Pty Ltd (1986) 5 NSWLR 703. (Followed in New Zealand in *Sigma Data NZ Ltd v Angus Corporation Ltd; Angus Group Ltd v Sigma Data NZ Ltd* [1987] BCL 1107.)

The New Zealand practice

It may be premature to speak of a New Zealand practice in regard to Commercial List actions. Nevertheless a pattern of caselaw is emerging which delineates the types of cases appropriate for the List.

Appeals as to jurisdiction

An appeal to the Court of Appeal on an application to remove the proceedings from the Commercial List does not operate as a stay of proceedings on the Commercial List whilst the appeal is pending:

Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd [1987] BCL 905.

Arbitration Act cases

The first proceeding on the Commercial List to reach a final hearing was by way of case stated pursuant to s 11 of the Arbitration Amendment Act 1939 in respect of the construction of a rent review clause:

Jeffries v RC Dimock Ltd & Anor [1987] BCL 939.

Rent review disputes as to commercial premises were held to be eminently suitable for resolution by the Commercial List. In *Mainzeal Construction Ltd v WL Tyrie & Co Ltd* [1987] BCL 904, a Dunedin plaintiff applied under Rule 446L to remove an action under s 6(2) of the Arbitration Act 1908 to the Commercial List in Auckland. The application was unopposed by the defendant. It was held to be a proper case for transfer to the List, there being no hardship to either party or their counsel and solicitors.

Contracts for Employment

In general contract of employment disputes will not normally be heard by a Commercial List Judge:

Giltrap & Anor v McNeill & ors [1987] BCL 1106

However, in this successful application to have the proceedings removed from Wellington under Rule 446L, His Honour Mr Justice Barker held (at 4):

> the general nature of the alleged activities of the parties is of such a nature that these activities can be called of a "commercial nature"; that therefore may qualify under R446(3) which rule is in terms permitted by s 24B(1)(g).

The allegation included breaches of the contract of employment, of the duties of a director, of the duty of an agent, and of the duty of confidentiality. In the course of his judgment His Honour stated (at 3):

> It is well known when the Commercial List was set up a conscious decision was made not to confine the cases qualifying for entry to those which came within the rather limited definition of commercial causes found in both England and Australia; the List was opened up considerably to include disputes which would be commonly considered "commercial" by persons in commerce but which, for mainly historical reasons, were not litigated in the Commercial Lists in London and Sydney. London and Sydney have Chancery or Equity divisions respectively. The Queen's Bench and Common Law Divisions respectively deal with commercial causes. Consequently, for example, intellectual property disputes can be included in the New Zealand Commercial List, even though these are frequently heard in the Chancery Division in London and the Equity Division in Sydney.

In *Amalgamated Wireless Australasia Ltd v Anderson & ors* [1987] BCL 1108 Barker J allowed an action to be brought by former employers against former employees in a breach of confidence action where the defendants were employed by a competitor of the plaintiff. His Honour stated that the Commercial List did not normally accommodate master and servant actions.

Contracts between Traders

In *Barry v Lion Corporation Ltd* (Unrep, High Court, Auckland, CL 38/87 Henry J 19 August 1987) in an application to remove the proceedings from the List under Rule 446K, His Honour held that the contract, being more in the nature of a commission agreement rather than an employment contract, had sufficient commercial flavour to make it a "commercial document" within the meaning of s 24B(1)(a)(iii). It being more in the nature of a contract made between traders, he held that the proceedings were properly entered on the Commercial List.

Companies Act: Section 209

In *Money v Ven-Lu-Ree Ltd & Ors* [1987] BCL 992 the plaintiff made an application for relief under s 209 of the Companies Act 1955, the proceedings being able to be entered on the Commercial List by virtue of s 24B(1)(f)(ii) of the Judicature Act 1908. There was an agreement for the sale of shares and the only dispute was as to their value. No affidavits in support were filed. Prima facie, despite their eligibility for entry on the Commercial List, proceedings under s 209 are still governed by the Companies

(Winding Up) Rules 1956. Because of R 448 of the High Court Rules, applications under the Companies Act 1955 are to be dealt with in accordance with Part IV of the High Court Rules.

Notwithstanding any inconsistency between the High Court Rules and the Winding Up Rules His Honour Mr Justice Barker made directions under s 24D of the Judicature Amendment Act 1908 for the speedy determination of the action. It is suggested that the following procedure may be appropriate in all s 209 applications:

(1) Applications may be commenced by statement of claim (and not petition) citing the company as a first defendant and the directors and the shareholders with whom the plaintiff is in contention as second defendants;

(2) The statement of claim should be accompanied by an application for directions and as to both persons to be served, and as to advertising;

(3) Substantive affidavits in support of the substantive relief sought should accompany the statement of claim: a separate affidavit in support of the application for directions should also be filed;

(4) Favourable consideration will be given to dispensing with advertising if it can be shown that there are no other persons likely to be affected by the application who would normally have the right to be heard, such as creditors or contributories;

(5) The normal Commercial List Rules should then apply as to the first call-over, application for directions timetable: the practice note regarding statements of issues also applies to this type of proceeding;

(6) Defendants should be prepared to file affidavits in support of their defence: affidavit evidence subject to cross-examination is the normal mode of resolving disputes of this nature.

In *Vujnovich v Vujnovich & Anor* [1988] BCL 233 confirmed by *Re Money v Ven-Lu-Ree* (supra), Barker J dispensed with advertising in respect of proceedings under s 209 where the financial stability of the company was beyond question and the dispute did not affect creditors; the unfortunate consequences of the advertising of a petition were to be avoided.

Discovery

Unless there is some evidence of the relevance of transactions pertinent to the proceedings, with some averment in the pleadings which might make such transactions relevant, then open-ended discovery will not be granted in a Commercial List action:

> *Vujnovich v Vujnovich & Anor* (supra)

Fair Trading Act

In *Alex Harvey Industries Ltd v Fletcher Industries Ltd* (Unrep, High Court, Auckland CL 21/87 Barker J 16 June 1987) the plaintiff alleged inter alia breaches of ss 9, 10 and 13 of the Fair Trading Act 1986. The plaintiff sought a permanent injunction to prevent the defendant publishing advertisements which would amount to unfair or misleading conduct in trade. The proceedings came within s 24B(1)(g) and His Honour also noted (at 3) that:

> proceedings under the Fair Trading Act 1986 seem prima facie to be prime candidates for entry on the Commercial List.

Insurance

In *Petley v State Insurance Office* (Unrep, High Court, Auckland CL 46/87 18 September 1987 Henry J) the plaintiff sued his insurers on a contract of motor vehicle insurance. The proceedings were issued on the Commercial List pursuant to s 24B(1)(a)(v) as arising out of insurance. His Honour Mr Justice Henry held that this was an ordinary insurance claim not warranting entry on the Commercial List and so the proceedings were removed from the List. In the course of his judgment His Honour stated:

> It is clear that what is involved here is what one can describe as an ordinary insurance case not involving any particular question as to construction of an insurance policy or anything of that nature. The action has no commercial flavour to it. . . . I do not think it was within the contemplation of the legislature in the setting up of this procedure to have included in it all what I may term ordinary insurance claims. Unless there is something of a true commercial nature involved, in my view such proceedings should follow the ordinary course and not be pursued through the Commercial List. Apart from anything else, there would or may well be a proliferation of such claims which would inhibit the very purpose for which the List was established.

Intellectual Property

In *Amalgamated Wireless Australasia Ltd v Anderson & Ors* [1987] BCL 1108 the plaintiff sought an injunction restraining former employees from using alleged confidential information relating to computer systems and customer lists. His Honour Mr Justice Barker held that the proceedings came within s 24B(1)(a)(vi) and that intellectual property rights within the meaning of the subsection included non-statutory rights such as the duty of confidentiality.

The question then arose as to whether the proceedings arose between "parties engaged in commerce". His Honour held that although the Commercial List did not usually accommodate master and servant actions (citing *Giltrap v McNeil & ors* (supra) since the defendants were employed by a competitor of the plaintiff, the proceedings were appropriately brought under s 24B(1)(vi) or alternatively as "proceedings of a commercial nature" under s 24B(1)(g) combined with Rule 446D(3).

In *Thornton Hall Ltd v Shanton Apparel Ltd* (supra), the plaintiff sought an injunction, an account of profits, damages and an order for delivery of the patterns for a long-sleeved dress which infringed the plaintiff's copyright. His Honour Mr Justice Barker held that the action was properly brought under s 24B(1)(a)(vi) and that the

provision did not require contractual relations between the parties to comply.

The defendant had given an undertaking not to manufacture, advertise, sell or display the dress during the course of the proceedings. In the course of his judgment His Honour stated (at 2):

> In the Commercial List, the Judges expect that wherever possible, commercial parties should be able to agree on temporary arrangements to hold the position in preference to wasting the time of the Court with lengthy and often cost ineffective hearings for interim injunction.

Interpretation of Documents

In *Loveland v Pilcher Ltd & Anor* (Unrep, High Court, Auckland CL 22/87 23 June 1987) the action concerned the interpretation of a clause in an employment contract as to how much the defendant must pay for shares held by the plaintiff and whether this included goodwill. His Honour Mr Justice Barker held that the proceedings were of a commercial nature and should be permitted on the List pursuant to s 24B(1)(f)(iv) as a dispute between shareholders.

In *Knapp Roberson and Associates v Roberson and Edwards* [1987] BCL 990, the action concerned a dispute as to expenses in regard to a lottery. His Honour Mr Justice Barker held that the matter related to the interpretation of a statutory regulation applicable to a particular transaction and thus "it would be stretching the normal concept of commerce to say the defendants were engaged in commerce." His Honour therefore removed it from the List under R 446K.

Interrogatories

In *Sigma Data NZ Ltd v Angus Corporation Ltd* and *Angus Group Ltd v Sigma Data NZ Ltd* [1987] BCL 1107 His Honour Mr Justice Barker followed *Coal Cliff Collieries Pty Ltd v CE Heath Insurance Broking (Australia) Pty Ltd* (1986) 5 NSWLR 703 in holding that interrogatories will be allowed on the Commercial List but only where they are strictly necessary.

Jury trial

In *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* (supra), the plaintiff filed a copyright action in respect of the design for a long-sleeved dress. Barker J on 16 June 1987 held that the proceedings qualified for entry under s 24B(1)(a)(vi). The defendant appealed the decision. The appeal did not act as a stay of proceedings (judgment of Henry J 11 August 1987). One of the grounds of appeal was the intention of the defendant to seek a jury trial. Jury trials are prohibited on the Commercial List by s 24F. His Honour Mr Justice Henry addressed the issue of a jury trial (on 24 September 1987) pursuant to ss 19A and 19B of the Judicature Act 1908 and held that there was no good reason why the action should go before a jury. He reasoned that:

> The law of copyright is very often complex and difficult to apply and it seems to me the legal issues and the application of the case law will be inextricably bound up with matters of fact. It would in my view be extremely difficult to try and isolate those issues which could properly be put to the jury, and it would be even more difficult adequately to instruct the jury in this technical field. A copyright action such as this is simply not suited to a jury trial, and the balance of convenience lies heavily with all issues being decided by a Judge alone.

Leases

Several cases on the Commercial List have dealt with leases or various aspects of their interpretation. *Jeffries v RC Dimock Ltd* [1987] BCL 939, dealt with the construction of a rent review clause in an action brought pursuant to s 11 of the Arbitration Amendment Act 1939. *Mainzeal Construction Ltd v WL Tyrie & Co Ltd* [1987] BCL 904, was a rent review dispute brought under s 6(2) of the Arbitration Act 1908. Both were in respect of arbitrations.

In *Chandler House Ltd v Peter Mack Ltd* [1987] BCL 993, the landlord had refused to consent to the assignment of a lease of commercial premises. The transaction was held to come within s 24B(1)(a)(i) or (iii) (ie ordinary commercial transaction or the construction of a commercial document). His Honour held that "ordinary transactions of persons engaged in commerce" were not limited to the buying and selling of goods but covered all transactions which were necessary for the conduct of trade: the securing of premises from which to conduct trade was just such a transaction. His Honour stated (at 5):

> I am aware that there are numerous lessee/lessor cases filed in Court in the course of a year: this present case need not be regarded as a precedent entitling all of those to enter on the Commercial List. There is the control mechanism in the power of the Commercial Judge under Rule 446K to remove from the List on his own motion. The Court will not hesitate to invoke this power if the pressure builds up on the List and there are too many cases where entry on the List is of marginal validity. Many lessee/lessor cases do not involve commercial parties, as does this one: not all disputes will have the necessary degree of urgency of this case.

In *The Pavillion Restaurant Ltd v Dominion Breweries Ltd* CL 58/87 22 October 1987 (Henry J), the plaintiff, the lessee of restaurant premises sought relief against forfeiture and various orders after the lessor had purported to terminate the lease and had re-entered the premises, for non-payment of rent. The plaintiff sought to remove the proceedings from the List under R 446K. His Honour Mr Justice Henry held that because the lease concerned commercial premises, it came within the meaning of an "ordinary commercial transaction" citing *Chandler House Ltd v Peter Mack Ltd* (supra) and *TSF Engineering Ltd v Hill* (1980) 2 NSWLR 105. There was sufficient commercial flavour to warrant entry pursuant to s 24B(1)(a)(i).

Pre-April 1 actions

In *Direct Imports (NZ) Ltd v The Ship "Cormorant Arrow" & Ors* [1987] BCL 833, R 446B(2) was held to exclude applications to transfer

to the List, of proceedings commenced before Part IIIA came into force on 1 April 1987. The Commercial List Rules were held not to have retrospective effect.

In *Haydon & Ors v Lombard Insurance & Ors* CL 27/87 21 October 1987 Henry J, an action had been discontinued on the ordinary list and a new claim was brought on the Commercial List identical to the former cause of action. His Honour Mr Justice Henry warned that:

> The Court will not allow the use of the subterfuge of discontinuance and the re-issue of the same cause of action between the same parties to overcome the clear time bar which arises under Rule 446B(2) of the High Court Rules. . . . Rule 446K will in such circumstances be invoked to ensure that the spirit and intendment of the new legislation is met.

The proceedings were removed from the List pursuant to R 446K.

Share and shareholder disputes

In *Waitemata Securities Ltd v Gaddis* [1987] BCL 766, the action concerned a share sale transaction whereby the plaintiff sold its whole business by way of the sale. It sued the defendant for not complying with the long-term agreement for the sale and purchase. His Honour Mr Justice Barker held that this was an extraordinary transaction, a one-off transaction, not an ordinary transaction of persons engaged in commerce. It essentially was a vendor and purchaser dispute and he thought such disputes inappropriate for the List and so removed it pursuant to R 446K.

In *McDonald v Waste Control Systems Ltd* [1987] BCL 1440 Henry J, although the dispute essentially concerned the sale and purchase of shares, because the contract involved construction of "custom and commercial usage" it had sufficient commercial flavour to warrant remaining on the List.

Vendor and purchaser disputes

In *Waitemata Securities Ltd v Gaddis* (supra), His Honour in a case concerning the sale of a business by the sale of shares commented (at 3) that:

> Essentially this vendor and purchaser case is not a proper one for the Commercial List.

Thus the case was removed from the List. In *Chandler House Ltd v Peter Mack Ltd* (supra) he referred to *Waitemata* (at 4) taking the view that vendor/purchaser disputes were not ordinary transactions of merchants or traders, and that there was a clear difference between a one-off sale of a business by shares, as in *Waitemata*, and the lease of commercial premises by a seller of goods, where the premises were going to be used by a succession of commercial persons engaged in trade. Henry J in *McDonald v Waste Control Systems Ltd* (supra), made a similar comment (at 3) where he said:

> Normally a vendor/purchaser agreement would not qualify

citing *Waitemata*. His Honour held that although *McDonald* essentially involved a vendor/purchaser dispute, it required the construction of the purchase price in accordance with "custom and commercial usage" and thus retained a commercial flavour warranting entry on the List.

Summary

To discern which cases are eligible for the Commercial List:

(1) One must advert to the true nature of the issues involved. As Mr Justice Henry put it in *The Pavillion Restaurant Ltd v Dominion Breweries & Anor* CL 58/87 22 October 1987, echoing the words of Walsh J in *Malleys Ltd v Horton Investments Ltd* (1961) WN (NSW) 1128 some 26 years before (stating at 4):

> In each case it will be necessary to examine carefully, the true nature of the transaction in question, and the issues which arise out of it.

(2) Next one must advert to the provisions of s 24B(1) of the Judicature Act 1908 to see if the action comes within its scope. If not, then the action will probably be inappropriate for the List. If the answer is "yes" then:

(3) Does it have sufficient "commercial flavour" to warrant entry on the List? If so, then the proceedings may be properly brought on the List. In each case however:

(4) The issue of whether it is or is not a matter for the Commercial List Judge is a matter in the Judge's discretion. Inappropriate cases may very well be removed pursuant to Rule 446K where the Judge finds a case does not warrant the special advantages the Commercial List brings. □

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1 Section 56 of the Supreme Court Act 1970 (NSW) was repealed and replaced by ss 38(b)(ix), 42(1)(g), 53(1), and 53(3E) whereby the New South Wales Commercial List is now the Commercial Division of the Supreme Court.

2 See: *Farmer & Co Ltd v Moss* (1952) 69 WN (NSW) 324, 325; *United Development Corporation Pty Ltd v Coffs Rutile NL* (1957) WN (NSW) 218, 219; *Malleys Ltd v Horton Investments Ltd* (1961) 78 WN (NSW) 1128.

3 *Sea Insurance Co Ltd v Carr* (1901) 1 QB 7; *Farmer & Co Ltd v Moss* (1952) 69 WN (NSW) 325; *Smith v Jamieson* (1958) 75 WN (NSW) 427; *Bilfield v Herman* (1960) 78 WN (NSW) 628; *Malleys Ltd v Horton Investments Ltd* (1961) 78 WN (NSW) 1128.

4 *Retravision (NSW) Ltd v Threlfo* (1968) 88 WN (Pt 1) 189, 190; *TSF Engineering Pty Ltd v Hill* (1980) 2 NSWLR 105, 110; *NRMA Insurance Ltd v Flanagan* (1982) 1 NSWLR 585, 592.

5 The expression "commercial flavour" appears in Colman, *The Practice and Procedure of the Commercial Court* (2 ed 1986) 32 and in: *Galong Investments Pty Ltd v Biddulph* (1980) 2 NSWLR 677, 680 where Rogers J states: "The transactions here clearly have the commercial flavour spoken of by Manning J in *Trubenised Ltd v Dobrinski*" (1957) 74 WN (NSW) 492, though the expression does not appear in that judgment.

Recent Admissions

Barristers and Solicitors

Teel PH	Auckland	18 February 1988	Wikramasinghe MM	Auckland	18 February 1988
Thompson JD	Auckland	18 February 1988	Williamson JM	Auckland	18 February 1988
Tingey ME	Auckland	18 February 1988	Wing SC	Auckland	18 February 1988
Tupou NT	Auckland	23 February 1988	Winkelmann BR	Auckland	18 February 1988
Wallwork DS	Auckland	18 February 1988	Woodd GP	Auckland	18 February 1988
Wallwork TS	Auckland	18 February 1988	Wright KM	Auckland	18 February 1988
Walton EM	Auckland	18 February 1988	Yardley CM	Christchurch	12 February 1988
Watson DA	Auckland	18 February 1988	Young DG	Auckland	18 February 1988
Webster DM	Auckland	18 February 1988	Zabidin AD	Christchurch	12 February 1988
Weir RAA	Auckland	18 February 1988	Zegers FPBL	Auckland	18 February 1988

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been excised in the 14th: see para 202 fn 14; for exceptions to the general rule see paras 70A, 72, 73. For recent restatements of the general rule in several jurisdictions see, eg, *Peso Silver Mines Ltd v Cropper* (1968) 58 DLR 1; *Vivian v Coca-Cola Export Corp* [1984] 2 NZLR 289; *Bliss v S E Thames Regional Health Authority* [1985] IRLR 308; and for academic support see eg, Dawson op cit (fn 5).

10 *Addis* (supra) at 491 per Lord Loreburn, at 495 per Lord Atkinson; see also *Hamlin* (supra) at 411; for the assessment of such damages see *A v B* [1974] 1 NZLR 673. The action is now obsolete in New Zealand.

11 See *McCall v Abelesz* [1976] QB 585; *Hutchison v Harris* (1978) 10 Build LR 19; *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 (duty in contract and tort); for recovery of such damages in tort see *Gabolinscy v Hamilton City Corp* [1975] 1 NZLR 150. See A S Burrows, "Mental distress damages in contract – a decade of change" (1984) Lloyds Marit & Comm LQ 119 and *Remedies in Contract and Tort* (1987) p 202ff.

12 On the person/commercial distinction see McGregor op cit para 70A; I Ramsay note in (1977) 55 Can BR 169 at 173-4; *Hutchinson v Harris* (supra), *Tippett v Int Typog Union* (1977) 71 DLR (3d) 146; *Brown v Waterloo Regional Board of Commissioners of Police* (1984) 150 DLR (3d) 729 (Ont CA); *Osmond v Anchor-Dorman Ltd* (unrep, HC Nelson, 3.11.81 A32/79). For the position of employment contracts see M G Bridge "Contractual damages for intangible loss; a comparative analysis" (1984) 62 Can BR 323 at 348, and below Part 4(a).

13 Such a conclusion seems clearly supported in *Francis v Bryce Francis Ltd* (unrep, HC Wgtn CP79/86 8.9.86) and *Horsburgh v NZ Meat Processors etc IUW* (unrep, HC Chch, 23.12.85, A188/84, Cook J), a case of expulsion from the union which was therefore considered to be not so "overshadowed" by *Addis* as if it had been a wrongful dismissal. *Gee* and *Klarwill*, (supra) might also support this theory.

14 The unilateral repudiation theory has been rejected in *Thomas Marshall (Exports) Ltd v Guinle* [1978]; in *Gunton v Richmond LBC* [1980] 3 All ER 577 and most recently in *Dietman v London Borough of Brent* [1987] IRLR 259. The ban on specific performance of a contract of service is seen more as a practical application of a general approach, based on quite specific rules; see the discussion in Burrows op cit, supra fn 11.

15 For a recent example see *Gill v Cape Contracts Ltd* [1985] IRLR 499, where the defendant's argument that there could be no collateral contract to a contract of employment was rejected.

16 See eg, D Newell, note in (1976) 92 LRQ 328; CJF Kidd "Damages for injured feelings in contract: developments in English and Canadian laws" (1979) 11 UQdLJ 42; Burrows, op cit, supra fn 11; and *Halsbury's Laws of England*, 4 ed, Vol 12, para 1187.

17 (1984) 150 DLR (3d) 729, Ont CA. The comments are obiter since there was no actionable claim to which damages for mental distress could be attached, the decision to dismiss having been made in good faith and set aside by judicial review.

18 The exceptions which allow recovery for loss of reputation suggest that some allowance can be made under this head without the necessity of a full scale defamation action, as argued by Lord Atkinson. (*Addis*, supra, at 496, see fn 7 supra.)

19 The principles are set out in *Liverpool C C v Irwin* [1977] AC 239, at 253-5 per Lord Wilberforce: see also *Codelfa Const Pty Ltd v State Rail Authority of NSW* (1982) 41 ALR 367 (HC of A).

20 For the distinction see *Lister v Romford Ice-Cold Storage Co Ltd* [1957] AC 555 and *Liverpool C C v Irwin* (supra) – a case of landlord and tenant; for a recent discussion in the employment context see *Sim v Rotherham BC* [1986] ICR 897 at 926-30.

21 For the importance of a "dismissal" and the concept of "constructive dismissal" see *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761 (CA); *Financial Techniques (Planning Services) Ltd v Hughes* [1981] IRLR 32 (CA); *Caledonian Mining Co Ltd v Bassett & Steel* [1987] IRLR 165 (EAT).

22 Examples might be provided from the position of company directors or trustees; or in the employment context, the duty to observe confidentiality: see *Seager v Copydex* [1967] 1 WLR 923, *Thomas Marshall (Exports) Ltd v Guinle* [1978] 3 All ER 193; *Europe Strength Food Co Ltd v AB Consolidated* [1978] 2 NZLR 515.

23 For the estimation of the measure of damages in contract see Fuller and Perdue "The reliance interest in contract damages" (1936) 46 Yale LJ 52; McGregor (op cit); Waddams (op cit) paras 536-549, 555-561; Bridge (op cit supra fn 12) pp 364-369; Sir Robin Cooke (1978) CLJ 288.

24 See Dawson (op cit) pp 236-8; Bridge (op cit); M Owen "Some aspects of the recovery of reliance damages in the law of contract" (1984) OxJLS 393; BS Jackson "Injured feelings resulting from breach of contract" (1977) 26 ICLQ 502.

25 Harris, Ogus, Phillips "Contract remedies and the consumer surplus" (1979) 95 LRQ 581; but cf S A Rea "Non-pecuniary loss and breach of contract" (1982) JLS 35.

26 *Esso Petroleum Co Ltd v Mardon* [1976] QB801; eg, *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384; *Ross v Caunters* [1980] Ch 297; *Yianni v Edwin Evans & Co Ltd* [1982] QB 438; *The Zephyr* [1984] 1 Lloyd's Rep 58; cf, however, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107 1 PC; on the particular question of damages see *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791.

27 The arguments for and against the retention of exemplary damages are summarised in the judgment of Richardson J in *Taylor v Beere* at 89-90; see also McGregor (op cit); Waddams (op cit) para 980ff.

28 See *Rookes v Barnard* (supra) at 1228, *Taylor v Beere* at 95 per Somers J. We are not here concerned with the problem where there is no "floor" of compensation damages, as in *Donselaar* (supra).

29 See eg *Vorvis v Ins Corp of British Columbia* (1982) 134 DLR (3d) 727 at 734-5. For an argument for recognition of the punitive element see Veitch "Sentimental damages in contract" (1978) 16 VWOLR 227. Punitive damages have been awarded in Canada for breach of a fiduciary obligation (*G E Cox Ltd v Adams* (1979) 26 NBR (2d) 49-628) and for breach of a collective agreement (*NB Elec Power Commissioners v Int Brotherhood of Electrial Workers* cited *Brown* (1982) 136 DRL (3d) 49 at 63).

30 That is, damages might be available even where eg, adequate notice had been given, circumventing the difficulty adverted to in *Pilon* (supra) and *Brown* (supra at 735).