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Law and Language

Did you know that the word "demagogue" can be used as a verb? In his newly published *A Dictionary of Modern Legal Usage* (Oxford University Press, New York, ISBN 0-19-504377-4. Price NZ$75.00) Bryan A Garner says it can be — by American lawyers. But not loosely! The entry in full reads as follows:

> demagogue may be an intransitive, but not a transitive, verb; that is, one may demagogue (= play the demagogue), but one may not demagogue *something*. In this sentence, the verb incorrectly has an object: "The fate of the complicated immigration bill could be influenced by what happens at the convention, whose participants may be tempted to *demagogue* the issue."

This book, published in New York by the American subsidiary of the Oxford University Press, is essentially aimed at an American audience. But it is a book that can be highly recommended. It deals with some legal terminology like distraint, proof, bail, infanticide, jurisdiction and jurat, but it is much more than that. It is, at the same time, a dictionary of good English usage dealing with such subjects as misplaced modifiers, the historical present tense, the definite and indefinite articles, adjectives, adverbs, collective nouns, correlative conjunctions and grammar itself. It even deals with mispronunciation as in the following entry:

> substantive, one of the words most commonly mispronounced by lawyers, has three, not four syllables/sub-stan-tiv/. The common error in the US is to insert what is known as an epenthetical -e- after the second syllable/sub-sta-ne-tiv/. Still another blunder is to accent the second syllable/sub-*stan*-tiv/.

As is obvious from the title the format of the book is based on Fowler's *Modern English Usage*. It is in dictionary form running literally from *a* to *zonate(d)*, which latter is explained as

> The term meaning "arranged in zones" is best made *zonate* rather than *zonated*.

The book mixes legal and linguistic terms arbitrarily according to the alphabet. Thus the entry "nouns" is followed by "novation". The book is concerned essentially with usage and thus most of the entries involve both semantic and juristic points. An indication of the broad way in which the author has interpreted his understanding of legal usage is this entry

> **nonlawyer.** It is a curious practice that lawyers (and others also write about law) divide the universe into *lawyers* and *nonlawyers;* but speakers of English do it of other professions and occupations as well. E.g., "The Supreme Court later expressly limited the vessel owner's duty to *nonseamen* to situations where the workers were doing 'ship's work.' " *Layman* is usually unambiguous, although it has the potential disadvantage of SEXISM, qv.; *nonlawyer* is clearly better than *layperson*.

There are entries on derogatory names for lawyers, on legalisms as distinct from legalese, upon Gallicisms and so on. The author writes with a light touch. In the entry on Gallicisms for instance, he gives a list of Gallicisms and then adds a comment in which he uses the word recherché adding parenthetically "to use yet another". And in the entry on "needless variants" he again throws in a caustically witty parenthetical comment when he writes:

> needless variants, two or more forms of the same word without nuance or differentiation, and seemingly without even hope for either, teem in the language of the law.

Allowance can be made for the few Americanisms in the book. Traditional English does get more than a look in, even if it is treated as an oddity as for instance in the entry for gaol:

> **gaol; gaoler.** These are variant BrE spellings of *jail* and *jailer*. The terms are pronounced the same regardless of spelling.

It might seem that this is a book for the library. That, however, is not so. It is really a book to have on the desk for immediate ready and continuous reference. For those with a love for language, and an appreciation of legal language, it is a pleasure just to dip into occasionally.

The Foreword, by an American Appellate Judge, correctly says:

> Compiled with the writer's interests in mind, *Modern Legal Usage* is not only an essential reference but also a lively, personal commentary on legal language as used today.

And for once it is appropriate to quote from the blurb on the dust-jacket. Professor Irving Younger who will be remembered for his own lively and literate contributions to the Law Conference in Christchurch last year and who recently died of cancer, is quoted as follows:

> From now on, anyone who tries to write about the law without this book close at hand will be guilty of literary and perhaps of legal misfeasance. In short, an indispensable reference.

P J Downey

Case and Comment

Letters of Comfort

The decision of Hirst J on 21 December 1987 in *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad*, Q B D, [1988] 1 All ER 714, will, without doubt, be of considerable interest and importance to those commercial and banking lawyers whose clients deal with Letters of Comfort.

Letters of Comfort are interesting creatures. They are in frequent use in New Zealand, often in significant commercial transactions, and yet their exact legal status is sometimes uncertain.

For the parties in *Kleinwort* the decision was important, because the Court had to decide whether the plaintiff was entitled to recover from the defendant damages which were agreed to be in the order of £12,000,000.

The facts can be briefly stated. Malaysia Mining Corporation Berhad (MMC) formed MMC Metals Limited (MMC Metals) as a wholly-owned subsidiary to operate as a ring-dealing member of the London Metal Exchange. To fund MMC Metals' operations, discussions were held with Kleinwort Benson Limited (KB) which resulted in KB offering an "acceptance credit/multi-currency cash loan facility" of £5,000,000. The offer recorded both MMC and MMC Metals as the borrowers. KB later amended that offer to provide that MMC Metals was to be the borrower with MMC giving a guarantee to support that borrowing. MMC did not wish to give a guarantee, suggesting instead that the facility be supported by a Letter of Comfort. This was accepted by KB and a Letter of Comfort was given by MMC which contained the following paragraph:

> It is our policy to ensure that the business of MMC Metals Limited is at all times in a position to meet its liabilities to you under the above arrangements.

Some nine months later the facility was increased to a maximum of £10,000,000 and a further Letter of Comfort was given, effectively in the same terms as the first letter but with the inclusion of a paragraph stating that it superseded the previous "letter of awareness".

In late 1985 the tin market collapsed and MMC Metals ceased trading. KB made demand on MMC Metals for repayment of the total facility. That demand was not met and shortly afterwards MMC Metals went into liquidation. KB then wrote to MMC requiring it to comply with the Letter of Comfort and ensure that KB received the payment due to it under the Facility Agreement. MMC refuted liability and so the matter came to be litigated.

Contractual — Yes or No?

One of the requirements necessary to establish a legally binding contract is that the parties to an agreement must have intended that such agreement should give rise to legal obligations between them. *Chitty on Contracts* (25 ed) at para 123, notes:

> An agreement, even though it is supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations. Of course, in the case of ordinary commercial transactions, it is not normally necessary to prove that the parties in fact intended to create legal relations. The onus of proving that there was no such intention "is on the party who asserts that no legal effect is intended, and the onus is a heavy one".

The main question for determination by the Court was whether or not the Letter of Comfort given by MMC to KB established a legal obligation on MMC — did the Letter of Comfort record an intention of the parties to enter into legal relations in respect of the "promise" given? In other words, was the promise to be binding in law or only in honour?

Wood's *Law and Practice of International Finance*, 1980, para 13.5, provides this commentary on Letters of Comfort:

> A comfort letter is a letter written usually by a parent company, or even by a government, to the lender giving comfort to the lender about a loan made to a subsidiary or a public entity. Comfort letters are commonly taken where the "guarantor" is not willing to accept a legal commitment. This may be, for example, because a guarantee would infringe guarantee limits in its constitution or borrowing instruments or because it does not wish a contingent liability to appear on its balance sheet. . . . Even if the letter is legally binding, commonly its terms are so woolly and the commitments of such limited effect that the letter does not give rise to substantial rights. The points usually covered are: (a) a statement of awareness of the financing; (b) a commitment to maintain ownership interest; and (c) the degree of support required by the lender.

The defendant's counsel argued that the Letter of Comfort given by MMC had, on true construction, a non-contractual status; and, in particular, the surrounding circumstances at the time of the preliminary discussions between MMC and KB clearly showed that MMC was not prepared to accept either joint and several liability, or to enter into a guarantee. It was alleged that to accord contractual legal status to the Letter of Comfort

> would to all intents and purposes [make the Letter of Comfort] . . . equivalent to a guarantee, since it would entitle the plaintiffs to recover the equivalent in damages to the amount they would be entitled to under a guarantee, and with equal speed and simplicity of procedure.

In essence the Court was being asked to find that the Letter of Comfort was simply a "gentleman's agreement", binding in honour only. The Court disagreed, holding that a contractual legal relationship could be established whilst also maintaining the distinction between a guarantee and a Letter of Comfort. Hirst J noted:

> A guarantee is usually drawn in language the meaning of which is not susceptible to much debate; it usually contains detailed and stringent provisions to facilitate prompt enforcement in case of default by the principal debtor; and it usually gives rise to a straightforward monetary claim for a precisely ascertainable figure. . . . By contrast, a paragraph such as the present one often provokes a debate as to its construction (as the present case shows); questions may arise as to whether the alleged default by the principal debtor is irredeemable or at least whether (even in the case of an insolvent principal debtor) there may not be a prospect of some dividend . . . moreover the claim will not be for a liquidated sum, but for damages, whose precise quantification may be controversial, and which is always subject to the plaintiffs' duties to mitigate.

Hirst J found that the Letter of Comfort did have contractual status, and since MMC did not comply with the terms of the Letter of Comfort, thus breaching the contract, KB was entitled to recover damages accordingly.

The future of the case is uncertain; given the legal principles involved and the quantum of the agreed damages one imagines that an appeal might be likely. Hirst J establishes a fine line between a "guarantee" document and a letter of comfort of the type given by MMC. As MMC had expressly refused to give a guarantee, it is perhaps arguable that on the facts a greater distinction should have been drawn. Certainly the introductory phrase "it is our policy . . ." provides room for interesting argument — do these words allow the giver of the letter to have a *change* of policy at a later date? Whether the distinction established by Hirst J can be maintained on appeal is a matter of conjecture.

Whatever the outcome, it is abundantly clear that care needs to be taken when drafting Letters of Comfort. Some basic points emerge:

1 The term "Letter of Comfort" really does not assist in establishing the exact status of a document bearing such a title; this will be determined by the content of the document, and, where appropriate, the surrounding circumstances.

2 If it is intended to exclude legal obligations then the contract should expressly say so. Many will recall the contract law case of *Rose & Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261 in which Scrutton LJ said

> Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. . . . This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties.

The parties' intention as to whether legal obligations and rights are being created are merely agreements binding in honour only should be stated clearly — do not leave it for the Courts to interpret the documents.

3 Avoid any ambiguity in the Letter of Comfort.

4 Detail precisely the undertaking which is being given.

One suspects that many perceive Letters of Comfort as akin to gentlemen's agreements. It is Mr Justice Vaisey who, of "gentlemen's agreements", is reputed to have said:

> A gentleman's agreement is an agreement which is not an agreement, made between two persons neither of whom is a gentleman, whereby each expects the other to be strictly bound without himself being bound at all.

The *Kleinwort* decision shows that such a perception can be quite, quite wrong.

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Re Twigger Endowments

In November 1885, John Twigger of Christchurch died, leaving provision in his will for the Twigger Endowments to be established. These were to benefit equally three local charities: the Ashburton Home, the Christchurch Female Refuge and the Canterbury Orphanage. By 1980 the last two institutions had become defunct and the Trustee of the endowments, the North Canterbury Hospital Board, began to prepare a scheme under Part III of the Charitable Trusts Act, 1957 whereby new beneficiaries could be substituted. The proposed scheme having satisfied the Attorney-General, the Trustee then applied to the High Court for its approval in 1987. By this time the capital of the endowments stood at just under $2 million and the accumulated income, unspent since 1980, at just over $1 million. Several notices of objection were filed and the case was heard before Tipping J in Christchurch last August. It has not, to date, been fully reported. This is perhaps disappointing, since in his thorough and closely reasoned judgment (*Re Twigger Endowments* HC, Christchurch M724/85; 24/8/1987) His Honour gave guidance on several matters

concerning the preparation and scrutiny of Part III schemes which are important to all those involved in this area of work. He also considered the charitable status of several local voluntary groups and his judgment on these points will be of interest and importance to similar groups around New Zealand.

Jurisdiction

In the circumstances of this case the jurisdiction of the Court was clear and was easily established at the outset. Where two of the original charities were defunct, the matter fell squarely within s 32 Charitable Trusts Act 1957 it being "impossible" to carry out those original purposes. Where s 32 applies the Court's traditional, or inherent, jurisdiction is excluded: *Re Palmerston North Hall's Trust Board* [1976] 2 NZLR 151. Consequently the drafting of a Part III scheme rather than a cy-pres scheme was appropriate here.

The Court's approach to Part III schemes

When scrutinising a proposed Part III scheme what criteria should the Court apply? This is obviously an important question for charity trustees (and for the Attorney-General) and Tipping J's judgment gives a clear statement of what has become the orthodox answer.

Section 56 of the 1957 Act requires the Court to be satisfied that the proposed scheme is:

> a proper one and should carry out the desired purpose or proposal and is not contrary to law or good morals.

Section 32 requires that the property "be disposed of for some other charitable purpose".

"Charitable" is given its usual legal meaning: s 2.

Otherwise the Act is silent, giving, for example, no directions on the selection of substitute beneficiaries and thus seeming to leave the greatest possible room for manoeuvre. The Courts, however, have significantly restricted this apparent freedom.

Basing himself on "a consistent line of authority spanning eighty years" derived from *Re Door of Hope* (1905) 26 NZLR, *Public Trustee v Att-General* [1923] NZLR 433, *Re Whatman* (unrep), *Re the Will of Keeley* (unrep), *Re Goldwater* [1967] NZLR 754 and *Re Erskine* (unrep) Tipping J discerned a clear, and restrictive, guideline for such schemes:

> Part III does not make a cy-pres approach mandatory. However, this Court has held in the series of decisions which I have traversed, that those promoting a scheme under Part III *should seek to substitute beneficiaries or purposes resembling as closely as possible in the changed circumstances those which originally commended themselves to the person who established the trust.* This is simply another way of saying . . . that the wishes of the testator must be followed as far as possible by the scheme (emphasis added).

This approach was justified in *Re Whatman* as appropriate because the Court was held to owe a duty, not only to the settlor but also to the proposed beneficiaries and to the public generally, to dispose of the property in such a way as would serve the interests of those intended to be benefited. Only if, in the event, the original charitable intention *cannot* be carried out should the Court approve a scheme which apparently ignores it. Trustees preparing Part III schemes (and possibly the Attorney-General when considering them) must ensure that they keep within these limits. They must first identify the essential intention of the settlor. The evidence available may lead to a more or less precise intention. They must then ascertain whether and how in the changed circumstances of the present day this purpose may best be promoted. If these investigations are not properly carried out, it follows that the Court should not approve the resulting scheme. What, then is the trustees' duty of diligence? How energetically should they search and inquire to produce a satisfactory scheme?

The wise trustee's inquiries

In *Re Twigger* the Trustee's preparations and inquiries were directly put in issue by the contention of several objecting parties that *their* purposes and activities furthered the testator's original aims as well as or better than those of the substitute beneficiaries selected for the scheme. Any scheme may be the subject of such a criticism. Tipping J's judgment on this point includes a most helpful discussion of the trustee's duty and gives practical guidance on how best to protect a scheme from such attack.

His Honour accepted an argument put forward by counsel for several objectors. He found that the position of a charity trustee preparing a Part III scheme was analogous to that of a trustee exercising a power of appointment among a significant group of persons or selecting the objects of a discretionary trust. In each case

> a choice or selection has to be made, albeit in differing circumstances, from a range of potential beneficiaries. In each case the trustee is under a duty to fulfil the intentions of the settlor or testator as best he can.
>
> In each case, in my view, the trustee, to discharge his duties properly, should inform himself as fully as the circumstances permit of those who may fall within the qualifying class and measure their respective claims to be selected as beneficiaries. So it is then that . . . I consider a trustee in a Part III scheme case should adopt the same sort of inquiries to find out and select appropriate beneficiaries from amongst those who have a claim to qualify.

The charity trustee is here being made subject to the duty discussed and refined, in relation to trust powers, in *Re Baden's Deed Trusts* [1971] AC 424, *Re Baden No 1* [1973] Ch 9 and in *Re Hay's Settlement Trusts* [1982] 1 WLR 202.

To fulfil this duty Tipping J considered that

> A trustee when promoting a scheme under Part III *would be wise to advertise and call for submissions from interested parties* (emphasis added).

This course of action is not obligatory for trustees as a matter of law. It is not expressly required

by the 1957 Act. However, such a practice should do much to avoid a scheme from being "ambushed" by potential but undiscovered beneficiaries at the late stage when an application for the Court's approval is advertised.

His Honour stressed that schemes presented to the Court without such inquiries "will not ipso facto fail":

> I do not regard it as mandatory for a trustee to advertise, call for submissions or do anything other than make genuine and bona fide inquiries. However, if a trustee does go through the sort of exercise suggested . . . prior to settling the scheme, it will be in a much stronger position when defending its scheme against objectors, if it has earlier called for submissions from those interested in being considered as substitute beneficiaries and has comprehensively considered those submissions.

In presenting the scheme to the Court, it is advisable that the trustee should explain the inquiries that have been made and the reasoning behind the final selection of beneficiaries. With regard to the Twigger Endowments, for example, His Honour commented that there were

> very large sums of money involved and . . . that it behoved the [Trustee] to look widely in its consideration of substitute beneficiaries and give the Court as much help as possible on what factors had prompted the ultimate choice.

The judgment in *Re Twigger* might therefore be regarded in the future as the charity trustee's "guide, philosopher and friend" on Part III schemes. It is a source of practical help without parallel in statute, text or journal.

Charitable status

Having described the duties of the trustee, it was also necessary for Tipping J to consider the charitable status of the various objectors to the scheme. Had they not been "charitable" in the law they would, of course, have had no claim, by virtue of s 32.

In reaching his decision on these points, His Honour used no direct New Zealand authority to guide him. Looking at the "primary or main purposes" of the objector groups as discerned from their constitutions and activities and disregarding merely ancillary or secondary purposes he was required to decide whether these groups fell within Lord Macnaghten's well-known four-fold classification from *CIT v Pensel* [1891] AC 531 at 583. He found that all were charitable in law. Thus, each of

> The Cholmondeley Children's Home
> The West Christchurch Women's Refuge
> The YWCA Nightshelter
> The Single Mothers' Support Group
> The Home and Family Society Christchurch Branch
> Chrischurch Rape Crisis
> The Battered Women's Support Group
> Pregnancy Aid

may be used as precedents in the development of contemporary New Zealand charity law. The importance of this aspect of *Re Twigger* is not, therefore, limited only to the groups immediately involved but extends also to similar voluntary groups wherever based. Since the law of charity has characteristically developed by analogy to meet changing modern needs the case may also have a latent future importance.

The outcome of Re Twigger

On the facts of *Re Twigger* His Honour found that he was not satisfied that the scheme as proposed was one which accorded as closely as reasonably possible to the terms of the original trust.

For the share of the defunct Canterbury Orphanage the Trustee had sought to substitute Birthright and the Trustee's own service, the Child and Family Guidance Centre. The Cholmondeley Children's Home, an objector, had been considered but passed over. Tipping J found that in respect of the Orphanage John Twigger's intention was to benefit

> (a) children
> (b) in Canterbury
> (c) on a non-denominational basis
> (d) by means of residential care
> (e) for a greater or lesser period of time and
> (f) in circumstances where there was a need for such care through the absence for whatever reason of a parent or parents to provide it.

Cholmondeley came closest to this in modern circumstances whereas the Child and Family Guidance Centre, being a service whose principal aim would be to avoid family breakups and separations, was quite distant from it. A scheme which excluded Cholmondeley was not, His Honour found, a scheme which paid sufficient regard to the testator's original wishes for him to approve it.

The provision made to substitute beneficiaries for the share of the Christchurch Female Refuge was also unsatisfactory. Tipping J invited the Trustee to consider the position further and he commented favourably on the claims of all except two of the objecting groups to be included. He felt, however, that the purposes of the Rape Crisis Group, like those of the Home and Family Society and the Child and Family Guidance Centre, although charitable, were too distant from the original will to qualify.

In accommodating these possible claims to the endowments, His Honour commended to the Trustee the advantages of a discretionary approach. The scheme, as revised, could include the various organisations indicated within the class of discretionary beneficiaries, and the Trustee would annually have the obligation of deciding what sums should be allocated to them. Such a structure would enable the funds available to be distributed more broadly within the testator's chosen geographical area and, in a perpetual Trust like the Twigger Endowment it would also provide for a flexible response to changing future needs. As His Honour said:

> Provided the scheme, as approved by the Court, fixes the members of the discretionary class, I can see no problem with the concept of discretionary allocation amongst the members of that class.

Limitations on the Court

In scrutinising the Part III schemes, the Court is expressly empowered to

approve the scheme "with or without modification, as it thinks fit". In *Re Twigger*, Tipping J commented that his power to approve the scheme with modifications was limited, and did not include

> a power to approve substantive changes in beneficial interests from those propounded by the scheme. As was said . . . in *Re Whatman* the Court cannot approve an alternative scheme put up by other parties.

Any change to bring in Cholmondeley at the expense of one or more of the other objects of the scheme as presently presented would go "well beyond modification". It was therefore necessary to refer the scheme back for redrafting and re-presentation. His Honour indicated with some precision a desirable model which the final scheme might adopt. He also took the opportunity of adding his voice to those many others who have recommended that the statutes be amended in this respect to give the Court wider powers of approval. If it were able to approve alternative schemes put forward by objectors rather than being blinkered to examine only the trustee's proposal then a satisfactory final solution could be reached within one hearing and the delay and expense caused by the existing limitations avoided.

Re Twigger makes several significant contributions to current charity law. Hopefully it will be made easily accessible and will not be left, like so many other authorities in this area, as a bloom of the system which is doomed to stay "unseen and waste its perfume on the desert air"!

Michele Slatter
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Partnership — obligation to furnish a return of income

In *CIR v Grover* [1988] BCL 205, the respondent taxpayer had been convicted in the District Court on a charge that, together with his business partner, he had failed to make a partnership return of income as required by s 10 of the Income Tax Act 1976. He had argued that, because the partnership had made a loss in the year in question, he had no obligation to furnish such a return, there being no assessable income on which tax could be payable. The District Court Judge rejected this argument, holding that, although in fact the Commissioner had accepted that the partnership return, when it was eventually received, showed a loss, nevertheless, a return should still have been made; "income" in s 10 meant income which could be taxable, subject to any exemptions and deductions being taken into account. The District Court Judge viewed "assessable income" as being a gross, rather than a net, concept.

On appeal from that decision, the High Court upheld the taxpayer's argument. It was held that "income" (which was not defined in the Act) in s 10 meant "assessable income"; "assessable income" was defined in s 2 as "income of any kind which is not exempted from income tax otherwise than by way of a special exemption expressly authorised as such by this Act"; "taxpayer" was defined in s 2 as "a person chargeable with income tax . . ."; "taxable income" was defined in the same section as meaning "the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled"; ss 101 and 104 indicated that deductions were allowable "for the purpose of calculating the assessable income of any taxpayer". It followed, held the High Court Judge, that the assessable income in respect of which a return had to be furnished pursuant to s 10 was a net concept, and meant the income which is arrived at by applying the definitions in s 2 and after allowing permissible deductions. Therefore, the partnership having no residue of income after the deduction of expenses incurred in producing it, the partners were not obliged to furnish a return. The Commissioner appealed.

The Court of Appeal unanimously restored the decision and orders of the District Court, taking the view that the entire statutory scheme must be examined, and that "[t]he general structure of the Act can be all-important". The Court of Appeal considered that, although a literal reading of the Act and the provisions in question could convey the impression that "income" was a gross concept, meaning the amount by which income receipts exceeded expenditure, nevertheless, a broad and purposive interpretation must be adopted. The Commissioner was charged by the Act with determining whether deductions alleged to have resulted in a loss had been properly claimed. Further, the deductibility of some items was expressly dependent on the opinion of the Commissioner. Bad debts, for example, must be "proved to the satisfaction of the Commissioner" to have been actually written off to be deductible, pursuant to s 106(1)(b). The provisions concerning deductions, being elaborate, could not be administered effectively without adequate returns being furnished by taxpayers. These considerations were held to override any contrary arguments based on a narrowly literal reading of the Act.

This case is of interest because of the approach adopted to construing the taxation legislation. There is, of course, ample authority for the proposition that the overall scheme of legislation is important in interpreting it, and examples of such authorities in the taxation field are cited by Cooke P in his judgment. Against this, however, is the traditional view that taxation statutes are to be interpreted narrowly in favour of the taxpayer; the dictum of Rowlatt J in *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, 71 that "in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax . . . Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used" is something of an incantation. However, the present case is concerned not with the imposition of tax but with the obligation to furnish a return, and the view of the Court of Appeal, it is respectfully submitted, accords with pragmatism and common sense. A decision in favour of the taxpayer in this case would have meant that a taxpayer's interpretation of the Act and his opinion on his entitlement to deductions were definitive, and could not be challenged or examined by the Commissioner. The practical consequences if this were the case are readily apparent.

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Women in the Law (I)

Remarks by the Rt Hon Sir Robin Cooke, President, Court of Appeal on the occasion of the admission to the Inner Bar of Sian Elias and Lowell Goddard at Auckland on 15 April 1988.

It is particularly pleasing to be able to be here today, first because the occasion is a special one and secondly because I rarely have the opportunity now of sitting in Auckland.

I take the opportunity of warmly welcoming to sit with us, as he is, Chief Justice Nathan Nemetz of British Columbia, a dear friend of a number of us; and also of conveying to the two ladies who have just been admitted as silks the congratulations and best wishes of our Chief Justice, Sir Ronald Davison, and of Mr Justice Chilwell, the senior Auckland Judge, and the other Auckland Judges unable to be here.

Since the rank of Queen's Counsel was established in New Zealand in 1907, 119 persons have been admitted to it. Of these 18 are present today, including one who for good reason has chosen not to robe (CP Hutchinson QC). Taking into account as well that there are some other Auckland Queen's Counsel who are not present, this is evidence of the way in which a separate Bar, made up of independent barristers who practise only as that and are available to give their specialised services to clients of any solicitor, has flourished in New Zealand in recent decades. In that figure there are included four of the New Zealand Judges at present sitting. Chief Justice Nemetz is also a Queen's Counsel. The appointment is for life, although serving Judges in the Court of Appeal and the High Court do not use the title. So my brothers Barker, Wylie, Gault and I share membership of the rank with the senior members of the present practising Bar. I have already called on them, in turn, in recognition of their right to be heard according to seniority, before the Court goes on with its listed business. It may be better to put it that they have prior rights to be heard, however briefly; and you may have noted that commendably none of them has said a word. It makes some contrast with other occasions on which I have had the advantage of hearing from them. The four of us on the bench remain of the rank, though not the taxi rank. I would not know how to set the meter for the current fares. But in welcoming to our rank Sian Elias and Lowell Goddard we can speak, not only warmly, but, what is also of some importance for a lawyer, accurately.

New Zealand was early in giving women the right to vote — 1893. It could be said that we have lagged behind in according them equality in the professions. The first women Queen's Counsel in England were appointed nearly 40 years ago, in 1949, Helena Normanton and Rose Heilbron. But I think that the point to be made is rather a different one. Lowell Goddard and Sian Elias — I now reverse the order because they are admitted to the Inner Bar on the same day — have not become Queen's Counsel because they are women who practise as barristers. They have achieved the rank because they are barristers who have shown in practice the necessary qualities, including integrity, ability, responsibility, learning, and judgment. They happen to be women as well.

Both have had varied practices and I mention only some parts of their work that stand out. Miss Elias has conducted major cases in the environmental planning field and before administrative tribunals in other fields. She has found time to attend this ceremony with some difficulty perhaps, as she is in the midst of a big television case in Wellington. From the point of view of the nation and of the Courts concerned, I would mention expressly her work as a representative of Maori people. There, led sometimes by Baragwanath QC, she has made a contribution to the future of our country. The case of *New Zealand Maori Council v Attorney-General* last year may come to be seen by future generations as marking a turning point in the history of New Zealand law, indeed of New Zealand itself. It is fitting that one of the counsel who represented the Maori Council should be honoured in this way.

Miss Goddard has nad predominantly a criminal law and commercial law practice, but recently has carried major responsibility as counsel assisting the Committee of Inquiry concerning the National Women's Hospital, an inquiry already having a profound effect on the approach to the health care of women. She has conducted before the Court of Appeal some difficult and very serious criminal cases. My colleagues and I in that Court have been impressed by her firmness yet sense of responsibility as an advocate. Perhaps her abilities and strength are sufficiently proved by the fact that all of us now here owe the venue to her. She has won a change of venue, although she seemed to start with a hopeless case: it may be an augury. I predict that she will be a true leader at the Bar and that both these appointments will be major successes.

It is wholly right that in this fine old building, crowded by ghosts of past trials, triumphs, disasters, tensions, incidents, Elias QC and Goddard QC should with general support and encouragement formally assume their new responsibilities. New Zealand has a great deal to derive from the services of both. They take their places in the first rank of the practising profession. They and the women who are already serving as District Court Judges, a High Court Master, and in Law Society office are the first wave of a tide of women coming into prominence in the practice and administration of New Zealand law. We rejoice in their taking silk and we wish them well. □

Women in the Law (II)

An interview with Judith Potter, President for 1988/89 of the Auckland District Law Society.

Judith, might I first offer you my congratulations on your election as President of the Auckland District Law Society. I understand you are the first woman to have held that office.

Thank you. Yes, I'm the first woman President for Auckland, and indeed for any District Law Society in New Zealand. But I have had 11 years on the Auckland Council, and there are now other women members of Council.

I understand you had become President just before Lowell Goddard and Sian Elias were called to the Inner Bar on Friday 15 April.

That's so. Yes, I was then the Auckland President.

Was it seen by people in Auckland, in the profession, as another indication of the growing acceptance of the status of women and their very active role in the legal system?

I am sure it was, Pat. I think it was a very significant event, not only for women in the profession but for the profession as a whole.

In what way?

It is the first time that any women in New Zealand have been appointed Queen's Counsel and it was very appropriate perhaps that two were appointed. They just happened to both be in Auckland but it does recognise the fact that there are now women who are sufficiently senior in the profession to be recognised in this way and to achieve this rank.

Do you think, from your own knowledge, there has been a tendency, probably over the past decades, for those women who were in the profession not to be active in the litigation area until fairly recently?

Perhaps. I think, going back a long number of years, when there were very few women in the profession those women tended to operate in the conveyancing field. But in more recent years, and for quite a long time now, there have been many of women in the litigation areas. I think a lot of young lawyers tend to want to do litigation perhaps without even knowing what litigation means or is all about, and because many young women have been entering the profession they too have been active in the litigation field. There has been a tendency for them, perhaps after an initial flurry to be directed into the family law field and some of them have found that very much to their liking and have proved to be very good at it. But latterly, I think, women are playing a very wide role and in the litigation world they are covering every aspect of the law.

Presumably they wouldn't want to be stereotyped as just looking after the women and children as it were?

I think not, and I think they certainly have ability that extends across the spectrum.

In Auckland are there many women who have been involved in criminal prosecutions?

I couldn't be accurate about that. I know Lowell Goddard certainly has done quite a lot of criminal work. I imagine there are women in the criminal field that I myself don't know.

Going back to when you started, there would have been other women in the profession at that time, wouldn't there?

There were. They were not very numerous. When I was at law school some lecturers would start "Gentlemen, Miss Potter and Miss Wright". There were two or three other women going through law school at that time though at different stages. Elizabeth Wright and I were the first two women to graduate in one year from the Auckland Law School.

I can remember that there were women in practice back in the 1940s and 1950s, and there had been earlier, going way back to Ethel Benjamin who was admitted by special Act of Parliament in 1897.

Oh yes, indeed. Pam Mitchell, for instance, and Anne Gambrill have

been around and there have been other women but they tended to be isolated. So you talked about Anne Gambrill or Pam Mitchell or, I guess, Judith Potter.

Have you noticed quite a substantial change in the years you have been in practice both in the number of women and in their acceptability?

Absolutely. To the extent that now women are very much part of the profession. No eyebrows are raised, no questions are asked. I think we have reached the stage where we are judged on our ability. Which is as it should be.

As far as the Auckland District Law Society is concerned, you are the first woman to occupy the position of President. How long have you been serving on the District Law Society Committee?

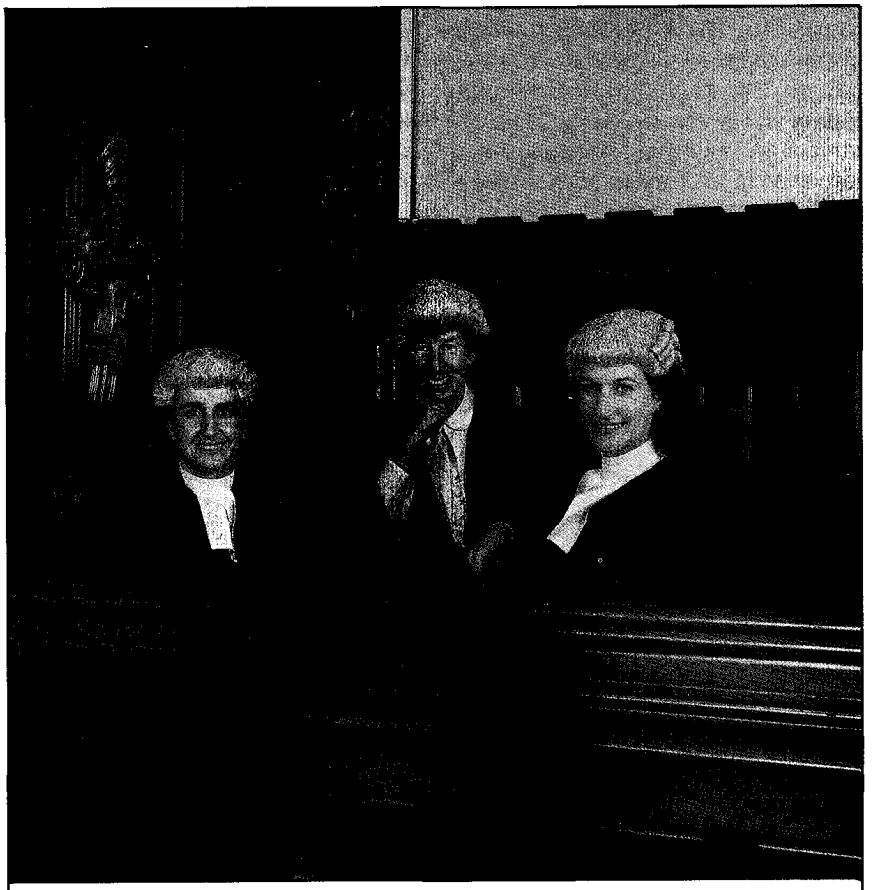
This is my eleventh year. That's the way it tends to go in Auckland. But it is a very busy Society and a very busy Council and quite frankly I don't regret having been there for a good number of years before taking on the role of President. There is an awful lot to handle and experience is a great teacher.

How are you finding your year as President — satisfying?

Indeed. It is very new still. I have been there only since the 3rd of March. It has been extremely busy. I really had no idea how busy it was going to be. One hears how busy it is will be and it has been. It's challenging, it's interesting, it's fun, I have tremendous support from my Council and indeed from the whole of the profession so in that way it is terrific. It is also very rewarding and I will learn much this year that I haven't managed to pick up in the last ten.

As far as your going on to the Council and eventually becoming President, did you really find any serious difficulty at any time because you were a woman?

In Law Society arenas — not at all. The members of the profession who serve on the Law Society invariably



Sian Elias, QC, Judith Potter, President, Auckland District Law Society, and Lowell Goddard, QC, photographed at the High Court, Auckland, after the call to the Inner Bar of the first two women Queen's Counsel on 15 April 1988.

are very able people. Able people don't feel threatened.

Do you think there are some people in the profession who do feel threatened still — some men?

There may be. Throughout society there are people who feel threatened by this and that. I guess they are probably people who are feeling threatened anyway and women perhaps are just another excuse for them to feel threatened.

I understand about 50% of those in the law school at Auckland are women, is that right?

That's right. About 50% coming into the Law School and 50% graduating and the other interesting statistic is that in the top group there is a predominance of women.

You mean the academic top group?

Yes. As you know to get into law school, there is a cut-off point, particularly in Auckland and I gather the higher the cut-off point, the higher the percentage of women who would be accepted into the law school.

Is there soon going to be a case for a special programme being made for males to preserve a balance of them in passing through the law school?

I am sure that it will never come to that.

Have you noticed any change in the attitude of clients over the years that you have been in practice?

Again, I guess it is true to say that it is now easier than it used to be for clients to understand and accept when their lawyer is a woman. The important thing I think now is that women are given opportunity and credibility in what are viewed as the top jobs. I think it has been slow for women to gain acceptance in the

commercial field. The excuse has sometimes been offered that in the commercial field the predominant clients are male and they want to work with male practitioners. I am sure that is no longer true. I think that males working in the commercial world want the best advice they can get and if that happens to come from a woman they are very happy to have it. Furthermore, there are increasingly large numbers of women working in the commercial world and in other professions. But it is important now that women are given the opportunity to take what are seen as the top positions. It is also important that women are prepared to take them and have the confidence to do so.

Would it be true to say that in the past women were, as a group, diffident about wanting to do some aspects of the legal work?

There may have been a little bit of that. I was perhaps fortunate in that the partnership in which I have had the pleasure of working has always been very supportive of me and what I wanted to do. I have been treated absolutely equally so that I have never had to, as it were, perhaps, fight. Not in my home environment.

But I am thinking more in terms of relationship with clients and the general public. Do you personally feel a difference from earlier years?

Probably more confident — a disappearing diffidence. I would like to think that as people like me take up roles such as President of a Law Society, as women are appointed as Queen's Counsel, that there is a spin-off of confidence throughout women, not only in the legal profession but in the commercial world. Confidence is so important when you are asked to take on or consider taking on a major role. But apart from that, there is the practicality of the thing. I think women in the profession have been restricted to a certain extent by their domestic role. It is very hard to take on a task — and this is very clear in the commercial field, in which I predominantly practise now — where quite often the size of the task will require you to work very long hours for a period. If you have pressing domestic commitments, you tend to shy away from that sort of work, not because you don't want to do it or because you are not confident but because, maybe you just can't do what is demanded of you. I think with an increasing awareness in all sectors of society, within families and within the profession itself, that there is a sharing of responsibility that can make it all possible, women are now more able to see their way clear to take on the commitments that perhaps in the past they felt a little frightened about.

It is somewhat surprising that it is only now that people like Lowell Goddard and Sian Elias have been called to the Inner Bar as Queen's Counsel. This is particularly surprising when you think how long ago it was that Judge Wallace was first appointed a Magistrate — now a District Court Judge. And of course there are a number of District Court Judges in Auckland, and in Wellington. Does the delay in women becoming Queen's Counsel perhaps have something to do with a previous lack of confidence in women going out on their own as Barristers?

Yes I think that probably has quite a lot to do with it. People like Augusta Wallace and Sylvia Cartwright were appointed to the Bench from firms. The de facto Bar itself is of recent growth. It is now quite large in Auckland — 130-150, barristers sole. Queen's Counsel are, of course, appointed only from barristers sole and that group until recent times was very small. It is not surprising then that it has taken the rapid expansion of a very small group into quite a large group to reflect the development of women within that group. And the other thing is, I think, that obviously to be a Queen's Counsel, you must not only have ability but you must have experience. You must have been practising for some time, and have had experience before all the Courts and not just the District Court but the High Court, and the Court of Appeal and perhaps even further. So it is perhaps just a process of time for there to be women who have in fact gained that experience.

With women Judges in the District Court, and Master Gambrill in the new role in the High Court structure, and now two Queen's Counsel, I suppose that women as a group are expecting that it won't be all that long before the next step is taken when women will be appointed High Court Judges.

Well that will inevitably happen and it will be wonderful when it happens. My personal hope, and it is a very deeply felt hope, is that that appointment will not be made in response to any pressure, political, consumer or otherwise, but that the appointment when made is made purely on merit and will be recognised as such. The woman who holds the position as the first women High Court Judge, must be able to hold that position very confidently.

Well, with the number of women now appointed to the High Court Bench in England and indeed one appointed to the Court of Appeal, and across the Tasman a Justice of the High Court and with one sitting on the Supreme Court of the United States, New Zealand practitioners will surely be able to provide a possible candidate or candidates.

Indeed, and with the numbers of women now coming into the profession and the quality of those women, my guess would be that in five to seven years time the sort of questions you and I are discussing now will not even arise. Women will be represented throughout the legal system.

Finally, just in terms of your professional life both in practice and the active part you have taken in the profession, have you found it a satisfying career?

Indeed. I guess I wouldn't be here if I hadn't. It, like all careers, has its downs and heaps of them, but I really enjoy my work. I love the law — I value extremely the Law Society involvement. I have met some very very fine people in Law Society affairs and I would recommend to any young lawyer, male or female, who wants to really feel part of the profession that this is a good way of doing it. □

Parties to an offence:

The function of s 66(2) of the Crimes Act

By Gerald Orchard, Professor of Law, University of Canterbury

Gang activities of a criminal nature are not all that uncommon. But it is not merely those groups who wear patches and ride motorcycles who can come within the definition of the law of being parties to offences when more than one person is involved with others in varying degrees of participation. In this article Professor Orchard considers the law relating to parties to an offence with particular reference to the relatively recent criminal cases of O'Dell *and* Curtis.

Introduction

Section 66 of the Crimes Act 1961 provides for the liability of those who are parties to an offence. In essence, s 66(2)(b)-(d) provides that everyone is a party to and guilty of an offence who aids, abets, incites, counsels or procures another to commit it, while s 66(2) adds that a person is a party to every offence committed in furtherance of a common unlawful purpose to which that person was a party, if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose. Section 70(2) further provides that everyone who incites, counsels or procures another to be a party to an offence is a party to every offence which the other commits in consequence of such inciting etc, if the first-mentioned person knew the offence was likely to be committed in consequence thereof.

When it is alleged that D was a secondary party to an offence it is not uncommon for the prosecutor to rely on s 66(1) and, as an alternative, s 66(2) (rather less is heard of s 70(2), although it does not require proof of a "common purpose"; cf *R v Baker* (1909) 28 NZLR 536). This is liable to result in somewhat involved directions to the jury on the question of secondary participation, the complexity being exacerbated in murder cases when, as is common, the mens rea alleged against the principal offender (P) is also put on alternative bases, and when the possibility of manslaughter (by one or more of the parties) may also be an important consideration. When there are a number of accused the precise role played by each may be obscure and even in seemingly simple cases factual and legal issues can generate directions which place considerable demands on the concentration and acumen of counsel, and one can only wonder what the jury makes of it all. Moves to avoid unnecessary complications are, therefore, to be welcomed.

O'Dell* and *Curtis

In *R v O'Dell* [1986] BCL 1705 P had committed murder after D had driven him to the vicinity of the crime. Although he had been told of P's intentions, D claimed that he thought P was joking, but the jury rejected this and convicted of murder. The primary contention of the prosecution was that D was guilty under s 66(1) as an aider and abettor, but s 66(2) was also mentioned and the Judge directed the jury on both subsections. The Court of Appeal said that it did not detract from the use of s 66(2) in appropriate cases, but here the case against D rested on s 66(1) only, and it would have been better if s 66(2) had not been mentioned. It added that:

> There is a tendency ... for prosecutors to introduce s 66(2) as a makeweight or fall back position in cases which really fall only within s 66(1). Such a tendency can only cause confusion and may sometimes lead to new trials.

D's conviction was, however,

affirmed because the Court was satisfied that the verdict would have been the same had the case been put only on the basis of s 66(1).

More recently the Court of Appeal has found it necessary to repeat its criticism of the unnecessary use of s 66(2), and to act upon it. In *R v Curtis*, [1988] BCL 139, P had committed murder by multiple stabbing, after the victim had been tied up. The prosecution alleged that P's motive was jealousy (although D also told the police that P had accused the victim of being a police informer), and it alleged that D (who had been present) was a party to the murder because he had handed P the knife for the purpose, and had previously paid him to do it (although D said that the payment had been for sexual favours, and had been intended to persuade P that D was a man of means). D was convicted of murder after the jury had been invited to consider his liability on three alternative bases: first, that D had intentionally encouraged, incited or counselled the murder (which would found liability under s 66(1)); second, that the killing was in furtherance of a plan between D and P to kill the victim (s 66(2) being relied upon); third, that D and P had agreed that the victim be tied up and assaulted, D knowing that the likely consequence was that P would proceed from that to the murder (s 66(2) being again relied upon).

As to the second of these, the trial Judge noted that if P and D had agreed that the victim should be killed D could be convicted under s 66(2) or s 66(1), the agreement being "evidence of encouragement or incitement". This may be over cautious. When presence was essential for aiding and abetting such an earlier agreement was merely evidence which supported the inference that D's presence amounted to intentional encouragement, or aiding and abetting (*R v Coney* (1882) 8 QBD 534, 557-558). But presence is not now essential for liability as a secondary party, and in a case like *Curtis* there seems to be no reason why entering an agreement that an offence be committed should not be held to actually constitute sufficient encouragement to make D a party (as an abettor or counsellor) if the offence is committed in furtherance of it.

In *Curtis* the real difficulty lay in the suggestion that s 66(2) could apply on the basis that P had committed murder in prosecuting a common purpose that the victim be tied up and assaulted. The trial Judge had doubted whether there was evidence of this, but had nevertheless put the hypothesis to the jury; the Court of Appeal, however, concluded that there was no evidence of the formation of such a plan, that the Crown's case stood or fell on s 66(1) alone, and that s 66(2) should not have been left to the jury at all. It was further held that the provision could not be applied because the verdict might have been founded on s 66(2) (it seems to be implicit in this that the jury might have acted (unreasonably) on s 66(2) while being (reasonably) uncertain whether s 66(1) applied).

As in *O'Dell* the Court expressed a general criticism:

> Regrettably, too often a case which can only be treated as a true case of aiding, abetting or encouraging under s 66(1) has been made more difficult and confusing to a jury by the Crown's attempted invocation of s 66(2).

In addition, McMullin J gave a concise account of the effect of the two subsections:

> Section 66(1) is concerned with intentional acts of aiding or abetting or encouraging given by one party to another in the commission of the very crime which the principal offender commits. On the other hand s 66(2) contemplates a different situation. It is concerned, not with an act which is the very unlawful act to which an offender lends his aid or his encouragement, but with any act done by the principal party which, while not the result aimed at, was a probable consequence of the prosecution of the unlawful common purpose.

The obvious omission

There is an obvious omission in the last sentence. Under the 1908 Act it sufficed that the offence ought to have been foreseen but under the 1961 Act it is not sufficient for liability under s 66(2) that the offence was in fact a probable consequence: D must have actually known, foreseen or contemplated that the offence was a probable consequence, or "serious risk". In *Curtis* this was recognised by McMullin J in the next page of the judgment, and it is made explicit in a passage he quoted from *R v Hamilton* [1985] 2 NZLR 245, 250; and see *R v Gush* [1980] 2 NZLR 92, and *R v Piri* [1987] 1 NZLR 66, 78. There have, however, been other cases where this point has been ignored when the Court has summarised the effect of s 66(2) (eg *R v Currie* NZLR 193, 209; *R v Gemmell* [1985] 2 NZLR 740, 748) and presumably this accounts for the suggestion in Garrow and Caldwell, *Criminal Law in New Zealand* (6 ed), 68, that s 66(2) fixes D with liability "not only for offences that were within his actual contemplation at the relevant time but also for other offences which were merely a probable consequence of the prosecution of the common purpose". With respect, it is clearly wrong to suppose that s 66(2) can make D a party to offences which were never within D's "actual contemplation", or "to which he may never have turned his mind" (*R v Piri* [1987] 1 NZLR 66, 84, per McMullin J). Such liability was formerly imposed at common law (Foster, *Crown Law* (1762), 370), was allowed for by the objective test in the 1908 Act, and is still imposed by the Australian criminal codes (P Gillies, *The Law of Criminal Complicity* (1980), pp 109-116). But at common law the liability of a party to a criminal enterprise is now confined to offences which that person actually realised might well be committed in furtherance of it (eg *Chan Wing-Siu v R* [1985] AC 168), and in New Zealand the same result was achieved in 1961 by the inclusion in s 66(2) of the requirement that the offence was "known" to be a probable consequence of the prosecution of the common purpose, and the deletion of the alternative objective test (and the same change was made to s 70(2)).

The primacy of s 66(1)

Apart from the omission of the requirement of knowledge in s 66(2),

the above extract from *Curtis* is of particular interest because of the way the Court describes the different roles of s 66(1) and s 66(2). If confusion is to be avoided it is necessary to clearly identify how the tests for liability under the two provisions might differ, but the law as to this, it is submitted, is not entirely free from doubt. It may be useful to begin an examination of this with a brief consideration of the theoretical relationship between the different subsections which describe parties to offences.

In Adams, *Criminal Law and Practice in New Zealand* (2 ed), para 624 it is said of s 66 that:

> While they may overlap on a verbal interpretation, the two subsections are best regarded as separate and independent enactments.

This, with respect, is very doubtful and it is submitted that the better view is that s 66(2) and s 70(2) in truth describe particular instances where D is guilty as an aider, abettor, counsellor or procurer; that is, these subsections provide a partial definition of the scope of s 66(1). It is only s 66(1) which provides that those described as parties are "guilty" of the offence committed, ss 66(2) and 70(2) simply declaring that every one caught by them is a "party" to it, and at common law such cases were merely particular instances of cases where D was held to be guilty as a principal in the second degree or an accessory before the fact (eg Foster, *Crown Law* (1762), 350-352, 370; Stephen, *A Digest of the Criminal Law* (1 ed, 1877), Arts 37-44). Section 66(1) imposes liability without qualification on all who abet, counsel or procure offences (although an element of purpose is required for "aiding"), ie those who at common law were principals in the second degree or accessories before the fact. Even if ss 66(2) and 70(2) were not included in the Act there seems little doubt that the parties they describe would be held to be liable under s 66(1). It is good that the Code makes liability clear in such cases, which perhaps represent the outer limits of accessoryship, but this does not mean that they involve a form of liability which is distinct from aiding, abetting, counselling or procuring, and it is submitted that they are best regarded as merely particular instances of such liability (cf I H Dennis, "The Mental Element for Accessories", in *Criminal Law: Essays in Honour of J C Smith* (ed P Smith, 1987), at 43; *R v Mills, Sinfield and Sinfield* (1985) 17 A Crim R 411, 443-444, per Roden J).

While the point is essentially theoretical, acceptance of this view might conceivably facilitate some simplification in the structure and content of directions on secondary participation. A common practice at present is to read s 66(1), or parts of it, attempt to explain it, and then repeat the process with s 66(2), which is described as providing an alternative basis for conviction. There is a danger that the jury is simply buried and mystified by a welter of words.

The supposed distinction between s 66(1) and s 66(2)

In *Curtis* the Court (wrongly, it is submitted) takes the view that s 66(2) is concerned with a "different situation" than that dealt with by s 66(1), and attempts to explain the difference. McMullin J rightly recognises that under s 66(2) the offence need not be "the result aimed at", but he does not say that this is the vital distinction. Although it may be implicit that there is or may be a difference in the mental element required in respect of the offence committed, there seems to be at least equal emphasis on an apparent or possible difference in the relationship between D's physical conduct and the offence committed by P. Section 66(1) is concerned with conduct which constitutes intentional assistance or encouragement of the offence actually committed by P, but under s 66(2) D may be a party to an offence even though it is committed by an act to which he did not "lend his aid or encouragement".

This may be compared with the explanation of s 66 offered in Adams, op cit, para 624. There it is suggested that s 66(2) is needed in two classes of case: cases where one or more of a number of participants foresaw but may not have "actually intended" the offence (although s 66(2) can apply to people who actually intended the offence it is said that it is not then needed, because s 66(1) deals with such a case), and cases "where there is a general common intention to commit an offence or offences of a particular type but not as yet particularised as to perpetrator, victim, time or other circumstances" (*R v Currie* [1979] NZLR 103, a case of gang rape, being cited as an example).

It may be objected, however, that this does not adequately explain the purpose of s 66(2), because both types of case would be caught by s 66(1) in any event. Thus, it is well established that, provided D knew of the crime or type of crime intended, D may be convicted as an aider, abettor, counsellor or procurer, even though, at the time of the assistance or encouragement, D had no knowledge of such details as the intended means, victim or time, and even though the principal may not have then decided upon such matters: *R v Maxwell* [1978] 1 WLR 1350; *R v Bainbridge* [1960] 1 QB 129; *R v Baker* (1909) 28 NZLR 536.

Nor does it seem right to say that ss 66(2) and 70(2) are needed to establish liability when D foresaw but did not actually intend an offence. No doubt it is true that in the "typical case" when s 66(1) is relied upon the accessory will have actually intended the offence or type of offence in question (*Chan Wing-Siu v R* [1985] AC 168, 175), but it seems that such an intention is not essential (and even when it is alleged that D instigated an offence which, when D acted, was not intended by the principal, it is at least doubtful whether D need truly intend the offence: cf *Gough v Rees* (1929) 142 Lt 424; *A-G's Reference (No 1 of 1975)* [1975] QB 773).

The mens rea needed for liability under s 66(1) is usually said to be an intention to help, encourage or facilitate the commission of the offence in question. This will require that at the time D acts D knows that P intends (or, at least, is likely) to do the acts constituting the offence, knows of the existence of circumstances (including a requisite intent) required by the definition of the offence, and knows that his or her conduct will help, encourage or facilitate the offence (see, eg, *R v Samuels* [1985] 1 NZLR 350; *Giorgianni v R* (1985) 156 CLR 473; *R v Clarkson* [1971] 3 All ER 344).

In relation to each of these, however, there seems to be no doubt that the necessary "knowledge" will exist even if D is uncertain of the true position, if D actually realises that it is likely that the relevant facts exist, or will exist (at least if the Court feels able to classify D's state of mind as "wilful blindness" or "connivance"): I H Dennis, op cit, at 48, 50, 51; *Thomas v Lindop* [1950] 1 All ER 966, 967; *R v Antonelli and Barberi* (1905) 70 JP 4; *Giorgianni v R* (1985) 156 CLR 473, 487-488, 495).

The question then arises whether any further state of mind is needed for liability under s 66(1), or for an "intention" to assist or encourage the offence. It has been thought to be established that D need not desire that the offence be committed, it being no defence to a charge of aiding and abetting that D was indifferent to whether it was committed, or even regretted it and acted out of fear of P (*National Coal Board v Gamble*) [1959] 1 QB 11; *Lynch v DPP* [1975] AC 653; *AG v Able* [1984] 1 QB 795, 811; cf *R v Joyce* [1968] NZLR 1070; *R v Pollock* [1973] 2 NZLR 491, 494). From this it might be concluded that nothing more is required than that D intentionally do something knowing that this will assist or encourage the offence, or is likely to do so: "The requirement of knowledge . . . supplies the mens rea . . . required for criminal responsibility" (*Runyowa v R* [1967] 1 AC 26, 41; cf *R v Maxwell* [1978] 1 WLR 1350). On the other hand, it has been suggested that, although D need not "desire" the offence in the sense of getting satisfaction from its commission, the law does require an element of "purpose" for aiding and abetting, and that it is essential that it can fairly be said that D acted "in order that" the criminal act may be committed, or will be assisted or encouraged: I H Dennis, op cit, 51-55. This is supported by cases where the Courts have accepted that the requisite "intention" might be absent when D knows that the offence might be promoted, but nevertheless goes ahead in order only to achieve some other, laudable, object: *R v Fretwell* (1862) Le & Ca 161; *AG v Able* [1984] 1 QB 795, 810, 812; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 27; cf J C Smith [1986] Crim LR at 115-117. These authorities could be rationalised by the employment of the concept of recklessness, used in the sense that requires D to have consciously taken an unjustified risk. This however, could not be said of one New Zealand case involving minimal assistance or encouragement where the Court of Appeal insisted that "mere knowledge" by D that his conduct would be likely to encourage the commission of the crime was not enough to make him an abettor, and that an "actual intention" to encourage it was essential, and that if D "intended no more than to avoid the contempt of the others then he should have been acquitted": *R v Pene*, (unreported, 1 July, 1980, CA63/80; cf *R v Lewis)* [1975] 1 NZLR 222, 227-228; *R v Tomkins* [1985] 2 NZLR 253, 256; *Giorgianni v R* (1985) 156 CLR 473, 506-508.

"Intention" is not defined in these cases and the true effect of this requirement may be debatable. It seems, however, to mean that when D acted, the assistance or encouragement of the offence must have been at least an object, purpose or desire of D's, although the existence of other reasons which may have accompanied or prompted such intention will not excuse. This is not quite the same as requiring the actual commission of the offence to be one of D's objects or purposes, but even so it seems difficult to reconcile with earlier authorities. It also invites a close consideration of D's reasons for acting and, if consistently applied, it could lead to some surprising results. For example, it is doubtful whether there is much merit in the idea that a person who knowingly assists, for example, by selling D the means to offend, could successful contend that the requisite "intent" was negatived because D was indifferent to the result, or "intended no more than" to make a profit (cf *R v F W Woolworth Co Ltd* (1975) 18 CCC (2d) 23, 34; *Cook v Stockwell* (1915) 84 LJKB 2187).

Conclusion

In some respects the mens rea needed for liability under s 66(1) remains doubtful, but it does not seem that the commission of the offence must be actually "intended" by D. If that is so, the need to catch cases where D does not have such intent does not explain the existence of ss 66(2) and 70(2). Moreover, the scope of the authorities which require an "intent" to assist or encourage for liability under s 66(1) is somewhat obscure, and it is very doubtful whether they extend to cases where D truly intends to assist or encourage one offence, but foresees that this may result in another. Finally, even though it is true that under s 66(2) (and s 70(2) "liability turns on the contemplated, albeit unwanted, consequences of the criminal enterprise" (*R v Hamilton* [1985] 2 NZLR 254, 250), it may be argued that in all these cases D does, in a real sense, "intend" the foreseen offence (cf *Chan Wing-Siu v R* [1985] AC 168, 175). When D joins others in a common enterprise which has a particular type of offence as its object (or when D counsels a particular type of offence), and contemplates that another offence may be committed in furthering that purpose, it may fairly be said that D agrees that the further offence should be committed if this is seen as necessary or convenient. In that case it may be said that D *does* "intend" that further offence — an actual, albeit conditional, intention: I H Dennis, op cit, 57; cf *R v Simpson* [1978] 2 NZLR 221, 225. The contrary may be implicit in *R v Gemmell* [1985] 2 NZLR 740, 748, but there the Court seems to overlook the "state of knowledge" which s 66(2) requires.

For these reasons it is submitted that the role of s 66(2) is not best explained by reference to parties who do not intend the offence in question. Such an intention does not seem to be needed under s 66(1), and a conspirator liable under s 66(2) may well be said to intend the foreseen offence. The remarks in *Curtis*, on the other hand, might suggest that the real effect of s 66(2) is to impose liability even though D's conduct did not in fact assist or encourage the offence committed by P, or even though D did not intend this, or did not appreciate that this would be the likely effect of his or her conduct. This may be a more plausible explanation of s 66(2), although even if s 66(1) stood alone it seems very likely that assistance

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Property Law Act notices:

Remember the basics

By Stuart D Walker, Senior Lecturer in Law, University of Otago

The procedure necessary for exercising a power of sale needs to be followed carefully. In this article Stuart Walker examines in detail the two essentials of effecting service of the notice and ensuring that the required period of notice is given.

Non-compliance with ss 92 and 152 of the Property Law Act 1952 continues to give mortgagors the ammunition necessary to have a mortgagee restrained from exercising a power of sale on a mortgaged property. The number of successful applications for interim injunctions based on such non-compliance is surprising. It is perhaps opportune to re-examine the basics.

The two essentials which can trip up an unwary mortgagee are firstly, failure to effect service of the notice in accordance with s 152; and secondly, failure to give the required period of notice under s 92.

1 Service under s 152

The service provisions of s 152 apply to all notices issued under s 92. It provides for two methods of service:

(1) By delivery to the addressee personally; or
(2) By posting it by registered letter addressed to the addressee at the last known place of abode or business in New Zealand of the addressee.

A notice posted under the second method is deemed to have been served at the time when the registered letter would in the ordinary course of post have been delivered "unless the intended recipient of the notice proves that, otherwise than through any fault on his part, it was not delivered at that time".

What is "the ordinary course of post"?

These words were considered by Holland J in the recent decision of *Anderson v NZI International Acceptances Ltd and Others* (unrep, HC Dn Reg CP113/87, 19 Nov 1987). The plaintiff was the owner of a farm property at Wanaka in Central Otago over which the defendants held a mortgage. The plaintiff defaulted under the mortgage, resulting in the

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or encouragement of one offence would be held to amount to assistance or encouragement of other offences D knew were likely to result.

With the deletion of the objective element from ss 66(2) and 70(2) it may very well be that these subsections are technically redundant (cf P Gillies, *The Law of Criminal Complicity* (1980), pp 122-125; under the Australian Codes the provisions equivalent to s 66(1) are held to encompass "common purpose" liability covered by s 66(2), while the provisions similar to s 66(2) impose further liability through a test of objective probability: eg *Brennan v R* (1936) 55 CLR 253; *Stuart v R* (1974) 134 CLR 426; *Borg v R* [1972] WAR 194). On the other hand, these provisions spell out tests for liability which, although probably available under s 66(1) in any event, will sometimes be useful, and it is as well that a Criminal Code should define the scope of accessoryship as explicitly as possible. In the interests of clarity and simplicity, however it appears that there are only two types of case where it is appropriate to invoke ss 66(2) or 70(2): cases where there is evidence that P intended one kind of offence but the accessory realised that another kind of offence (which was in the event committed) was a likely result, and cases where a number of offences were committed (which might or might not be of the same kind, and actually intended by all parties). In the latter kind of case s 66(2) may provide a convenient single test for assessing the liability of a number of accused, particularly if there is uncertainty as to the precise part played by each: *R v Currie* [1969] NZLR 193, 208-210. It is of course always necessary that there be proof that at least one of the parties committed the offence charged (*R v Nathan* [1981] 2 NZLR 473), and, as *Curtis* shows, the mere fact that a number of offences may have been committed cannot justify reference to s 66(2) if there is no sufficient evidence of the alleged common purpose. □

defendants issuing two notices under the Act. These were dated Friday 14 August 1987 and were posted by registered mail from Dunedin the same day, arriving at the Wanaka Post Office the next day. The notices required the breaches specified therein to be remedied before 18 September 1987.

As the plaintiff's property was on the Wanaka Rural Delivery circuit the notices remained at the Post Office until Monday 17 August when they were given to the rural deliverer. Service was not effected and the notices were returned to the Post Office the same day. The notices were subsequently uplifted by the plaintiff's mother on Wednesday 19 August.

The Court had to determine when "in the ordinary course of post" the letter would have been delivered, for the date of service was of obvious importance in determining whether or not the required *period* of notice under s 92 had been given. The manager for NZ Post at Wanaka gave evidence that:

> In the ordinary course of events a registered article posted in Dunedin would arrive in Wanaka the following day. Where the addressee lives on one rural delivery circuit the postal deliverer would telephone the addressee and arrange to meet him or her at the gate in order to uplift the article. The residences of many people on the rural delivery circuit are frequently some distance from their mail box. If contact is made with the addressee the article would be delivered on the date of its receipt in Wanaka. Otherwise it would remain at the Post Office until contact is made.

Holland J held:

> In the light of the explanations given by the manager of the Post Office I consider that some allowance must be given for the lapse of a day or two by virtue of the possible difficulties of the rural mail deliverer communicating with the addressee. I accordingly consider that in the ordinary course of post a registered letter posted in Dunedin on Friday 14 August addressed to the plaintiff in Wanaka would in the ordinary course of registered post be delivered to him on either Monday 17 August, Tuesday 18 or Wednesday 19 August.

Because of the interlocutory nature of the proceedings Holland J was not required to make a final decision as to the date of delivery, but he did note that "If it were necesary for me to make a precise decision I would in this case find that the letter would in the ordinary course of post have been delivered on Wednesday 19 August when it was uplifted by Mrs Anderson." As the mortgage document required one month's notice to be given, Holland J found that the plaintiff had shown a "much more than arguable case that the service of the Property Law Act notices was inadequate to have authorised the defendants to exercise their power of sale . . . because the notice did not in fact give the defendant one month's notice to remedy the breach". The interim injunction was therefore granted.

The decision emphasises the essentially variable nature of the "ordinary course of post" requirement, which is, and must be determined by reference to the actual practices and procedures of NZ Post in a particular area. What of delivery to outlying areas of New Zealand involving "river boat" delivery? When using the registered post method caution, inquiry of NZ Post, and for safety's sake perhaps allowing a few extra days for delivery, are required.

What constitutes "delivery"?

In *Matich v United Building Society* (unrep, HC Whang Reg, CP3/87, 24 March 1987) Henry J held that delivery "must mean actual delivery or handing over of the letter either to the addressee or to his agent (actual or ostensible)". He rejected any form of constructive delivery where, for example, the post delivery person calls to the address, and being unable to obtain a receipt takes the letter back to the Post Office. Henry J's judgment has been approved by Barker J in *Cook v United Building Society* (unrep, HC Auckland Reg, CP 403/87, 26 May 1987):

> . . . Unless the intended recipient of the notice proves that otherwise than through any fault on his part, it was not delivered at that time.

These words were added by s 8(1) of the Property Law Amendment Act 1982.

Prior to their inclusion proof of registered posting of a notice would automatically constitute delivery on the addressee. In the pre-amendment case of *Joblin v Reed and Another* [1954] NZLR 666 a notice was sent by registered post, but was returned by the Post Office to the sender as "unclaimed". Finlay J rejected the submission that "delivery" meant delivery into the actual hands of the addressee. In effect the section provided for irrebuttable proof of service.

That presumption can now be rebutted, and it is the amendment *relief* provision which a mortgagor will look to rely on when seeking to show non-service of a notice.

Whether delivery has been effected at a particular time will essentially be a question of fact. Delivery to someone other than the addressee could lend itself open to possible attack on the basis that that person was not the addressee's agent; care is required in these circumstances.

Faults

In *Raitt & Another v Allied Nominees Ltd* (unrep, HC Blenheim Reg A18/86, 17 Dec 1986) Heron J considered the element of "fault". Notices had been sent to the mortgagors at the mortgaged farm property, but were not physically delivered. After remaining unclaimed at the Post Office for about a month, they were returned to the mortgagee. Heron J after stating that whether fault existed was a matter for *objective* determination, found that there was no conduct on the part of the plaintiffs which prevented them from receiving the notice, concluding:

> I am quite satisfied that Mr Raitt had little opportunity of responding to a notice in his letterbox relating to registered articles. His telephone had been disconnected. He had no transport to get from his farm into Blenheim and for a period of time it is plain that he been subsisting on the farm. . . . I am

quite satisfied that Mr Raitt was preoccupied with matters and was severely handicapped by his financial circumstances in such a way as to satisfy me that he was without fault.

Heron J rejected the argument proposed by the defendant's counsel that on the facts the knowledge of a registered letter at a Post Office, combined with failure to make inquiry of the Post Office and make some arrangments to ensure that there was somebody at home when the postal delivery person next called, amounted to fault within the meaning of the section.

It goes without saying that in many instances the mortgagor's "personal circumstances" will not be known to the mortgagee; even where they are known, how are those circumstances then applied in determining the period of notice to be given?

The warning is clear. The amendment gives to a mortgagor the ability to rebut the presumption of service, and underlines the whole aim of the notice procedure which is, after all, to formally advise the mortgagor of the contents of the notice, namely details of the breach and the action required of the mortgagor.

Section 152 as it now stands must surely suggest that personal service of s 92 notices should be the preferred course. The registered post method has disadvantages:

The uncertainty in determining the time of service due to the variable nature of "ordinary course of post".

The delay, if after the notice is not able to be served, NZ Post holds the notice for some weeks, and then returns it to the issuer. A new notice has to be issued.

The lack of receipt with the normal registered post procedure. Non-return of the notice does not prove receipt by the addressee. The A/R procedure gives a receipt, but a question mark arises where someone other than the addressee signs the receipt (particularly where the notice is sent to a location other than the mortgaged property).

The relief provision of s 152 gives considerable room for argument by a mortgagor. Delay and cost are the inevitable followers to injunction proceedings.

As Heron J said in *Raitt v Allied Nominees Ltd* ". . . the posting by registered letter is *merely a convenience* and no doubt a saving in cost, but it carries with it the likelihood . . . that the notice may not in fact be received", and as noted by Barker J in *Cook v United Building Society* ". . . there can be no great hardship for a mortgagee to retain a process server to effect personal service of the notice".

2 Failure to give required period of notice

As is evident from *Anderson v NZI International Acceptances Ltd and Others* the uncertainty which arises from the registered post method can often produce adverse results when determining whether the required *period* of notice has been given. There it proved fatal, because an arguable case was established that the required period of notice had not been given.

How much notice need be given?

Under s 92(2) a power of sale cannot be exercised earlier than four weeks from the service of the notice nor earlier than the date on which the power would have become exercisable or the moneys would have become payable if the section had not been passed. The four week period is of course a *minimum* period, and mortgage documents frequently require a greater period of notice — for example, *one month* is specified in many mortgage documents; (remember condition 8 of the powers and conditions listed in the Fourth Schedule to the Property Law Act, which provides that after default "at least one month's notice in writing of his [the mortgagee's] intention so to do has been served by the mortgagee on the mortgagor".) Perusal of the mortgagee document is required in every case.

Whilst no greater period of notice that that specified in s 92(2) need be given, the writer's preferred course is always to add at least three or four extra days into the minimum notice period.

Points to remember on the issue of notices

The form of notice should be as far as possible that which is contained in The Property Law (Mortgagees Sales) Regulations 1983. Whilst no notice is void by reason of any variation from the prescribed form so long as the notice complies with the various stated requirements, there really is no need to run the risk that at a later date the notice may be held to be defective.

Individual notices should be given to each mortgagor.

The preferred method of delivery must be by personal service; the issuer can then immediately confirm that the required period of notice has been given.

However, if service is to be effected by registered post, and there is to be a Registrar's sale, ascertain the Registrar's exact requirements as to proof of service. Consequent upon the recent case law some Registrars are applying more stringent procedures; extended declarations of service may be required.

Ensure that the s 92(2) time requirement has been satisfied; check the mortgage document.

Allow three or four days into the period which you specify on the notice — simply as a safety margin. Both the day on which the notice is served as well as the day on which the act may be done must be excluded when calculating the period of time to be given: *Wallace McLean Bawden & Partners Nominees Ltd v Fish* [1980] 1 NZLR 540 (CA).

If faced with a mortgagor who is avoiding service, s 152(4) provides that the Court can "make an order directing the manner in which any notice is to be delivered, or dispensing with delivery thereof".

Care on the issue of Property Law Act notices is always required. □

Fundamentals

By The Right Hon Sir Robin Cooke, KBE, PhD, President of the Court of Appeal of New Zealand.

This article was originally given as a paper at the first Canada-Australasia Law Conference held at the Australian National University, Canberra, in April 1988. The fundamental question with which the paper deals is the function of the Courts in relation to Acts of Parliament and whether this is at bottom only a question of interpretation. The author wishes it to be understood that this paper attempts a direct look at the subject rather than an exploration of the labyrinth of academic writings. Recent guidance there, leading in different directions, can be found, he suggests, in articles by C de Q Walker "Dicey's Dubious Dogma" (1985) 59 ALJ 276 and George Winterton "Extra-Constitutional Notions" (1986) 16 FL Rev 263.

On behalf of the New Zealand Court of Appeal I express our sense of the significance of this Conference, our appreciation of the initiatives which have led to it, and our pleasure at being invited to be represented at it.

We are a relatively small Court – at present the complement of permanent working members is six and we usually sit as a bench of five for more important cases and three for others. The Court has existed as a separate Court since 1862; but, whereas formerly it was manned by Supreme Court (now High Court) Judges sitting in turn, since 1958 the working membership has consisted of permanently appointed Judges of the Court of Appeal, augmented as necessary, especially for criminal cases, by visiting High Court Judges.

The change in 1958 was one manifestation of New Zealand's development as a nation and, in the three decades since, this process has accelerated. The stage has now been reached in which in virtually every major field of law New Zealand law is radically, or at least very considerably, different from English law. In many respects Australian or Canadian legal experience and ideas are now more relevant for us, as we work out our legal destiny. The trend is evident in reciprocal legislative influence, but inevitably it has also come to be reflected in the approach of the appellate Judges in particular to common law issues. So obvious are these things that, notwithstanding that I cherish English associations and the opportunity there has been over the past ten years to sit from time to time in the Judicial Committee of the Privy Council in Downing Street, I have recently felt compelled to acknowledge that the time has come to abolish the New Zealand appeal to the Privy Council.

Of course English decisions, and also Scottish ones, will continue to be of great persuasive value for us, but in working out our own solutions to our own crunch questions they will no longer have a tacitly yielded head start over Canada or Australia. The recent *Spycatcher* litigation – a phenomenon from which Canada has been spared, as I understand it – might be cited as an illustration of the current more impartial character of our predatory approach. We have long kept a regular eye on and entertained great respect for Australian jurisprudence. An example of the way in which parallel thinking occurs on the opposite sides of the Tasman is an uncanny but entirely unconnected similarity between Sir Anthony Mason's Fullagar Memorial Lecture appearing in the Monash University *Law Review* for September 1987 and entitled "Future Directions in Australian Law" and a paper which I gave in Christchurch in October entitled "The New Zealand National Legal Identity". As the later author it behoves me to disclaim plagiarism.

Canadian decisions

Our full awareness of the rich resources of Canadian jurisprudence has perhaps been more recent, reflecting an outsider's respectful impression that the Supreme Court of Canada and provincial Courts of Appeal are going on from strength to strength. A short list of a few concrete examples, far from exhaustive, will show that this is not empty flattery. We have drawn deeply on Canadian

precedents in developing our law on the liability of public authorities for negligence in building control (*City of Kamloops v Nielson*)[2] and on total absence of fault as a defence to charges of statutory offences (*R v City of Sault Ste Marie*).[3]

We have benefited from Canadian decisions on the human rights issues posed by statutory warrants to use listening devices to detect drug dealing (*R v Welsh and Ianuzzi*).[4] And from the contrasting judicial opinions at the highest level in Canada on the no less awkward problems of the bearing of insurance covenants on negligence liability between landlord and tenant (*T Eaton Co Ltd v Smith*).[5] As to that last subject, what the Supreme Court in truth has shown us is how to disagree; and we have not failed to follow suit.

Bill of Rights?

Two years ago it seemed that New Zealand might follow Canada more dramatically by strongly entrenching rights and freedoms. The 1982 Charter was the chief text used as a precedent for the draft Bill of Rights annexed to a White Paper presented to the New Zealand House of Representatives by the Minister of Justice.

Like an increasing number of lawyers interested in constitutional questions, I found myself virtually driven to support the concept of such a Bill, once the chips were down. This basically for three reasons. First, if one genuinely believes in the abiding value of the rights and freedoms proclaimed, as distinct from paying lip service to them, how can one consistently reject their entrenchment? Second, some statement of accepted ideals rather more contemporary and comprehensive than Magna Carta or the 1689 Bill of Rights seemed a possible candidate for filling a gap; for a unifying expression of values accepted by the whole community, divided though the community is on a multitude of particular issues. Third, a unicameral legislature seems thin.

In the event the movement for a Bill of Rights has not gathered much momentum in New Zealand. It may be before its time. There are of course arguments against it, some superficial but correspondingly easy to promulgate. It is facile to represent the Bill as subversive of democracy by transferring power to non-elected Judges. The idea is less readily grasped that on the contrary the Bill would safeguard democracy by putting brakes on interference with minority rights. Canadian experience, highlighted by the recent *Morgentaler* decision holding that women have a limited right to abortion, suggests that a Bill of Rights may also be a safeguard against certain kinds of acutely controversial legislation, thus emphasising that there is no natural magic in a bare majority. But a belief that democracy equals majority rule is quite widespread and difficult to dispel.

Much has also been made in New Zealand of the spectre of political appointments to the Judiciary, although if there is a risk of that, despite our traditions, it is there already. Some apparently less than judicious attempts on the part of the President of the United States, construed as being in that direction, have lent colour to the argument. They did no service to the concept of constitutional separation of powers for which the United States stood: still stands, as a generally acceptable nominee, evidently seen as first and foremost a dedicated Judge, was ultimately put forward. But some damage has been done. The ability to make non-political appointments to high judicial and some other public offices is an acid test of the integrity of a government.

For a combination of reasons, then, the writing on the wall in New Zealand may now point to a fallback position: perhaps some form of hortatory Bill, partly an adjuration by Parliament to itself and partly an enactment of canons of interpretation for the Courts, on lines having some affinity with the 1960 Canadian Bill of Rights. Machinery might be built into the parliamentary process to enable some form of clearance of new legislation or specific examination of any rights issues raised thereby. Even an occasional consultative reference to a Court might be feasible, provided that there was a safeguard against use as simply a matter of political tactics.

A withdrawal to some such position would not be a volte-face. Rather it might be a case of *reculer pour mieux sauter*. Moreover entrenchment, like most other legal principles and practices, is a matter of degree. Even in the Canadian Charter of 1982 the "notwithstanding" clause (cl 33) enables the federal Parliament or the legislature of a province to declare expressly that specific enactments will operate notwithstanding some — though not all — the rights and freedoms set out in the Charter.

The Canadian Bill of 1960 is not understood to have accomplished much; perhaps it was more of a breaking of the ice. In the 1980s a New Zealand Bill might be in somewhat similar terms, but it would be launched into a very different climate of opinion. It might be much more effective.

The fundamental question

That background of hesitation and questioning in my own country and the theme of this session lead me to offer a few thoughts on fundamentals, on the ultimate question in any legal system like those of Canada, Australia and New Zealand, or the United Kingdom. What is the function of the Courts in relation to Acts of Parliament; is it at bottom only interpretation or is there something more? It is a question of perennial fascination, but to dismiss it as purely theoretical, a mere intellectual puzzle, could be a profound mistake.

If all goes well in a given society, it will not seriously arise. But all does not go well. Virtually every case before virtually every Court illustrates that elementary truth. The Judge's work is part of the pathology of society. With luck one can go through a judicial career without having to confront the really big choices about constitutional power. But Judges in the former Southern Rhodesia (see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, reporter's note at 650-1; *Adams v Adams* [1971] p 188; *In re James* [1977] Ch 41), the Philippines, Fiji, have had to do so.

The Canadian Judiciary have been faced with and have discharged the crucial task of defining constitutional conventions between federal Canada and the Provinces. (*Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1) In my own country the embryonic Treaty of Waitangi was once a closed book to lawyers — the Privy Council so ruled in 1941 (*Hoani Te Heuheu Tukino v Aotea District Maori Law Board* [1941] AC

308) — but in the past decade or so it has been taking on, and at an accelerating pace, a wholly different dimension. (See *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353.) Such things considered, it may be advisable to have one's ideas in order against the day of unexpected test.

Before any serious discussion of the subject it is necessary to get Dicey out of the way. Of immense historical weight, a weight still continuing among those who prefer not to be troubled by much thinking about the subject, his hypnotically persuasive pronouncements do not condescend to deal with obvious difficulties. At any rate those usually quoted do not.

I do not claim to be a student of Dicey and acknowledge the likelihood that he was more subtle than appears at first sight and may have skilfully tailored his dogmas to the Victorian market. Sir Owen Dixon, on the other hand, was not necessarily one to minimise difficulties. One of the best jokes in legal literature must be on the dust-cover of *Jesting Pilate*. After confessing that the volume is addressed to "persons of cultured tastes", the publishers say "Even when the subject is abstruse, the meaning is immediately apparent". The lecture on *The Law and the Constitution* is probably a fair specimen. It includes gnomes such as

> In a purely legal point of view supremacy over the law is a thing which by its very nature the law cannot restrict: and after all a statute is but law.

It ends with a sentence standing in isolation as a self-contained, pregnant paragraph:

> Thus in the end we return to a conception of the supremacy of the Crown.

Human rights

There are about 6000 million people in the world, yet, if a global opinion poll could be taken asking the respondents to select among a standard list of legal subjects the one they considered of greatest importance, perhaps it is not hard to guess the result. I am referring not to elementary needs — subsistence, safety, some form of organised society — but to what you might call *Halsbury* titles. I may be wrong, but it is doubtful whether, given the background of a society in which some form of order prevails, any other subject would have the appeal of human rights.

The rather endearing distrust on the part of British lawyers of theory and generalisation is illustrated by the fact that in the 50 volumes of the fourth edition of *Halsbury's Laws of England*, the subject of Human Rights is dealt with in 45 pages, and then gingerly within the title Foreign Relations Law. But a great adjustment is under way. In the conflicting judgments at the interlocutory stage of the English *Spycatcher* litigation, members of the House of Lords of each school of thought supported their reasoning by reference to the European Convention on Human Rights (*Attorney-General v Guardian Newspapers Ltd* [1987] 3 All ER 316, 346-7, 348, 355-6, 364; cf 375-6),

Similarly, and again under a quintessentially British title — "The Principle against Doubtful Penalization" — the author of a recent textbook on statutory interpretation, Francis Bennion, organises his exposition of this principle in terms of detriments to various human interests as identified in the European Convention (*Statutory Interpretation*, Butterworths, London, 1984, 609 et seq). His headings of danger are to human life or health, freedom of the person, family rights, religion, free assembly and association, free speech, property and other economic interests, status or reputation, privacy, law and legal proceedings, other infringements of a person's rights as a citizen. The approach is quite different from that of traditional textbooks such as Maxwell and is more, I think, than a difference in classification. It marks a new tendency to formulate rights in positive terms. Sooner or later, in one way or another, the time will surely come in the United Kingdom, Australia and New Zealand when the legislature cannot resist this trend.

Bennion's assortment of English case law brings out how much of the work of the Courts is concerned with elaborating and balancing human rights. There are innumerable fields in which the legislature has not given consideration to how a particular enactment will work in detailed practice, innumerable situations as to which Parliament in truth has formed no intention at all. It becomes the function of Judges to blend the enactment with the body of existing law, giving due weight to the policy of the statute but, in cases not clearly provided for, taking into account also the value of rights whose application is said to be curtailed.

It would be out of the question in a conference paper to develop that theme adequately. I will mention here only one example, ignoble but of considerable practical moment in many countries: the exposure of alcohol-impaired driving. The evil of the road toll may fall to be weighed against the age-old faith that the home is a castle; but legislatures, understandably in relation to such a sensitive issue, leave much unresolved as to the powers of enforcement officers.

The House of Lords reached the compromise that (1) an unlicensed entry into a house and a requirement of a breath test there and arrest on refusal were unlawful (*Morris v Beardmore* [1981] AC 446) but that (2) a breath test obtained after the defendant had been taken to a police station under the unlawful arrest was admissible (*Fox v Chief Constable of Gwent* [1986] AC 280) It was said that "of course" it would have been different if the appellant had been lured to the police station by some trick (ibid, 293).In New Zealand we have jibbed at the second step (*Howden v Ministry of Transport* [1988] BCL 100), finding the case of a trick difficult to distinguish in principle. Whatever be the best answer, this does seem the kind of rights issue which can appropriately be left to the Courts.

Natural law

The sanctity of the home, subject to strictly limited exceptions, can be seen as an example of a right existing by natural law. I would not burke the idea of natural law. It is a very old idea of which the fashionability waxes and wanes, but as Lord Lloyd of Hampstead says "it seems to possess almost inextinguishable powers of survival" (*The Idea of Law*, Penguin Books,

London, 1977 reprint, 86). However, I am trying here to look perhaps a little further even than the content of natural law or Bennion's "principle against doubtful penalization". That is to say, to return to the theme touched on by Dicey and Dixon.

It is not often grappled with by the Courts, but an exception, producing judgments of abiding interest, occurred some two years ago in New South Wales in *Builders' Labourers Federation v Minister of Industrial Relations* (1986) 7 NSWLR 372. Legislation had been passed empowering a Minister to give a certificate leading to cancellation by the Governor of the registration of a union. The union claimed to be entitled to a hearing before cancellation. Lee J rejected that claim, holding (and this is a most interesting use of *Hansard*) that what the Minister had said when introducing the Bill showed that the union's conduct was the very mischief aimed at and that an opportunity of a hearing could never have been intended. While an appeal against that judgment was pending the New South Wales Parliament passed an Act "to remove doubts", validating the certificate and the cancellation. The union challenged this in the Court of Appeal, unsuccessfully, on the ground inter alia that it had a right to pursue its judicial proceedings with which Parliament could not interfere.

The short answer to that claim would appear to be one of those given by Street CJ (ibid, 387). Even if there is a doctrine invalidating legislative interference with the judicial process, the 1986 Act was not of such a character as to infringe it. The New South Wales Parliament could have passed legislation, as the Commonwealth Parliament had done, directly and simply cancelling the registration.

I understand the Chief Justice to be making the point that such a course was always within Parliament's power and that the fact that the Supreme Court of New South Wales had already determined that the registration had been validly cancelled earlier could not deprive Parliament of the right to exercise that power for good measure. Moreover, it is difficult to work up any indignation about what the Parliament did in that case; rendering an appeal pointless after a failure at first instance does not strike one as necessarily an unacceptable intrusion into the judicial process. As a matter of fact and degree nothing constitutionally objectionable emerges in a case where, after all, everything turned from the start on interpreting legislative intention. Parliament was merely confirming that the Judge had got its intention right.

Collecting the authorities

But the judgments range more widely. They are valuable both in themselves and as collecting the leading earlier authorities. The actual language used by the Judges of our era repays attention and I quote a representative selection. Lord Reid (*Pickin v British Railways Board* [1974] AC 765, 782):

> I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was fully demonstrated by the Revolution of 1688 any such idea has become obsolete.

Lord Reid again (*Wiseman v Borneman* [1971] AC 297, 308):

> Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, *supplemented* procedure laid down in legislation where they have found that to be necessary for this purpose. But before *this unusual kind of power* is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

Lord Hailsham LC on the right to a hearing (*Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, 144):

> Once it is established as was conceded here, that the office held by the chief constable was of the third class enumerated by Lord Reid in *Ridge v Baldwin* [1963] 2 All ER 66 at 72, [1964] AC 40 at 66, it becomes clear, quoting Lord Reid, that there is an "unbroken line of authority to the effect that an officer cannot unlawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation". I regard this rule as *fundamental* in cases of this kind when deprivation of office is in question.

Lord Diplock (*Duport Steels Ltd v Sirs* [1980] 1 All ER 529, 542):

> My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the *British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them.*
>
> . . .
>
> It endangers continued public confidence in *the political impartiality of the judiciary, which is essential to the continuance of the rule of law*, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the Court before whom the matter comes consider to be injurious to the public interest. The frequency with which controversial legislation is amended by Parliament itself . . . indicates that legislation, after it has come into operation, may fail to have the beneficial effects which Parliament expected or may produce injurious results that Parliament did not anticipate. But, except by private or hybrid Bills, Parliament does not legislate for private cases.

> Public Acts of Parliament are general in their application; they govern all cases falling within categories of which the definitions are to be found in the wording of the statute. So in relation to s 13(1) of the 1974 Act, for a Judge (who is always dealing with an individual case) to pose himself the question, "Can Parliament really have intended that the acts that were done in this particular case should have the benefit of immunity?" is to risk straying beyond *his constitutional role as interpreter of the enacted law* and assume a power to decide at his own discretion whether or not to apply the general law to a particular case. The legitimate questions for a Judge in his role as interpreter of the enacted law are, "How has *Parliament*, by the words that it has used in the statute to express *its intentions*, defined the category of acts that are entitled to immunity? Do the acts done in this particular case fall within that description?"

Lord Diplock again, on Westminster model constitutions (*Hinds v The Queen* [1977] AC 195, 212):

> They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with *the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.* As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.

Lord Wilberforce (*Vesty v IRC* [1980] AC 1148, 1174):

> The result of the preceding argument is that, if *Congreve* is correct in this respect, a result is produced, in the case of discretionary trusts, which is arbitrary, unjust, and in my opinion *unconstitutional.* That must cast doubt on the decision. For it is a well accepted principle that if one interpretation of an Act of Parliament produces such a result, but another avoids it, the latter is to be preferred.

Lord Pearce on the Colonial Laws Validity Act 1865 (*Liyanage v The Queen* [1967] 1 AC 259, 284-5):

> Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words "but not otherwise" in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy. Moreover their Lordships doubt whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former. Whatever may have been the possible arguments in this matter prior to the passing of the Colonial Laws Validity Act, they are not maintainable at the present date. No case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has been founded on that portion of Lord Mansfield's judgment.

Lord Cross of Chelsea on Nazi legislation against Jews (*Oppenheimer v Cattermole* [1976] AC 249, 278):

> Of course on some points it may be by no means clear what the rule of international law is. Whether, for example, legislation of a particular type is contrary to international law because it is "confiscatory" is a question upon which there may well be wide differences of opinion between communist and capitalist countries. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. *To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.*

Sir Laurence Street CJ (7 NSWLR at 405):

> For my own part, I prefer to look to the constitutional constraints of "peace, welfare, and good government" as the source of power *in the courts to exercise an ultimate authority to protect our parliamentary democracy,* not only against tyrannous excesses on the part of a legislature that may have fallen under extremist control, but also in a general sense as limiting the power of *Parliament.* I repeat what I have said earlier — laws inimical to, or which do not serve, the peace, welfare and good government of our parliamentary democracy, perceived in the sense I have previously indicated, will be struck down by the courts as unconstitutional. There is here a field of constitutional jurisprudence which has not yet been explored and developed.

Kirby P (ibid, 405):

> I agree with Lord Reid's conclusion. I do so in recognition

> of years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom. That unbroken law and tradition has repeatedly reinforced and ultimately respected *the democratic will of the people as expressed in Parliament*. It has reflected political realities in our society and the distribution of power within it. I also do so in recognition of the dangers which may attend the development by judges (as distinct from the development by the people's representatives) of a doctrine of fundamental rights more potent than *Parliamentary legislation*. Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit. They may thereby undermine a rule of law and invite the only effective substitute, viz the rule of power. In the end, it is respect for long standing political realities and *loyalty to the desirable notion of elected democracy* that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of *Parliament* by reference to suggested fundamental rights that run "so deep" that Parliament cannot disturb them. This conclusion does not leave our citizens unprotected from an oppressive majority in *Parliament. The chief protection lies in the democratic nature of our Parliamentary institutions.*

Mahoney JA (ibid 413):

> but in the end the power, and so the responsibility, lies with the Parliament and, in my opinion, it is proper that it be so. For the consequences of such legislation may be serious. And it is the Parliament and those who comprise it who must be accountable for it.

Some of those quotations are very familiar and it may be said with respect that most of them represent the height of orthodoxy. A number of the pronouncements, that of Lord Wilberforce for example, are plainly limited to preferences in statutory interpretation.

I would respectfully repeat that there is a constant and wholly legitimate volume of work for the Courts in that realm, work generated because very often legislation does not deal with specifics. A fortiori that applies to parliamentary debates, which is probably the main reason why, even when one is entirely ready to derive help from *Hansard*, it is a common experience to get not much more than the general drift of ideas. Lord Reid's recognition of a judicial power to supplement legislation is especially suggestive. It harmonises with the theme of developing the common law in parallel with established trends in Parliamentary views of the public interest, spoken of by Lord Diplock in *Erven Warnink v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743, the Advocaat case. In New Zealand we are using much the same idea in adapting common law to accept an Australian-New Zealand common market in some fields of commerce. (*Dominion Rent a Car Ltd v Budget Rent a Car Systems* (1970) Ltd [1987] BCL 487).

Fundamental and complementary rules

But there is more to be found in the authorities just collected than banal generalisation. I have underlined some of the more important language. The message conveyed may be summed up by saying that it is the duty of the Courts, their constitutional role, to ascertain the democratic will of the people as expressed in Acts of Parliament. Parliament enacts law, the Courts interpret what Parliament enacts.

The *Courts* interpret what *Parliament* enacts. Here, it may be, are two fundamental and complementary rules of any constitution, written or unwritten, with which we are familiar. Perhaps they at least are of the essence of the polity.

One can explore this by asking what would happen if an Act were to provide that, notwithstanding any enactment or rule of law to the contrary, the legislative assembly need not be convened in 1989 and that the Governor-General or Governor may make by Order in Council such regulations as he deems fit for the peace, order, and good government of the realm, state, or province, including without limiting the generality of the foregoing such provisions for taxation as he deems fit.

The present Canadian Charter would not allow this, for by cl 5 there must be an annual sitting of Parliament and of each legislature. No doubt there would be other complications under federal constitutions; but here I am trying to look beyond the federal barricades. The guarded language in the Bill of Rights 1689, "Parliaments ought to be held frequently" would be of dubious value. It might be held directory only or capable of being overriden by a sufficiently express Act of Parliament itself.

If, notwithstanding the imagined Act, a legislative assembly has convened and passed legislation, no doubt there would be little difficulty about treating the latter as valid. It would be said that no Parliament could bind its successors. What would be much less clear, though, would be the validity of delegated legislation under the imagined Act. A strong argument could be mounted, invoking some of the dicta that I have collected, on the lines that a basic premise of the constitution, written or unwritten, is the functioning of a democratically-elected Parliament. It is the supremacy, sovereignty or plenary power of such an institution that the Courts accept. If the institution has chosen not to function, the Courts have not committed themselves to accepting an alternative.

The imagined Act is not totally unrealistic. In New Zealand there used to be an Economic Stabilisation Act 1948, now happily repealed, which inter alia empowered the Governor-General in Council to make such regulations as appeared to him necessary or expedient for promoting the economic stability of New Zealand. Various regulations made under that power survived challenge, not always unanimously and I must admit to having been of the majority on one occasion (*New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374). But the question raised by the challenges always was whether particular regulations made in reliance on the power were intra

vires as reasonably capable of promoting economic stability, or some question of their effect, such as whether the privilege against self-incrimination prevailed against official questioning under powers conferred by the regulations (*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394). The ultimate issue — whether *the Act* was ineffective — was never raised. Probably it could not have been raised successfully. Parliament had not abrogated any power: it had merely delegated wide power in a wide field, and the regulations had to be laid before Parliament. But it is not clear that if Parliament had taken the further extreme and self-denying step, the Courts should have recognised that as valid.

Be it noted that this is not the same question as whether an Upper House can be abolished. In New Zealand the non-elective Legislative Council was indeed abolished with its own concurrence by the Legislative Council Abolition Act 1950 pursuant to the New Zealand Constitution (Amendment) Act 1947 of the United Kingdom Parliament, which empowered the New Zealand Parliament "to alter, suspend, or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act 1852 . . .". It has been assumed that this was valid. If not, the Courts have long since acquiesced in a legal revolution.

Nor am I now concerned to enter into the debate about whether the House of Lords can be abolished. As to the Crown itself I should suppose, as Sir Owen Dixon appears to have thought, that its continuance is a fundamental premise of the legal order, but again I do not propose here to take that point further. What I am seeking to stress is that the existence and functioning of a legislature with a democratically-elected chamber is a fundamental premise, asserted or assumed by authoritative dicta of the nature already quoted.

Independent Courts

So also is the existence and functioning of independent Courts. A reasonable mandatory retiring age can be no infringement of this principle, but executive control of judicial tenure clearly would be. If an Act were to provide that the superior and other Courts should cease to hear cases after a certain date and that thereafter all indictments, informations, suits, actions or other justiciable proceedings or issues whatsoever should be determined within a hierarchy of administrative tribunals, with members holding office at the pleasure of a Minister, it could hardly stand in the light of the dicta. The Courts have a constitutional role and it is their duty to fulfil it. An action would lie for a declaration accordingly.

Of course that does not prevent restructuring of the Court system. For instance, in New Zealand by an Act of 1987 a Labour Court has been created (Labour Relations Act 1987, ss 278-314). It has taken over, to the exclusion of the High Court but subject to rights of appeal to the Court of Appeal, jurisdiction over (inter alia) tort and inducement of breach of contract actions connected with strikes or lockouts, including the power to grant injunctions. Its Judges hold office during the traditional "good behaviour", subject to removal by Her Majesty upon the address of the House of Representatives. There appears to be nothing constitutionally objectionable in these provisions. What would be constitutionally objectionable, I suggest, would be to try to transfer the essentially judicial part of the work to a body that is not a Court in the same sense. (See the *New Zealand Drivers' Association* case, supra. Two panel members are part of the Labour Court for a limited class of cases on the borderline of judicial work; this seems reasonable and compatible with principle.)

Two unalterable principles

The argument can be summed up in some of the words of the Canadian Charter. Clause 1 states that the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. My submission is that the modern common law should be seen to have a free and democratic society as its basic tenet and, for that reason, to be built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts.

On historical grounds it is arguable that there is a third such principle, the existence and functioning of the Crown, but it is with the first two principles or pillars that this paper is primarily concerned. I am suggesting that if a change, by legislation or otherwise, were seen to undermine either of them to a significant extent, it would be the responsibility of the Judges to say so and, if their judgments to that effect were disregarded, to resign or to acknowledge frankly that they are prepared to depart from their judicial oath and to serve a state not entitled to be called a free democracy.

Limits of legislative power?

Perhaps there is something more than those two or three fundamental pillars. Suppose that an Act of the legislature purported to strip Jewish people of their citizenship and their property; or to disfranchise women (or men); or positively and without qualification to require the Courts, notwithstanding any rule of law to the contrary, to receive in evidence any statement appearing to be a confession of crime, whether or not obtained by force or any other form of compulsion. Can any lawyer in all honesty accept as a viable principle that some infringements of human rights are so grave that if enacted in other countries they will not be recognised as law at all by us, but that this would not matter if they were enacted by our own legislature?

It would seem that hypocrisy on that scale must be the ultimate result of taking Dicey undiluted. It is easy to say that the hypothetical examples are so unlikely that we need not bother about the problem. That may be so. On the other hand, if honesty compels one to admit that the concept of a free democracy must carry with it *some* limitation on legislative power, however generous, the focus of debate must shift. Then it becomes a matter of identifying the rights and freedoms that are implicit in the concept. They may be almost as few as they are vital; this paper is certainly not intended as an incitement to judicial activism.

Within very broad limits Parliament has the constitutional

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Abortion: the father's lack of standing

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

There have now been some cases in which a father has sought the assistance of the Court in preventing the abortion of a foetus in the conception of which he has been instrumental. In this article, Mr J L Caldwell of Canterbury University surveys case law in New Zealand, England, Canada, the United States and Australia. He points out that in New Zealand, as in other jurisdictions, abortion is regarded as a unique medical operation. The legal difficulty is the question of how the Courts can ensure that the limits that are imposed are to be observed.

With the intended introduction of a new Crimes Bill, and the apparent moves by pro-abortion supporters to ensure the introduction of a private member's Bill liberalising abortion, it seems inevitable that the issue of abortion will again shortly be the subject of vigorous political and legal debate. The aim of this article is to analyse just one aspect of the debate – the issue of a father's standing to challenge a decision to terminate a pregnancy.

There are two ways in which a father might seek to prevent an abortion in New Zealand: firstly he could seek an injunction to enforce the criminal law (which would raise the problems discussed in *Gouriet v Union of Post Office Workers* [1978] AC 435), or secondly he might seek to argue that on administrative law grounds there has been a defective exercise of statutory powers.

The caselaw from jurisdictions other than Canada would suggest that the father lacks standing in either case, and it is almost certain that a New Zealand Court would reach the same conclusion. But, as with most aspects of abortion, the matter is far from simple, and this article will attempt to address some of the difficulties which can arise from a father's challenge to a proposed termination.

The legal nature of abortion decisionmaking

As is well known, the Contraception, Sterilisation, and Abortion Act 1977, as amended in 1978, provides a procedure whereby abortions may be lawfully carried out. In brief, s 32 of the Act provides for a process of medical referral whereby a woman's request for a termination on any of the grounds set out in s 187A of the Crimes Act 1961 is considered by two certifying consultants, who are themselves appointed by the Abortion Supervisory Committee under s 30 of the Act. Then s 33 provides that if the certifying consultants are of the opinion that the case is one to which any of the grounds listed in s 187A of the Crimes Act applies, they shall issue a certificate authorising the performance of an abortion by an operating surgeon.

There are a number of grounds set out in s 187A of the Crimes Act, but the ground usually relied upon, according to the Abortion Supervisory Committee's annual reports to Parliament, is that found in s 187A(1)(a), namely:

> That the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl. . .

In particular, it appears that serious danger to the mental health of the woman is the ground most commonly

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role of laying down policy, and undoubtedly there is a corresponding duty on the Courts to uphold and respect Parliament's role. But, on the foregoing approach, one can no longer talk about "some vague unspecified law of natural justice" or resort to similar anodynes. One may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility. □

1 Its history is outlined in *R v Clarke* [1985] 2 NZLR 212.

2 (1984) 10 DLR (4th) 461; followed in *Brown v Heathcote County Council* [1986] 1 NZLR 76, though not specifically mentioned in the Privy Council judgment [1987] 1 NZLR 720.

3 (1978) 85 DLR (3d) 161; lending encouragement to earlier tentative judicial suggestions in New Zealand, and applied in *Millar v Ministry of Transport* (1986) 2 CRNZ 216 and *Civil Aviation Department v McKenzie* [1983] NZLR 78. The position in Canada is now affected by the 1982 Charter. I understand that the latest case is *R v Vialacourt*, not yet reported.

4 No 6 (1977) 74 DLR (3d) 478; *R v Douglas* (1977) 1 CR (3d) 238; followed as concerned with a similar legislative policy in *R v Menzies* [1982] 1 NZLR 40, 46.

5 (1977) 92 DLR (3d) 425: *Ross Southward Tyre Ltd v Pyrotech Products Ltd* (1975) 576 DLR (3d) 248. See *Marlborough Properties Ltd v Marlborough Fibre Glass Ltd* [1981] 1 NZLR 464; *Leisure Centre Ltd v Babytown Ltd* [1984] 1 NZLR 318.

found to be established.

On examining the provisions of the Contraception, Sterilisation, and Abortion Act it becomes apparent that abortion in New Zealand can not be categorised as simply a private medical decision. A pure medical decision over, say, the removal of an appendix or tonsils is completely free from legislative control. For abortions, however, the New Zealand Parliament has set out a detailed code of procedure for decisionmaking in abortions and provided an exhaustive list of relevant criteria which must be taken into account and applied by a two-person committee before they can be performed.

Certainly as the Court of Appeal noted in *Wall v Livingston* [1982] 1 NZLR 734, 739 the kind of decision and the process leading up to an abortion is ". . . probably unique [and] certainly is remote from the normal work of any administrative tribunal". Certainly it would be "peculiarly difficult" (p 740) for a Court to review discretionary decisions based primarily on medical grounds, but nevertheless the legislative structure of the Act may leave open that possibility. For if such decisions were indeed immune from judicial review the limiting provisions of the statute would, for practical purposes, be rendered nugatory. For example, it would be possible for a set of certifying consultants to take into account an overtly irrelevant criterion, such as the undesired gender of the foetus, with effective impunity. Such impunity might seem inconsistent with the tenor of the detailed statutory provisions.

Indeed at first instance in *Wall v Livingston* Speight J had indicated that in the most unusual circumstances of "blatant bad faith" judicial review might be available, and the Court of Appeal did not completely discount the possibility of judicial review. Similarly in Canada, which has a similar decisionmaking process, it would seem that the decisions of therapeutic abortion committees might, in limited circumstances, be amenable to some form of judicial review (*R v Morgentaler* (1984) 12 DLR (4th) 502; (1986) 22 DLR (4th) 641, *Carruthers v Therapeutic Abortion Committee of Lions Gate Hospital* (1984) 6 DLR (4th) 57 and *R v Medhurst* (1984) 7 DLR (4th) 335). Those Canadian cases, along with *Wall v Livingston*, do highlight the real problems involved in challenging medical opinions, but the point remains that under New Zealand law, as under Canadian law, abortion is currently both an administrative and medical process. In principle, therefore, the administrative process can be subject to judicial review.

The case law on the father's locus standi and abortion

(a) New Zealand

Assuming for the moment that abortion decisionmaking under the Contraception, Sterilisation, and Abortion Act 1977 may be reviewable in some circumstances, the question arises as to who would have standing to bring proceedings. Since the landmark case of *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 the issue of locus standi in administrative law cases has been greatly liberalised. For instance, in 1987 a public morals organisation was held to have standing to challenge the decision of the Film Censor even though the organisation lacked any statutory recognition in the Films Act 1983 (*Society for the Promotion of Community Standards v Everard* [1987] NZLJ 203). Standing does remain relevant in New Zealand law but the emphasis today is more on the totality of the facts (*Budget Rent a Car v Auckland Regional Authority* [1985] 2 NZLR 414, 419) and on the seriousness of any alleged breach of the law (*Van Duyn v Helensville Borough Council* (1985) 5 NZAR 55, 60).

In the context of abortion the issue of standing was exhaustively considered by the New Zealand Court of Appeal in *Wall v Livingston*. In that case a paediatrician sought judicial review of the decision of the two certifying consultants who had authorised the proposed abortion. The Court of Appeal held that the doctor, who was not one of the statutory participants to the authorisation process, lacked a sufficient interest to institute proceedings for judicial review. Delivering the judgment of the Court, Woodhouse P declared that:

> [i]t would be inconsistent with the whole scheme and tenor of the Act if it were possible to introduce into such a matter anybody other the woman herself and those very few persons who have been given the statutory responsibilities for screening her request for an abortion.

Thus whilst this leading case was not directly concerned with the issue of a father's standing to institute judicial review proceedings of a decision to authorise an abortion, it would seem clear from the above pronouncement that the father, not being a statutory participant, must also necessarily lack standing. It therefore seems most unlikely that a father today could obtain an ex parte injunction to restrain a proposed abortion, although such injunctions were initially granted both by Bisson J in *Wall v Livingston* and by Hardie Boys J in *D v S* and *S*.[1]

(b) England

Strong support for the views expressed by the New Zealand Court of Appeal in *Wall v Livingston* is to be found in the English cases. In the first English case on the issue, *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, a husband sought an injunction to restrain his wife from carrying out an abortion without his consent. Sir George Baker P described the claim as "completely misconceived" (p 283), and held that the husband enjoyed no right of consultation enforceable at law or equity, which was needed to found such an injunction. Moreover Baker P declared that the foetus only acquired legal personality and enforceable rights upon its birth, and that the husband therefore could not rely on any alleged right of the foetus. The European Court of Human Rights upheld the findings as being consistent with the provisions of the European Convention of Human Rights in *Paton v United Kingdom* (1980) 3 EHRR 408.

Then in the important case of *C v S* [1987] 1 All ER 1230, which went as far as the House of the Lords, it was held, inter alia, by Heilbron J, that an unmarried father lacked standing to restrain the mother from terminating a pregnancy in circumstances alleged to constitute a criminal offence

under English statutory law. *Paton's* case was applied by Heilbron J, and whilst on appeal the Court of Appeal did not need to resolve the question of standing, it is fairly clear from the judgment of Donaldson MR that the Court of Appeal was also in sympathy with the views expressed by Baker P in the earlier case. The House of Lords refused leave to appeal and, perhaps not surprisingly, the judgments of *C v S* have produced not only a stream of academic comment (eg (1987) 103 LQR 340, (1987) Fam Law 319, and (1987) 137 NLJ 185, 188) but also the introduction of a private member's Bill seeking, amongst other things, to give the fathers of foetuses the right to be consulted about abortions.

(c) Canada

There have been a number of challenges to both abortion decisionmaking and the abortion laws generally in the Canadian jurisdictions. Firstly there have been constitutional challenges to s 251 of the Criminal Code, which sets out the process for the performance of legal abortions. In one challenge a well-known pro-life campaigner was held by the majority of the Supreme Court of Canada to have standing to argue that s 251 contravened s 1 of the then Canadian Bill of Rights by depriving the foetus of the right to life. (*Minister of Justice v Borowski* (1982) 130 DLR (3d) 588). In the majority judgment it was also stated, obiter dicta, that the husband of a pregnant wife would undoubtedly have locus standi. Then in another challenge, a well known pro-choice doctor, charged with the conspiracy of procuring an unlawful miscarriage, was held by the High Court of Ontario to have standing to argue that s 251 contravened the Canadian Charter of Rights and Freedoms by infringing other guaranteed freedoms. (*R v Morgentaler* (1984) 12 DLR (4th 502).

Both challenges were in the event unsuccessful, but the liberal approach to standing in the constitutional cases was also evident when the Canadian Courts came to consider the issue of a husband or father's standing to either enforce the criminal law or to review a decision to abort on administrative law grounds. (It can be noted, though, that pro-life applicants not personally affected by abortion decisionmaking have been denied locus standi in Canada (*Dehler v Ottawa Civic Hospital* (1979) 101 DLR (3d) 686, *Carruthers v Langley* (1984) 13 DLR (4th) 528, and *League for Life in Manitoba and Soena v Morgentaler* (1985) 19 DLR 703).

But in *Medhurst v Medhurst* (1984) 9 DLR (4th) 252 Reid J said that despite a husband's lack of any right to be consulted or to consent to abortions under s 251 of the Criminal Code the husband "could suffer real injury of a particularly agonising kind", and that it was difficult to think of "anyone who could have an interest equal to that of a husband in the pregnancy of his wife" (p 259). It was therefore held that the husband had standing to move for an injunction to enforce compliance with s 251 of the Criminal Code. On a subsequent application, by the same applicant, for certiorari to quash the therapeutic abortion committee's certificate the husband's standing was again assumed, this time with an expression of some doubt, by Krever J. (*Medhurst* (1984) 7 DLR (4th) 335, 337). Finally it can be noted that in the earlier case of *Whalley v Whalley* (1981) 122 DLR (3d) 717 the British Columbia Supreme Court also seemed to assume that a husband would have standing to seek an injunction to enforce compliance with s 251 of the Criminal Code.

There are two points of some note which emerge from the Canadian cases. Firstly, and most importantly, although husband applicants have been accorded locus standi, none has succeeded in the substantive arguments. The evidential problems involved in challenging the medical opinion have been stressed by the Courts, and to the extent that New Zealand Courts now examine the substantive merits of a case in determining locus standi the Canadian cases will lend little assistance to a husband applicant in this country. Secondly it can be noted that the Canadian cases involved husbands and not unmarried fathers — the difference between the two classes of applicants was highlighted in the United Kingdom cases of *Paton* and *C v S*, and pointed out by Reid J in *Medhurst* — and it would seem that the Courts look less favourably on the claim of the unmarried father.

(4) United States

The American case law is of interest on this issue, for although the constitutional arguments are of little relevance in the New Zealand context, the American Judges have often grappled more directly with the underlying policy issues than have their Commonwealth counterparts.

The leading American case on the position of the father in abortion decisionmaking is the Supreme Court judgment of *Planned Parenthood of Central Missouri v Danforth* 428 US 52, 49 L Ed 2d 788 (1976). Here a Missouri statutory provision, which required the consent of the spouse to any abortions carried out in the first twelve weeks of pregnancy (unless certain conditions were met), was declared by the majority of the Supreme Court to be unconstitutional. The issue of spousal consent had specifically been reserved in the earlier case of *Roe v Wade* 410 US 113, 35 L Ed 2d 147 (which held that abortions in the first trimester were to be left to the judgment of the woman and doctor free from State interference), but the majority in *Danforth's* case held that a legislative provision requiring spousal consent was inconsistent with the reasoning in *Roe v Wade*. In *Danforth's* case the dissenting justices suggested that a father's interest in his potential or living child was unmatched by any other interest in his life. The majority Judges however, argued that the interest of a father in his foetus was in fact subordinate to the woman's right of a woman to have an abortion; for, they argued, it was the woman who physically bore the foetus and gave birth to the child. Thus, it was said, the mother was the party more directly affected by the pregnancy, and as between the woman and the man the balance must lie in the woman's favour. That reasoning of the majority was subsequently applied to defeat applications against proposed abortions brought by a husband (*Coleman v Coleman* 471 A 2d 1115) and by a non-married father. (*Rothenberger v Doe* 374 A 2d 57)

In an earlier case *Doe v Doe* 314 NE 2d 128 (1971) the Supreme Court of Massachusetts had also addressed the policy issues

concerning a father's standing. In his judgment the dissenting Judge had argued that if the abortion was carried out it would result in a permanent, irreversible, dramatic loss for the father, whereas in the circumstances of the case (where the man was prepared to assume responsibility for childcare and custody and where no medical complications were expected), any damage to the woman, if the pregnancy continued, would be of a temporary nature. The majority Judges, however, emphasised that the grant of an injunction might not only drive the woman to seek the services of an unlicensed abortionist, but that it would also be impossible to enforce. It was declared to be "unthinkable" that a woman could be imprisoned or fined for contempt of court if she ignored such an injunction.

The policy difficulties surrounding the issue were further analysed in *Scheinberg v Smith* 482 F Supp 529 (1979). This case concerned a constitutional challenge to a Florida provision which required spousal *consultation* (as opposed to *consent*). Whilst recognising the husband's interest in "the procreative potential of the marriage" the United States District Court in this case produced a number of reasons which told against the validity of a general requirement of spousal consultation. The reasons included, for example, the obvious undesirability of requiring consultation if the woman had been either emotionally or physically "battered" by her spouse, and the undesirability of requiring consultation if the foetus had been a result of an extra-marital affair. The Court therefore concluded that the requirement of spousal consultation would produce an undue burden on the woman and could cause her to seek the less desirable alternatives of self-abortion or illegal abortions.

Thus the American Courts have certainly been ready to recognise that a husband has a real, direct interest in the foetus but have at the same time unequivocally ruled that the woman's interest in her health and freedom from unwanted pregnancy and birth must prevail. That judicial approach is of relevance in the New Zealand context for the same judicial concerns would assuredly be present if a husband were to argue he had locus standi to review the abortion decisionmaking process within this country.

The legal tension of abortion

Courts in all jurisdictions have acknowledged the divisiveness, sensitivity, and plurality of views on the abortion issues (see, for example, *R v Woolnough* [1977] 2 NZLR 508, 519 per Woodhouse J, and *R v Morgentaler* (1986) 22 DLR 641, 648 per Ontario Court of Appeal). And in the modern pluralistic society the Courts tend to state that the law should be morally neutral. This attitude was well-exemplified by the High Court of Australia when it refused an application for an injunction to prevent an abortion, made by the Attorney-General of Queensland on the relation of an unmarried father. Concluding the judgment of the Court in that case of *Attorney-General (Qd) (Ex rel Kerr) v T* (1983) 46 ALR 275, 277 Gibbs CJ said:

> There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be overstepped if an injunction were to be granted in the present case.

Such judicial thinking would also contribute to the frequently expressed reluctance to review the decisionmaking of medical practitioners in the abortion context (see, for example, *Wall v Livingston* [1982] 1 NZLR 734, 741, *Medhurst v Medhurst* (1984) 9 DLR (4th) 252, 265 *Paton v Trustees of BPAS* [1979] QB 276, 282 and *Roe v Wade* 410 US 113, 35 L Ed 2d 147, 191-192.

However the difficulty remains that the Legislature in New Zealand, as in many other jurisdictions, has treated a termination of pregnancy as a unique medical operation, and therefore subjected it to statutory controls and limits not found with any other. Herein lies the legal difficulty. How can the Courts ensure those limits are observed? Can it really be assumed that medical practitioners are not as prone to the occasional mistaken or deliberate misuse of statutory powers as any other donees of statutory powers?

The moral tension of fatherhood and abortion

In modern times the debate over abortion has tended to focus on the difference of views between the pro-life advocates (who argue for the right of the foetus to its life) and the pro-choice advocates (who argue for the right of the woman to her health and control of her body). The suspicion and philosophical divergence between the two groups is so wide that the positive arguments of each side are rarely acknowledged or addressed by the other.

Surprisingly little consideration, however, has been given to the complicating interests of the father of the foetus. In New Zealand the Report of the Royal Commission into Contraception, Sterilisation, and Abortion in New Zealand did address and reject the concept of paternal consent to abortions (p 276) but in the Parliamentary debates it appears that only one pro-life Member of Parliament, Rt Hon R D Muldoon, directly raised the issue of the interests of a husband (1977) 414 *New Zealand Parliamentary Debates* 3525 . Other prolife MPs concentrated almost exclusively on the alleged rights of foetal life. (Conversely, in considering the history of abortion it is interesting to learn that in Roman law that abortion was not considered a crime against the foetus, but a crime against the husband for the deprivation of his child. (Glanville Williams: *The Sanctity of Life*, 1957, 148)

Pro-choice feminists might well argue that pro-life opponents are still in truth attempting to rearticulate a patriarchial family structure, and that in truth pro-life men feel threatened by abortion because "women can undo what men have done to them" (Brenda Cossman (1986) 44 *University of Toronto Faculty of Law Review* 85, 87). However it is possible that as a result of the liberating impulses of the feminist movement many men may now reject the traditional gender roles and may more readily desire, as their primary goal, the role of caring, nurturing, father.

Thus in recent years fatherhood has for the first time become the subject of serious academic study, and it is becoming apparent from that research that a father can forge a relationship to the foetus

strikingly similar to that of the mother. For some men there is an intense absorption in the foetus, with a very deep relationship being formed. (*The Father Figure* ed McKee and O'Brien (1982) pp 89-193) Indeed researchers in Britain are now beginning to wonder if fathers, like mothers, can suffer from clinical postnatal depression (*The Times*, December 3 1987, p 11).

The relevance of all this is that from the moral point of view the attempt by a father to prevent an abortion can not be so readily condemned, from a feminist perspective, as the attempt to exert male dominance over the autonomy of women. If, freed from gender conditioning, the psyche of the male is not dissimilar from that of the female then the father may simply be harbouring the same instincts as would a mother towards a wanted unborn child.

The difference being, of course, that it is always the woman who must physically bear the foetus for the full nine months.

Conclusion

Obviously it would only be in the rare case where a father would wish to challenge legally a woman's decision to seek a termination of pregnancy. Usually the taking of such a step would indicate that the relationship had either been severely fractured by the decision, or maybe that it was never much more than sexual in its nature. In such circumstances the possibility of a legal challenge, and the consequent uncertainty, would surely contribute greatly to the distress which many women experience when their decision to abort is made. Thus, even whilst recognising the genuine interest that men may have in seeking the continuation of pregnancy, it is not surprising that most American Judges have found the women's countervailing interest to be greater than that of the man. Other real practical problems could also arise. For instance must the man establish paternity before he can bring action? Can that paternity be established sufficiently quickly to avoid delays which could otherwise be prejudicial to the safe and legal performance of the operation?

It is therefore readily discernible why the Courts in all jurisdictions, other than Canada, have denied husbands locus standi, and why the Courts in all jurisdictions, without exception, have consistently refused substantive relief. Yet the nagging question persists in our own country. If Parliament in the Contraception, Sterilisation and Abortion Act 1977 has decided to regulate medical decisionmaking over abortions by providing procedures and criteria which must be followed, can it have been Parliament's intention that those procedures and criteria could be by-passed with immunity from review.

In *Wall v Livingston* the Court of Appeal was influenced in its conclusion concerning the probable unreviewability of abortion decisionmaking by the absence of any legislative provisions enabling the Supervisory Committee to review individual decisions of certifying consultants, and by the absence of any legislative provisions requiring the consultants to give reasons. Yet in other contexts the absence of internal review procedures or of legislative provisions requiring reasons would not hinder the Court from judicial review. And, as earlier discussed, in some Canadian cases reviewability of abortion decisionmaking under similar legislative provisions has been assumed.

But it is the views of the Court of Appeal concerning standing which have effectively guaranteed the unreviewability of abortion decisionmaking. By limiting locus standi to the woman and the statutory participants involved in the authorisation process the Court of Appeal has limited standing to the very parties who have no cause to challenge a decision to abort (see the majority judgment of the Supreme Court of Canada in *Minister of Justice v Borowski*). Assuming that the Attorney-General is most unlikely to bring proceedings, and accepting that the foetus enjoys no legal personality or rights until its birth (*Paton, Wall, Dehler* and *Kerr*), it is only an aggrieved father who would be motivated to challenge a proposed abortion. But, not being a statutory participant, he is clearly barred from bringing any action.

Certainly before *Paton's* case there were no reported cases in England or New Zealand of a father bringing an action to prevent an abortion, but that could simply have reflected the earlier more stringent abortion laws. Today's abortion laws are more relaxed and a father's interest, if he has one, is more obviously threatened. But equally today's locus standi requirements are much more liberal. Indeed some would argue that if a rugby player can be accorded standing to challenge the decision of the Rugby Union to tour South Africa (*Finnigan v Recordon* [1985] 2 NZLR 159) then a father of a foetus should be given that standing to challenge the certifying consultants' decision to abort.

Indeed there can be no real denial of the directness of interest which a father has in his foetus. The reasons that standing has been denied to a father have more to do with such matters as the evidential difficulty of challenging medical opinions and the consequences to the woman of granting any injunctive relief. In other words the reasons really concern justiciability, and perhaps tend to indicate that the issue of abortion is not ideally suited to legal argument or judicial resolution. If that is so, it raises the even more fundamental question of whether abortions should be subjected to the present legal, but unreviewable, limits and procedures. Fortunately, the answer to that question lies beyond the scope of this article □

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1 Unreported, Dunedin Registry, 25 May 1981. The abortion was in fact carried out before the order of Hardie Boys J was made. The author is grateful to Mr J S O'Neill, Barrister and Solicitor, Dunedin, for access to the file.

Books

Cheshire and North, Private International Law

By P M North, MA, DCL, and J J Fawcett, LLB, PhD.
London, Butterworths, 11 ed, 1987. xcviii + 940 pp (including Index) Price $102.56 + GST (limp), $150.20 + GST (cased).

Reviewed by P R H Webb, Emeritus Professor of Law, University of Auckland

The year 1987 appears to be a bumper one for England as regards the conflict of laws — with new eleventh editions of both Dicey and Morris's *Conflict of Laws* and Cheshire and North's *Private International Law.*

The last edition of *Cheshire and North* appeared in 1979, that is, as long ago as eight years. This new edition will thus be welcomed more than ever by all those interested in this increasingly complex but ever fascinating subject. It will be seen that Dr North has taken in a junior partner, Dr James Fawcett, a lecturer in law at the University of Bristol — a fact which greatly pleases this reviewer as a native of that city, though not an alumnus of its University. It appears from the learned authors' Preface that each took initial responsibility for the preparation of different chapters, but that the final result is a collaborative work. The collaboration proves to be a most successful one, as any reader will see.

As the collaborators also state in their Preface, the changes in the new edition are substantial. In the first place congratulations are to be offered for the decision to reset the whole work and to replace the long-familiar side notes with more conventional headings. The result is a nice-looking volume. There is a much more logical and congenial order of treatment of topics. There are now 37 chapters instead of the former 20, which means that some of the larger chapters have been broken down and have been made more easily assimilable in a text now consisting of 922 pages, beginning to make one think (with tongue in cheek, of course, and a misplaced sense of humour to boot) of Browning's reference to "The new edition fifty volumes long". In particular, the topic of recognition and enforcement of foreign judgments has been removed from the end of the book and is now included in Part III (Chapters 10 to 17) entitled "Jurisdiction, Foreign Judgments and Awards". One may single out from this Part, as being particularly excellent for New Zealand consumption, Chapter 12. This is devoted to stays of English proceedings and restraining foreign proceedings. The former topic, as the reader will soon perceive, has lately been moving in England, though admittedly not in New Zealand, with the speed of summer lightning. Some of the material in this Part, eg in Chapters 10, 14 and 16, is concerned with the Brussels Convention and the Civil Jurisdiction and Judgments Act 1982, and will therefore prove to be of interest rather than immediate practical usefulness to the New Zealand practitioner, unless, of course, he needs to be aware of the EEC situation. On the other hand, insofar as the "traditional" rules as to jurisdiction, the common law rules as to recognition and enforcement of foreign judgments and the Foreign Judgments (Reciprocal Enforcement) Act 1933 are dealt with in Part III, their treatment will be invaluable to New Zealand practitioners, law teachers and students learning conflict of laws and/or international trade.

It will be obvious at first glance to every reader of the book as a whole that very considerable activity in the field of the conflict of laws, and its reform, has been occurring over the years since the tenth edition. It is justly claimed by the authors that the changes introduced by legislation alone have been greater than in any equivalent period in the life of the book — now past the date of its golden jubilee, which would have been 1 January 1985. The reviewer would guess that the number of new decisions, English and otherwise, that have called for comment in the text or mention in footnotes must far exceed the number arising in the intervals between all the earlier editions.

One perforce has to observe, with much more than a tinge of regret and sadness, that *Cheshire and North* is proving to be yet another example of an English textbook of first class repute whose 100% usefulness (as opposed to jurisprudential interest) in New Zealand gradually decreases with each new edition. This, of course, is no fault at all of the authors, who are primarily writing a book for English consumption, although their citation of Commonwealth and American cases and statutes is nothing short of prodigious. It is not difficult, indeed, to find a page

where footnotes take up half the space.

There are naturally some chapters which will have to be read by New Zealand law practitioners, law teachers and law students bearing very carefully in mind that New Zealand possesses its own statutory provisions: for instance, Chapter 7 on the proof of foreign law, Chapter 9 on domicile; the whole of Part V (Chapters 21-27) on family law; Chapters 32-35 on the administration of estates, succession and matrimonial property), and Chapters 36 and 37 on, respectively, corporations and bankruptcy. But this is not, by any manner of means, to say that they cannot be read with some considerable advantage or that assistance is not to be derived from them. Other chapters can be read, for New Zealand purposes, with greater confidence and readiness: the law student will especially find the first six chapters on historical and introductory matters very illuminating. The chapter (Ch 8) on the exclusion of foreign law is a most instructive analysis (it contains a discussion, of course, of *A-G of New Zealand v Ortiz* [1984] AC 1 (HL)). The chapters on contract and negotiable instruments (18 and 19) are excellent. The authors have, with skilful scholarship, guided the reader through all the labyrinthine complexities of torts (Ch 20) — though one must have it in mind that the New Zealand Accident Compensation legislation, for all practical purposes, reduces the local reader to thinking — hopefully with a due degree of gratitude — in terms of New Zealand plaintiffs who consider themselves to have been libelled by an author of some Western Australian publication or who have had their car converted by some Queensland defendant. Chapters 28-31, concerned with movables and immovables, and Chapter 35 on trusts are also extremely helpful.

The value of the tenth edition was much enhanced by the fact that Dr North was in his first term as a Law Commissioner at the time of writing it. When the time came to write the eleventh edition, he had completed two full terms as a Law Commissioner. He was accordingly in a better position than ever to bring to bear upon it, in one way or another, the fruits of his very considerable labours in the field of conflict of laws at the Law Commission. Accordingly, both conflicts lawyers and those interested in law reform and the law reforming process should be very greatly indebted to both learned authors.

It is very much to be hoped that this scholarly and experienced partnership, which has not missed a trick, will produce many more editions of this work and that we will not have to wait for eight more years to pass before we are treated to the twelfth edition. □

Combating Commercial Crime

Edited by Rae Weston, of Massey University
The Law Book Company Limited 176pp $29.50

Criminal Fraud

Lanham & Ors
The Law Book Company Limited 629pp $80

Reviewed by G L Turkington, Barrister of Wellington

The surfacing of large scale losses arising from questionable commercial activity since the events of October 1987 and the more recent revelations of GST fraud are reminders that the workings of the criminal mind are as imaginative as ever, and the areas in which it is employed difficult to detect. These two books serve to highlight the difficulties involved in the detection and prosecution of commercial fraud and are a welcome addition to modern criminal law.

Combating Commercial Crime is a soft back publication in which Rae Weston of Massey University has compiled the contributions of 13 persons, mainly New Zealand based, who have specialist knowledge in such areas as insolvency, company embezzlement, computer and other technological frauds. The book has a particular emphasis on case studies from overseas and the lessons to be applied in this country and is marked with a practical approach to solutions rather than an esoteric discussion of the legal principles

continued on p 176

Insurers and AIDS

By Andrew Borrowdale, Ph D (Cantab), Senior Lecturer in Law, University of Canterbury

New and complex problems call for new legal remedies, or at least a reconsideration of existing principles. In this article Dr Andrew Borrowdale looks at the legal implications for insurance purposes of the disease of AIDS or the risk of infection. He considers that any indication of the presence of AIDS would be highly material and would have to be disclosed when taking out a policy, whereas involvement in homosexual activity would probably not be legally material although some insurance companies have a different view.

Introduction

In the United Kingdom figures to the end of 1987 for the known sources of the human immunodeficiency virus (HIV) which causes AIDS are as follows:

Homosexual and bisexual contact	56.1%
Intravenous drug abuse	19.5%
Blood transfusions, including haemophiliacs	17.5%
Heterosexual contact	5.6%
Child of infected mother	1.3%

(See *The Economist* 30 January 1988, at 47).

It might be expected that the figures for New Zealand would be roughly similar.

Against this background of the highest incidence of HIV occurring amongst the homosexual community, a questionnaire was sent in 1987 to each of the 26 Life Insurance companies doing business in New Zealand. The following questions were asked:

(1) Does your company regard the fact of homosexuality as a material fact which should be disclosed?

(2) If the fact of homosexuality is disclosed at the proposal stage, does your company decline to undertake insurance of that life?

(3) If the fact of homosexuality is not disclosed before a contract of insurance is entered into, and this is regarded by your company as a material fact, would your company repudiate liability on the life insured dying of an AIDS-related disease?

On the 26 companies canvassed, 12 replied by answering the above questions, three replied declining to take part, and there was no response at all from the remaining companies.

Homosexuality non-material

Nine insurers replied that they did not consider homosexuality to be a material fact for disclosure, although one indicated that this could change if it could be shown that the fact of homosexuality has an effect on mortality statistics. It was emphasised that the decision to insure is one made on the basis of the medical history and condition of the proposed life insured. Further *medical* investigation may be called for by the fact of homosexuality coming to light. One insurer put it in the following way:

> as prudent insurers, we look for indicators which may suggest that further information or more exhaustive tests are required before an underwriting decision can be made. Thus if we suspected or knew that a proposer was homosexual then we would direct the medical examiner's attention to this and ask for tests which hopefully would show whether or not the proposer had been affected by suspected homosexual activity.

It followed from the fact of homosexuality not being regarded as material that none of these

insurers would necessarily decline cover to a proposer disclosing his homosexual orientation, nor would any avoid the contract once entered into if the life insured subsequently died from an AIDS-related disease. However one insurer replied that if its proposal form contained a question about the sexual habits of the proposer (which in fact it does not), and homosexual orientation was not disclosed, then it was possible that the policy would be repudiated on the death of the life insured.

Homosexuality material

Three insurers considered homosexuality to be a disclosable fact on a proposal for life insurance being made. The basis for this is the assertion that the homosexual community is more at risk from AIDS than any other section of the community. One insurer took the view, incorrectly, that

> due to the current legislation . . . Life Insurance officers are precluded from asking clients directly of their sexual preferences and must therefore rely upon the applicant under the "uberrima fides" concept disclosing all information relevant to the risk.

All three insurers indicated that the disclosure of homosexuality would not necessarily result in the proposal being declined; it would be a factor in assessing the risk, but the decision would depend largely upon further medical evidence. One insurer said:

> If homosexuality is disclosed, a proposal would not be declined but further evidence would be obtained. It would be prudent to arrange a medical examination with a blood test for HTLV III antibodies. If the medical examination and blood test were normal, it would be possible to accept the proposal with perhaps a small extra premium, depending on the type of policy. The age and stability of the person's relationship would have be taken into account, as any degree of promiscuity would be adverse feature.

On the question of avoiding a policy for non-disclosure, no categorical response was made. All three insurers acknowledged that repudiation was a possibility, although one considered that it would be most improbable. Another said:

> Every case of non-disclosure would have to be treated on its merits, bearing in mind the long incubation period that is possible with AIDS and the three year limit to non-disclosure. Should death caused by an AIDS-related complaint occur shortly after the policy commenced and the contract be for a short term only, it would appear that the insurance cover was effected to cover the AIDS risk. In these circumstances it seems that repudiating the claim could be justified.

Discrimination against homosexuals

Insurers are sensitive to the charge that they discriminate against homosexuals in their underwriting practices. (On the question of discrimination see Neave "Anti-discrimination Law and Insurance – the Problem of AIDS" (1988) 1 *Ins L J* 10; Schatz "The AIDS Insurance Crisis: Underwriting or Overreaching" 100 *Harv L Rev* 1782 (1987).) In two Australian jurisdictions there exists a legal bar to discrimination against homosexuals by insurers (s 49ZP of the New South Wales Anti-Discrimination Act 1977; s 29(1)(b) of the South Australian Equal Opportunity Act 1984).

There is no equivalent legislation in New Zealand. Section 24(1) of the Human Rights Commission Act 1977 renders unlawful discrimination in the provision of goods and services "by reason of the sex, marital status, or religious or ethical belief of that person"; none of these categories embraces homosexuality. There is one qualification: s 24(6) permits the differential treatment of the sexes for the purposes of insurance where such discrimination is justified by reference to actuarial evidence or is otherwise reasonable.

The protection afforded homosexuals by the New South Wales and South Australian legislation is thought to have been largely eroded by the decision of the High Court of Australia in *Australian Mutual Provident Society v Goulden* (1986) 4 ANZ Ins Cas 60-708, a case concerning alleged discrimination by an insurer against a physically handicapped insured. The High Court held the AMP entitled to a declaration that the provision of the New South Wales Anti-Discrimination Act 1977 rendering it unlawful to discriminate on the basis of a physical impairment was invalid for being in conflict with a Commonwealth statute, the Life Insurance Act 1945, which takes precedence under s 109 of the Australian Constitution. In its *Report on AIDS and Insurance* (1987) the Australian National Advisory Committee on AIDS has recommended, inter alia, that

(1) insurers should not be permitted to refuse insurance, charge a higher premium, or require antibody testing solely on the basis that a person is a homosexual or is believed to be homosexual; and

(2) the Commonwealth legislation on insurance should be amended to preserve the operation of State equal opportunity laws in the area of insurance.

The evidence is that insurers in New Zealand are anxious not to discriminate against homosexuals as a class. No insurer indicated that life cover would be refused to a homosexual as such. Whether insurers are entitled to expect disclosure of homosexuality is a different issue.

Disclosure

Disclosure and mis-statements

It is trite that the insured is under an obligation to disclose to the insurer at the time of contracting all material facts known to him. The duty of disclosure is not restricted to answering questions specifically asked in the proposal form. But non-disclosure and mis-statements by a proposed insured on the proposal form may overlap. For the insured to reply in the negative to the question "Have you ever been tested for AIDS?" when he has in fact undergone such a test constitutes both a mis-statement and non-disclosure.

Mis-statements are now covered by the Insurance Law Reform Act 1977 (see generally Borrowdale "The

Insurance Law Reform Acts in Practice" [1987] *NZLJ* 30, 68). Life insurance and general insurance are treated differently. A mis-statement as to age is never a ground for avoiding a life policy (s 7(1)). Section 4(1) of the Act provides that any other mis-statement in a proposal for life insurance entitles the insurer to avoid, providing the statement was —

1 substantially incorrect;
2 material; and
3 made either (a) fraudulently, or (b) within three years immediately preceding the date on which the policy is sought to be avoided or the death of the life insured, whichever is the earlier.

A statement is made fraudulently if the proposer knows it to be incorrect, or has no belief in its correctness, or does not care whether it is correct or not (s 4(2)).

The duty of disclosure as such is not touched by legislation. This gives rise to an uneasy relationship between disclosure and mis-statements. An insured is bound to disclose those material facts of which he has knowledge and clearly cannot disclose what he does not know. However the rule in marine insurance is that

> the assured must disclose . . . every material circumstance known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business ought to be known by him. (s 18(1) Marine Insurance Act 1908).

It is suggested that this rule may apply to all classes of insurance on the basis that the Marine Insurance Act is a codification reflecting, on this particular point, the position at common law in respect of non-marine insurance as well (*Birds Modern Insurance Law* (1982) 87). In *Australia and New Zealand Bank Ltd v Colonial and Eagle Wharves Ltd* [1960] 2 Lloyd's Rep 241, 252, McNair J left open the question whether disclosure of constructive knowledge is required in respect of non-marine insurance. The point has never been fully argued in New Zealand but in *Blackley v National Mutual Life Association of Australasia Ltd* [1970] NZLR 919, 931, Richmond J accepted that the duty to disclose extends to facts which the insured knows or ought in the ordinary course of affairs to know, and this dictum has been followed more recently in *Edwards v AA Mutual Insurance Co Ltd* (1985) 3 ANZ Ins Cas 60-668, 79, 169.

Whereas an "innocent", ie non-fraudulent, mis-statement cannot be relied upon by an insurer in repudiating liability after expiry of the statutory three year period, innocent non-disclosure (ie non-disclosure of a fact of which the insured was unaware, although he ought to have known of it) may ground avoidance no matter how many years have elapsed. Ironically it is to the advantage of the insurer to ask fewer rather than more questions in the proposal form. An innocent but incorrect reply amounting to non-disclosure is subject to the three year limit; non-disclosure which is not covered by a question in the proposal form is not.

The test of materiality

Section 6(2) of the Insurance Law Reform Act 1977 provides that a statement is material

> only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms.

This merely re-states the test of materiality as found in s 18(2) of the Marine Insurance Act 1908 in respect of marine insurance, and in the common law in respect of all other classes of insurance (*Mayne Nickless Ltd v Pegler* [1974] 1 NSWLR 228, 239).

1 Reference to the actual insurer

There are two crucial ambiguities in construing the prudent insurer test. The first concerns the question whether a non-disclosed fact or mis-statment is sufficient for avoidance of the policy where it would have influenced a prudent insurer but would not have or did not in fact influence the particular insurer concerned. The authorities are divided. In *Berger & Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 Kerr J took the view that the test of materiality was whether, by applying the standard of the judgment of the prudent insurer, the insurer in question would have been influenced:

> Otherwise one could in theory reach the absurd position where the court might be satisfied that the insurer in question would in fact not have been so influenced but that other prudent insurers would have been. It would then be a very odd result if the defendant insurer could nevertheless avoid the policy (at 463).

Subsequently, however, Kerr LJ (as he became) sat in the Court of Appeal in *CTI-Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 (for a discussion of the case see Brooke "Materiality in Insurance Contracts" [1985] *LMCLQ* 437) and recanted from the position he had taken in *Berger's* case (at 495).

There is a similar divide in New Zealand. In *Avon House Ltd v Cornhill Insurance Co Ltd* (1980) 1 ANZ Ins Cas 60-429 Somers J affirmed the objective approach, rejecting *Berger's* case, while in *Edwards v AA Mutual Insurance Co Ltd* (1985) 3 ANZ Ins Cas 60-668 it was held held that a statement is not material unless it would have influenced a prudent insurer with the actual knowledge possessed by the insurer in question.

None of these cases provides clear authority for resolution of the matter. In the *Oceanus* case earlier dicta were extensively canvassed, but almost all of these are themselves inconclusive. There is an unambiguous but obiter statement in *Zurich General Accident and Liability Insurance Co Ltd* [1942] 2 KB 53 (CA) where in reference to the general law of insurance Mackinnon LJ said:

> What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium, and if this is proved it is not necessary to prove that the mind of the actual insurer was so affected (at 60).

Historically there is a strong argument to be made out that at

common law the requirement of inducement of the actual insurer still survives (see Kelly, "Recent Developments in relation to Inducement in Non-disclosure and Misrepresentation" (1988) 1 *Ins LJ* 30). On this view, the crystallization of the prudent the insurer test in *Ionides v Pender* (1874) LR 9 QB 531 should not be taken as settling that a given the insurer may avoid for non-disclosure or misrepresentation of an objectively material fact. Rather the insurer must show also that he too would have considered the fact to be material:

> the prudent insurer test of materiality in relation to non-disclosure should be seen simply as supplementary to the rule that the non-disclosure must have induced the insurer to enter the contract. It is not, and was never intended to be, a substitute for that requirement. True, the primary rule is not mentioned in the Marine Insurance Acts. But that is nothing more than an oversight by the drafter. (Kelly, op cit 34)

Unfortunately, so far as New Zealand is concerned, the prudent insurer test *simpliciter* is enshrined not only in the Marine Insurance Act 1908 but now also in the Insurance Law Reform Act 1977, and on the face of those statutes there is no requirement that in the judgment of the actual insurer the non-disclosed or misrepresented circumstance should have appeared material.

On the other hand, unless materiality is tested with reference to the actual insurer as well, s 10(2) of the Insurance Law Reform Act 1977 is rendered less effective in some circumstances. Section 10(2) provides:

> An insurer shall be deemed to have notice of all matters material to a contract of insurance known to a representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer.

In *Edwards v AA Mutual Insurance Co* (1985) 3 ANZ Ins Cas 60-668 the insured signed a proposal for insurance on his house, in which it was stated that the main living rooms were constructed of gib board, a fire-resistant material. What the insured in fact said to the insurer's agent who completed the form was that he thought the sitting room walls *could* be gib board but that he was not sure. As it happened the sitting room walls were constructed of a non-fire resistant material. On the house being destroyed by fire the insurer repudiated liability on the basis of the mis-statement contained in the proposal. Tompkins J held that the statement was substantially incorrect in terms of s 6(1) of the Insurance Law Reform Act 1977 but that it was not material in terms of s 6(2). The reason for this finding was that, in the particular circumstances of the case, it would not have influenced the judgment of a prudent insurer since the knowledge of its incorrectness would be imputed to him by virtue of s 10(2). This result could not have been obtained if the mixed test of materiality had not been used, viz the test of the prudent insurer in the position of the particular insurer in question.

2 The insurer's response

It has never been clear whether the test of materiality, in referring to the influence upon the judgment of a prudent insurer in fixing the premium or in determining whether it would have taken or continued the risk upon substantially the same terms, requires a difference in response on the part of the insurer for the test to be satisfied. In other words, is a fact material only if its disclosure would have led the prudent insurer actually to refuse the insurance, or to fix a higher premium, or to impose some other condition? Or is it material if it is a fact which the prudent insurer would want to take into account in assessing the risk, but which would not necessarily induce it to amend the terms of the insurance in any way?

There is precious little New Zealand authority. In *Avon House Ltd v Cornhill Insurance Co Ltd* (1980) 1 ANZ Ins Cas 60-429 Somers J took the view that no actual difference in response is necessary before a fact may be considered material. In *CTI-Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 the English Court of Appeal came to the same conclusion in respect of a marine policy. This decision has now been followed in a non-marine case in *Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep 109. In this last case Steyn J was not drawn into discussing the merits of the issue, but followed the *Oceanus* decision simply on the basis that there should be no difference in this regard between marine and non-marine insurance.

In the *Oceanus* case Kerr LJ relied principally upon a number of authorities, themselves mostly ambiguous on this point or at least not so strong that the Court of Appeal could not have distinguished them had it so wished. Parker LJ considered that it would be impractical to require, as an element of the test of materiality, a difference in the response of the prudent insurer. While it might be possible to say that prudent insurers would consider a particular circumstance as bearing on the risk, it would not be possible to say that prudent insurers in general would have acted differently, because there is no absolute standard by which they would have acted in the first place ([1984] 1 Lloyd's Rep 476, 511; see too Stephenson LJ at 526-527). Stephenson LJ said, referring to the duty of the utmost good faith:

> That duty seems to require full disclosure and full disclosure seems to require disclosure of everything material to the prudent underwriter's estimate of the character and degree of the risk; and how can that be limited to what can affirmatively be found to be a circumstance which would in fact alter a hypothetical insurer's decision? (527)

But this last factor surely begs the question of what is material in the first place, for the duty of disclosure extends only to facts which are material. Moreover, even if the difficulty of proof of how a prudent insurer would respond is conceded, it seems unfair that this should be invoked to the detriment of the insured: the onus is on the insurer to prove materiality.

In *Barclay Holdings (Aust) Pty Ltd v British National Insurance Co*

Ltd (1987) 4 ANZ Ins Cas 60-770 (discussed by Kelly (1988) 1 *Ins LJ* 30 at 36-39) the Court of Appeal of New South Wales declined to follow *Oceanus*. In *Barclay* the insured, a company, had failed to disclose, first, a fire claim made by the controlling shareholder under a separate prior policy with MLC Insurance Co on different premises and, second, the subsequent refusal (later withdrawn) by MLC to renew the insurance. The evidence was that there was nothing about the undisclosed fire which pointed to any untoward physical or moral risk, and that renewal of the insurance was refused for administrative reasons, viz that the insured under that policy had proved to be very difficult to deal with in processing the claim arising from the fire.

Kirby P said that for a circumstance to be deemed material, its effect on the mind of the insurer should be strictly limited to those considerations which will ultimately determine whether the insurer will accept the insurance, and if so, at what premiums and on what conditions. It is not sufficient that the circumstance or fact is one which the prudent insurer would be interested in knowing. Kirby P adopted the more stringent test of materiality for a number of reasons:

1 even on this test, the duty of disclosure is already burdensome and should not be made more so;

2 in the present case the insurance had been placed with Lloyd's and the policy issued in London; it is unreasonable to expect an insured to be familiar with the practices of an overseas insurance market;

3 statistical data is as much relied upon as the claims history of the insured in the insurer coming to a decision whether to insure;

4 it is necessary to place some limit on the insured's duty of disclosure, for otherwise no insured could in practice comply with the necessity to disclose virtually endless material;

5 it would be unjust in a case such as this, where the insurer could have asked a specific question in the proposal form, and where there was no suggestion that the risk run was any greater than that actually disclosed, for the insured to bear the very substantial loss.

There is much that appeals in this reasoning, but it fails to take account of one factor. The existence of a particular circumstance may not of itself cause the insurer to decline the insurance, or amend the conditions on which the insurance is issued. But it may be a circumstance which would cause the insurer to make further inquiries before undertaking the risk. It might be preferable, therefore, to regard a fact as material if disclosure would have caused a difference in response, including the making of further inquiries.

Conclusion

On the basis of the survey of New Zealand life insurers, it is probable that a Court would not find the fact of homosexuality to be material, although a not insignificant minority of insurers believe that it is. However any indication of the presence of AIDS would clearly be highly material and must be disclosed. In some jurisdictions in the United States insurers are prohibited from taking the antibody status of the insured into account in issuing the policy. But this raises questions of social policy quite distinct from the issue of materiality. □

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continued from p 171

involved. No easy solutions are offered but some useful guidance is given for checks and balances that might make prevention and detection easier. For example the spectacular fraud of Stanley Rifkin in the USA in transferring millions of dollars to his own account by unauthorised wire transfers is revealed as being remarkably simple and resulted in major reviews of control procedures. It was no coincidence that following his sentence, Rifkin was quickly employed as a computer security consultant with a major US bank.

The book also deals with crime involving credit cards, false invoicing, international trade, futures trading and has an interesting contribution on the difficulties involved in prosecuting major companies in terms of sheeting home the moral reprehension of what has occurred to the officers involved.

Criminal Fraud is a book with a different emphasis altogether and adopts a far more traditional text book type approach to its main topic. It is a scholarly work which deals with fraud and the legislation governing it on a state by state basis in Australia. Obviously some of the emphasis needs to be treated with reserve when comparing it not only with New Zealand legislation but with some of the pronouncements of our Court of Appeal. For example the subjective test of dishonesty in *Williams* [1985] 1 NZLR 294 is not the same as the more objective requirement in Australia. Further the Australian Courts have given a mixed reception to the very wide definition of fraud in *Welham v DPP* [1961] AC 103 which held that mere prejudice to another as against the infliction of economic loss, is all that is required as an element in the charge. But I found this book refreshing in that it deliberately moved away from well trodden areas that might have been included to topics not often covered comprehensively. And so the reader is treated to a penetrating analysis of such matters as bribery and secret commissions, company frauds, deceptions in trade and commerce, securities industry frauds (including share market manipulation and insider trading), social security and medical frauds, and computer related crime, to name but some of the topics covered.

The authors with the exception of Kenneth Brown (a former head of the Victorian Fraud squad) all hail from the Faculty of Law of the University of Melbourne and collectively represent an impressive array of experience and knowledge. While understandably, the book is designed for Australian practitioners, anybody wishing to become versed in the intricacy of modern commercial crime in this country would be well served by having this edition on hand. □

Books

Similar fact evidence

By Don Mathias, BSc(Hons), LLB, LLM(Hons), PhD, Barrister of Auckland

This review article looks at a new book Similar Facts *by J R S Forbes, published by The Law Book Company, Sydney, 231pp plus index.*

Written by an academic for the Australian market, this concise analysis of the historical development and present state of the law relating to the admissibility of similar fact evidence will be of more interest to the student than to the practitioner. The organisation of the material makes it difficult quickly to locate cases in which similar fact evidence was ruled inadmissible, for example, so that the practitioner preparing an argument would better spend his or her time with the law reports. It is of course no criticism that the book does not serve a purpose for which it was not intended. As an introduction to the subject, it is clearly, indeed readably – even engagingly – written, and few will resist the logic of the arguments with which Forbes highlights what he claims to be the various weaknesses in the law.

The text is divided into ten chapters, and each chapter into numbered paragraphs (which will be cited in this review in square brackets). There are also subheadings at various intervals but each numbered paragraph does not have its own heading. The major topics are: the development of the modern law and the resulting various types of cases found in the reports, the criteria for determining whether there is sufficient similarity, the subsequent decision as to balance between probative and prejudicial values, whether there is a further discretion to exclude otherwise admissible evidence as an exercise of judicial discretion, and similar facts in civil cases.

New Zealanders will wonder why the citation of cases from this country ceases at 1980, when the Preface indicates that "Citations used are those available as at 1 September 1987." And even then the omission of *R v Te One* [1976] 2 NZLR 510 should be remedied in later editions. Illustrative cases which are also not mentioned are *R v Julian* [1981] 1 NZLR 743; *R v Davis* [1982] 1 NZLR 584; *R v Paunovic* [1982] 1 NZLR 593; and *R v Hsi En Feng* [1985] 1 NZLR 222. Of the eleven cases from New Zealand which are cited, six are mentioned once, while *R v Anderson* [1978] 2 NZLR 363 receives due attention as an example of a borderline case on the question of similarity, and *R v Horry* [1949] NZLR 791 and *R v Holloway* [1980] 1 NZLR 315 are referred to briefly to highlight the requirement of relevance to a live issue in the case.

Propensity reasoning

As might be expected of an author who believes that propensity (or disposition) reasoning has been stigmatised in a way not intended by Lord Hailsham in *Makin v Att-Gen for New South Wales* [1984] AC 57, Forbes is at pains to give that form of reasoning respectability. The New Zealand Courts do not preoccupy themselves with criticising reasoning which proceeds along the lines: D tends to behave in the peculiar way in which the offender in the present case behaved and he had the opportunity to so behave at the relevant time, therefore it is likely that D is the offender; see [1986] NZLJ 42. Forbes observes [3.86]:

> The Courts are careful not to press a priori doctrine (which excludes disposition reasoning) to the point of outraging the moral or common sense of the community, or diminishing their own authority. Occasionally, if that authority is to be maintained, the professional insularity of legal rules about matters of common experience has to be reduced, albeit temporarily.

This could be a bit too much of a sociological and spurious veneer for some readers, and it may be doubted whether propensity reasoning carries the stigma he claims it does.

Forbes overstates the judicial resistance to the acceptance of propensity reasoning. Providing that the evidence sought to be admitted is sufficiently relevant to an issue, it will

have overcome the first hurdle and will be admissible, subject to subsequent discretion which will be discussed below. All that propensity means is a tendency to do certain things in a particular way; propensities may vary in strength and in persuasive value, and it is the probative value which is critical. This point is obscured by Forbes.

In para [3.76] he says:

> . . . it is clear that later authority has interpreted *Makin* as placing an absolute prohibition, at least in dealing with prosecution evidence, upon disposition reasoning per se.

Authorities cited in support of this proposition do not measure up in the way Forbes suggests. For example, reference is made to *Sutton v R* (1984) 152 CLR 528 at 533, 559. The first passage is in the judgment of Gibbs CJ, but it is clear that the Chief Justice is not saying that there is an absolute prohibition on disposition evidence per se; he is saying that the prohibition is on evidence which is not strongly probative. This emerges on p 534 where the evidence is subjected to what the Chief Justice describes as a double safeguard; the first is that the evidence is excluded unless it is strongly probative (that is, it is insufficient if it does no more than to show a propensity to commit the sort of crime charged), and the second is that although admissible, it is then subjected to a judicial discretion to exclude evidence if its prejudicial value outweighs its probative value. The Chief Justice said the same thing in *Perry v R* (1982) 150 CLJ 580, 585. The second judgment cited in *Sutton* is that of Deane J. At p 557 evidence of mere propensity to commit a particular crime is distinguished from evidence which has a higher probative value and which tends to prove that the accused committed the offence charged. This is a comparison of probative values and not a rejection of propensity reasoning per se.

Another authority cited by Forbes for his proposition in [3.76] is *De Jesus v R* (1986) 61 ALJR 1, 10. The reference is to the judgment of Dawson J where we find the following remark:

> . . . where the evidence has relevance beyond showing a criminal disposition then it will be admissible provided its probative value is sufficient to outweigh its prejudicial effect.

There follows a reference to *Sutton* as authority. This again is not a rejection of propensity reasoning, it is a repetition of the oft-stated requirement for the evidence of similar facts to be of high probative value. This is consistent with Dawson J's next remark which follows that quoted above:

> . . . The cases in which similar fact evidence may have sufficient probative value to make it admissible are not confined, but recognised instances occur where the evidence is relevant to prove intent or to disprove accident, to prove identity or to disprove innocent association.

Judicial discretion

Another area where Forbes tilts at windmills is that of the role of judicial discretion. He claims in [7.1] and [7.2] that there are, on the authorities, three steps to the decision whether to allow the similar fact evidence to be admitted, and he then proceeds to criticise the third, saying that it merges with the second. The three steps he discerns are (1) the decision on whether the similar facts are sufficiently similar to have a high probative value on an issue in the present case, (2) the weighing of probative value against prejudicial value, (3) the general discretion to exclude otherwise admissible evidence in the interests of fairness to the accused. Logically, one would tend to accept that the third merges with the second, because unfairness would seem to be within the prejudicial weighting. Forbes adopts (in [3.23]) the definition of prejudicial evidence given in *US v Figueroa* 618 F 2d 934 (1980):

> Evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue which justifies its admission . . . The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact not properly in issue, or unfairly to excite emotions against the defendant.

But the discretion to exclude evidence which would otherwise be admissible extends beyond this balancing of probative and prejudicial values. As Forbes himself notes, in [8.66], evidence obtained by the misconduct of police officers is subject to discretionary exclusion if the Court considers that the misconduct was serious and deliberate, and such exclusion is for reasons which have nothing to do with prejudice as that term was defined in the above quotation from [3.23]. But apart from such exceptions, is it correct that the Courts purport to apply a three-step decision process before similar fact evidence will be admitted? Forbes supports his view that the third stage exists by citing three dicta (p 162, [7.12]). The first goes no futher than state the weighing of probative value against prejudice. The second dictum is that of Gibbs CJ in *Perry v R* (1982) 150 CLR 580, 585:

> A trial Judge must decide as a matter of law whether the evidence is admissible, and it is only if he decides that it answers the test of admissibility that he need consider whether he should exclude it in the exercise of his discretion.

However Gibbs CJ is referring at this point not to a general discretion to exclude evidence in the interests of fairness, but rather to the discretion to exclude it by weighing its prejudicial effect against its probative value. Gibbs CJ refers to this as a two-step process. The third dictum is from the judgment of Gibbs CJ in *Sutton v R* (1984) 152 CLR 528, 534:

> The law now affords a double safeguard. . . . First, there is a rule of admissibility which excludes, as a matter of law, evidence unless it is probative, and strongly probative, of the offence charged. . . . Further, the trial Judge has a discretion . . .

That is the extract as it appears on pp 162-163 of Forbes's book. It is a

reference to steps (1) and (2) as outlined above. This is clear from the words in the judgment which immediately follow those quoted by Forbes:

> . . . to exclude evidence which is admissible as a matter of law but whose prejudicial effect may be so great as to outweigh its probative value.

Thus this dictum does not support Forbes's proposition in [7.12] that authority now asserts that the general discretion (ie the third step) applies to admissible similar facts, as to all other types of lawful evidence for the prosecution, if "general discretion" means the discretion to exclude evidence in the interests of fairness.

The true position, and the correct interpretation of the authorities upon which Forbes relies, is that the decision whether to admit similiar fact evidence is a two-step process, as was held by our Court of Appeal in *R v Te One* [1976] 1 NZLR 510, 514:

> It is usually said that there are two separate questions: (1) whether the evidence in question is legally admissible, which turns on relevance; (2) whether in the exercise of the Judge's discretion the evidence, although strictly admissible, should be excluded because its prejudicial effect outweighs its probative value.

Furthermore, while the evidence in question may pass these two tests, it still might be attacked on the *independent* ground that to admit it would be to give apparent approval to an abuse of process, such as could arise where, for example, the evidence was obtained by serious and deliberate misconduct on the part of police officers.

Level of proof

What is the threshold requirement for the admission of similiar fact evidence, ie to what level of proof must those facts be established before they may be considered by the jury? Does the Judge have to be satisfied that the evidence of similar facts is sufficiently strong to amount to proof of those facts on the balance of probabilities, or to the standard of beyond a reasonable doubt? Forbes concludes [4.24] that the test for the Judge to apply on the question of admissibility is whether the evidence is capable of proving the similar facts to the standard of beyond a reasonable doubt. Without direct authority on this point, support for this conclusion is gleaned by analogy with the treatment of circumstantial evidence by the High Court of Australia in *Chamberlain v R* (1984) 153 CLR 521. Forbes observes that similar facts are a type of circumstantial evidence [4.17], and the word "not" in the last sentence of [4.18] which has the effect of contradicting this proposition appears to be out of place. The facts sought to be admitted as similar may, considered individually, be insufficiently probative to be admissible, whereas considered together coincidence may be negatived and the probative value of them as a whole may be sufficient to allow them to pass the high degree of similarity test. This was the position in *R v Julian* [1981] 1 NZLR 743. Similarly, when considering whether the evidence is sufficiently strong for evidence of those similar facts to be admissible, the Judge should consider all that evidence together to see if, taken in that way, it is capable of proving those facts to the standard of beyond a reasonable doubt.

What if there is no evidence against the accused, apart from the similar fact evidence which is sought to be admitted, other than that the accused had the opportunity to commit the offence with which he is charged? In this situation should any similar fact evidence be admissible, ie can a case be proved on similar fact evidence alone? Should there be a requirement for other evidence, which at least establishes the charge to the level of balance of probabilities, before there arises any question of allowing similar fact evidence? One thinks of conspiracy, and the requirement for non-hearsay evidence to establish on the balance of probabilities that there was an unlawful agreement of the type or kind alleged in the indictment, before hearsay evidence to prove the existence of such a common design is admissible: *R v Buckton* [1985] 2 NZLR 257. But there is no history of an analogous requirement in similar facts cases; in *Makin* there was little evidence against the accused apart from the similar fact evidence. Forbes does not explore the possibilities of this analogy with conspiracy, but his style of presentation is sufficiently stimulating to encourage readers to explore matters only hinted at in the text. If his suggestion (considered below) that similar facts should be admissible on a more common-sense basis than on the present requirement of a judicially perceived high probative value is to be accepted, then a safeguard of the kind suggested here by analogy with conspiracy might be appropriate.

Joinder of counts

The treatment of joinder of counts in an indictment illustrates judicial faith in the ability of jurors to ignore inadmissible evidence which has been heard by them. The danger of the jury wrongly transferring evidence to a charge on which it is not admissible is not necessarily neutralised by a warning by the Judge to the jury about the dangers of so doing. To pretend that it is may involve "more than a trace of legal fiction" [9.18]. Joinder of counts in one indictment was not permitted at common law except in respect to misdemeanours. Apart from the danger of confusion of admissibility rules by the jurors, one justification for the disallowance of joinder of felonies was that an accused may be prejudiced in his challenge to the jury, as he might object to a particular juror trying one count while preferring that same person to be a juror in respect of another count in the same indictment: *R v Young* (1789) 3 TR 98, 105-106. Statutory authorisation of joinder of counts was introduced in the Indictments Act 1915(UK), and in New Zealand this is echoed by s 340 of the Crimes Act 1961. Usually the economies of dealing with several charges in one trial rather than one charge in each of several trials are given as justification for the legislative change, but, as Forbes notes in [9.29] "in the 19th century most criminal trials occupied one day and trials lasting a week were exceptional". With joinder can come the prolonging of a trial due to increased complexity. Now there seems to be a presumption that joinder is appropriate, and it is for

the accused to establish to the satisfaction of the Court that injustice may result unless severance is granted. If this reflects a faith in the ability of jurors to ignore evidence when it is inadmissible but to consider it when it is admissible on another charge with which they have to deal, it would be consistent to relax the safeguards to the accused which the rules concerning the admissibility of similar fact evidence represent. Those latter rules are based on a judicially perceived juror fallibility. Forbes seems to suggest that to solve this contradiction the rules concerning the admissibility of similar fact evidence should be changed by moving legal relevance closer to common sense [9.32]. But equally, Forbes notes a growing, if embryonic, tendency of Courts to be more accepting of the appropriateness of severance of counts, so the contrary view is tenable.

Admissibility for the defence

What if the defence wishes to call similar fact evidence? For example, in an effort to support a challenge to the admissibility of a confession on the grounds that it was obtained unfairly, the defence may wish to call evidence of other occasions on which the police officer in question obtained confession by allegedly unfair means. Of course when the defence seeks to have such evidence admitted considerations of unfairness to the defence have little relevance (at least in relation to *that* defendant). The admission of such evidence is still subject to the criterion of striking similarity, as is applied in relation to prosecution evidence of similar facts: Forbes [5.108], citing *R v Livingstone* [1987] 1 Qd R 38. Another relevant authority, which Forbes may be forgiven for not citing, is the New Zealand Court of Appeal decision in *R v Katipa* (1986) 2 CRNZ 4, in which the judgment of the Court was delivered by McMullin J. The Court, confronted with allegations of police misconduct akin to the instigation of offending (cf *R v Pethig* [1977] 1 NZLR 448), took the opportunity to make some obiter remarks on the requirements for admissibility of similar fact evidence for the defence (p 10):

> . . . such evidence would be admissible only if it bore such a strong similarity to the case before the Court, in that it disclosed the instigation of similar offences by the use of similar means, that it strongly suggested that, contrary to the police officer's denials, the tribunal of fact might conclude that he had instigated the commission of the charged offences by the defendant.

On the facts of *Katipa* the evidence sought to be admitted was too general to satisfy this requirement, and it failed to suggest that the officer instigated the offences charged against Katipa.

In a joint trial of several accused persons, one may seek to adduce evidence of similar facts to exculpate himself by inculpating one or more of his co-accused. Forbes suggests ([5,110]) that in such a situation " 'prejudice' is not a counterweight to probative value." However in *Katipa* the Court made the following observation (p 9):

> . . . where similar fact evidence is tendered on behalf of a co-accused the fair administration of justice may require some limitations to be placed upon its admissibility other than relevance: *R v Bracewell* (1978) 68 Cr App R 44; *R v Darrington & McGauley* [1980] VR 353.

Neither of those two authorities cited by the Court of Appeal is considered by Forbes. *Bracewell* contains a cautionary dictum which indicates that the interests of the other accused must be considered (p 50):

> . . . where the evidence is tendered by a co-accused, the test of relevance must be applied, and applied strictly, for if irrelevant and therefore inadmissible evidence is admitted, the other accused is likely to be seriously prejudiced, and grave injustice may result.

Reference was then made to the Judge's overriding judicial duty to prevent injustice. Perhaps in using the expression "the test of relevance" the Court was referring to the overall requirements for admissibility of similar fact evidence (the two-stage test), but this is not clear. In *Darrington & McGauley* the Full Court of the Supreme Court of Victoria held that a trial Judge had a discretion to exclude otherwise admissible evidence tending to exculpate one of several accused jointly charged and tending also to inculpate another of them. Jenkinson J, in a judgment concurred in by Young CJ, gave as reasons for this discretion the need to be able to avoid intellectually and emotionally overburdening the jury, the fact that simplicity could not be achieved by severance of accused because the evidence may only be capable of contradiction by a co-accused, and the fact that the probative value of the evidence may have to be "subordinated to the other interests which the system of trial of criminal issues by jury is designed to serve". This last point presumably includes the interests of avoiding prejudice to co-accused.

Criminal and civil law

As a subject, similar fact evidence has a secure place in the criminal law, even if, on one argument Forbes presents, that should become merely an historical place. Forbes also surveys similar fact evidence in civil law, and this occupies a chapter of some 30 pages. His 30 out of 231 may be compared with the figures he gives for the third Australian edition of *Cross on Evidence*: 3 out of 51 pages on similar fact evidence. The notable difference from the criminal context is the standard of proof according to which probative value is to be assessed: the balance of probabilities. Forbes also seeks to show that the discretion to exclude evidence on the general ground of unfairness does not apply in civil law, while rules relating to abuse of process do apply. The significance of this is diminished if one accepts, as was suggested above, that the general discretion concerning unfairness is not a third step to the judicial decision process concerning the admission of similar fact evidence in criminal cases.

Dr Forbes has written a stimulating text which contains an abundance of challenges for the reader willing to take on the role of devil's advocate. It is not necessary to agree with him to find his book a rewarding read. □