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Intellectual property and the entertainment industry

Radio and television broadcasts of their very nature are as ephemeral as idle chatter or circus performances. They are but sounds and images blowing in the wind. There is however a human desire for permanence, for the retention of experience in some more reliable form than the fallibility of memory. In early times this need was met by writing. With modern technology this wish for preservation has taken a more dramatic form with records, tape recordings, compact discs and video cassettes. The law has to develop in accordance with the expectations and the demands made on it for social arrangements that are just, in this case, for the protection of intellectual property, and the provision of a sound and reasonable economic base which will enable the majority of citizens to share in the benefits of the new technologies.

In the United States and in England the highest Courts have had to deal with an aspect of this problem in cases concerning private or commercial preservation and reproduction of recordings, and radio and television broadcasts. The United States case was *Sony Corp of America v Universal City Studios* 104 S Ct 774 (1984), more commonly called the *Betamax* case. The Supreme Court ruled cautiously on the issue of copyright relating to videotape recorders, known in the United States as VTRs. An article on the case is published in the *Harvard Law Review* vol 98:87 at p 284 ff. The article summarises the decision in this way:

> In a decision noteworthy for its extension of traditional copyright doctrine and its application of patent law concepts to copyright problems posed by new technology, the Court held that manufacturers of VTRs — devices used primarily to tape television programs for later viewing — are not liable for contributory infringement of the copyrights held by the producers of the shows that VTR owners tape. Although the majority opinion was limited in scope and may be subject to change as the capabilities of VTRs expand, it modernized the test for contributory infringement by adapting it to allegations of indirect infringement. Further, the Court redefined the judicially created doctrine of fair use both by expanding it to include "nonproductive uses" and by declaring its focus to be primarily on the economic harm resulting from a given use.
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> The plaintiffs, Walt Disney Productions and Universal City Studios, owned the copyrights to a number of programs broadcast over the public airwaves. In 1976, Disney and Universal sued Sony Corporation, alleging that purchasers of Sony's VTR, known as the Betamax, had infringed and were continuing to infringe the plaintiffs' copyrights by taping programs off the air for later viewing — a practice known as "time-shifting". The plaintiffs alleged that Sony, which manufactured and marketed the VTR, was liable under a theory of contributory infringement. Universal and Disney sought damages, an equitable accounting of Sony's profits attributable to contributory infringement, and an injunction against the further manufacture and marketing of the Betamax.

The decision of the Supreme Court was a close one, ruling five to four. The decision is interesting among other things for the way the Court split in view of the commonly alleged ideological bias of certain of the Justices — Brennan and Thurgood Marshall for instance being on opposite sides. The majority opinion was written by Justice Stevens. He was joined by Chief Justice Burger and Justices Brennan, White and O'Connor. Justice Blackmun wrote what has been described as a vigorous dissent. Justices Marshall, Powell and Rehnquist were the other dissenters. Another unusual aspect of the case was that it had to be re-argued as one of the Justices could not make up her mind to begin with, and hers was the deciding vote.

The case was fought out technically over the interpretation of a statute. In reaching their decision the majority adopted a doctrine from American patent

law of the "staple article of commerce". As the *Harvard Law Review* article states at p 290 this doctrine balances the need for protection of one party with the right of others to engage in areas of commerce that are substantially unrelated. Thus, it is said the decision accords with a goal of copyright law to maximise over a period of time the information that is available to the public. As a statement of principle standing on its own this is open to being contested. The article also justified the majority approach by what was described as the constitutionally enshrined goal of copyright and patent law – promoting innovation.

This United States decision was not referred to in the recent decision of the House of Lords *CBS Songs Ltd v Amstrad Consumer Electronics* (unreported, H of L, 12 May 1988). This case was concerned with the use of blank tapes in private houses to record music on equipment manufactured and sold by the defendant company. The commercial background to the litigation case can be appreciated from a paper prepared in 1982 for the Commonwealth Secretariat by Mr Denis de Freitas, a consultant in intellectual property and then Chairman of the British Copyright Council. The paper was presented to the meeting of Commonwealth Law Ministers in February 1983. Referring to the attitude of copyright owners he said that previously the attitude had been a rather casual one and that no effort had been made to enforce rights for two reasons. The first was that the record industry had been booming, and the other reason was the problem of finding evidence to show that a specific protected work had been taped in a private house and was not to be used for private use or study. Mr de Freitas then went on to say:

> The growing concern of the record industry at the growth in sales of recording equipment and blank tapes has led to various surveys being carried out so that today there is a substantial amount of statistical evidence – as opposed to the "common knowledge" guesses of the past – showing the actual extent of the damage to the interests of copyright owners caused by this particular use of recording technology. For example, the report of a taping survey carried out during January 1982 in Australia on behalf of the Australian Record Industry Association concluded from a sample designed to represent 74 per cent of the Australian population, that during a period of 12 months an equivalent of 55.1 million LPs were taped either from records, pre-recorded tapes or from radio and television. At an average retail price of Aus$8.00 per LP this represents Aus$440.8 million per year. However, not all this necessarily represents lost sales; the survey concluded that from the volume of home taping the loss to the copyright owners and other interests in the music industry was the equivalent of seven million LPs in 12 months representing Aus$56.16 million.
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> In the United Kingdom the British Phonographic Industry commissioned a series of surveys of the volume, nature and effect of home recording of recorded works, principally music. These surveys commenced in 1973, and the two latest – the fourth and fifth – were conducted in November 1980/January 1981 and November 1981/January 1982. They indicate that in 1979 the amount of music recorded by home taping was 158.5 million hours, and in 1981, 179.7 million hours; of these gross totals the surveys indicated that in 1979, 25 percent, and in 1981, 22 percent of the music recorded prevented the purchase of a corresponding record or tape from normal retail outlets, and the total value of those lost sales was £282 million in 1979 and £305 million in 1981.

In the *Amstrad* case the House was unanimous in rejecting the claim of the real plaintiff the British Phonographic Industry Ltd (BPI). Lord Templeman wrote the judgment that was concurred in by Lord Keith, Lord Griffiths, Lord Oliver and Lord Jauncey. Lord Templeman commenced by pointing out that the electronic equipment industry and the entertainment industry were dependent on one another. Without the public demand for entertainment the electronic equipment industry would not have a market, but conversely without the electronic equipment industry the entertainment industry could not make its gratifying profits. On the evidence in the case it was estimated that in 1984 the sales of sound recordings in the United Kingdom were about 40 million, and the blank tapes sold about 70 million. While blank tapes could be used for legitimate purposes it seemed His Lordship said that on average for every authorised copy of a recording there would be two infringement copies.

Lord Templeman described the case before their Lordships:

> This appeal is the climax of a conflict between the makers of records and the makers of recording equipment. The appellants, the British Phonographic Industry Ltd ("BPI"), represent the makers of records while the respondents, Amstrad Consumer Electronics Plc and Dixons Ltd, represent the makers and sellers respectively of recording equipment. BPI argue that it is unlawful for Amstrad to make recording equipment which will be used by members of the public to copy records in which copyright subsists. In the alternative, BPI argue that Amstrad must not advertise their equipment in such a way as to encourage copying. Amstrad and Dixons argue that they may lawfully make and sell to the public any recording equipment which ingenuity may devise and may lawfully advertise the advantages of such equipment.

The judgment went on to consider various factual matters including a possibly absurd situation. The effect of the law as it stands is that a home copier recording a broadcast live concert which includes, say, the works of a long dead composer and a contemporary one, such as Bach and Walton, must be careful to switch off the copying machine during the performance of the Walton composition.

BPI was successful at first instance before Whitford J, who apparently was chairman of a committee, the Whitford Committee, that reported on the Law of Copyright and Design in March 1977 (Cmnd 6732). That Committee made seven recommendations on this topic which have not been acted on.

The Court of Appeal ([1988] Ch 61) struck out BPI's action by a majority, and the House of Lords has now

unanimously upheld that decision.

BPI based its appeal on six submissions. The first two were allegations of direct or implied authorisation of the infringements. The third was that Amstrad were joint infringers as soon as a purchaser decided to copy a record since they provided the means. The fourth, fifth and sixth arguments were that Amstrad's activities constituted a common law tort being, either or all, incitement to commit a tort, viz a breach of copyright, incitement to commit a criminal offence and negligence. All of these arguments failed.

It is of some general interest however to note the comments of Lord Templeman on the negligence issue. At p 15 of the typescript of the judgment Lord Templeman says:

> Finally BPI submit that Amstrad committed the tort of negligence, that Amstrad owes to all owners of copyright a duty to take care not to cause or permit purchasers to infringe copyright or alternatively that Amstrad owes a duty to take care not to facilitate by the sale of their models or by their advertisement the infringement of copyright. My Lords, it is always easy to draft a proposition which is tailor-made to produce the desired result. Since *Anns v Merton London Borough Council* [1978] AC 728 put the floodgates on the jar, a fashionable plaintiff alleges negligence. The pleading assumes that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone solvent must be liable in damages. In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 the plaintiffs were the authors of their own misfortune but sought to make the local authority liable for the consequences. In *Yuen Kun-Yeu v Attorney-General of Hong Kong* [1987] 3 WLR 776 the plaintiff chose to invest in a deposit-taking company which went into liquidation; the plaintiff sought to recover his deposit from the commissioner charged with the public duty of registering deposit-taking companies. In *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 a claim for damages in negligence was made against a Minister of the Crown for declining in good faith to exercise in favour of the plaintiff a statutory discretion vested in the Minister in the public interest. In *Hill v Chief Constable of West Yorkshire* [1987] 2 WLR 1126 damages against a police force were sought on behalf of the victim of a criminal. In the present proceedings damages and an injunction for negligence are sought against Amstrad for a breach of statutory duty which Amstrad did not commit and in which Amstrad did not participate. The rights of BPI are to be found in the Act of 1956 and nowhere else. Under and by virtue of that Act Amstrad owed a duty not to infringe copyright and not to authorise an infringement of copyright. They did not owe a duty to prevent or discourage or warn against infringement.

The comments on *Anns*, (besides the cleverly amusing passing reference to the *Donaghue v Stevenson* neighbour principle as now including Pharisees as well as Samaritans), puts the decision of the Judicial Committee in the *Takaro Properties* case in a context of a consistent attempt by their Lordships to close the floodgates, or at least dam the stream flowing from *Anns*. This paragraph is a succinct statement of the present development, or some might say regression, of the law of negligence.

Certainly, there are many jurists who will applaud the repeated criticism of the tendency towards the universalisation of liability. It is true that there is an ancient common law, or equitable adage that where there is a wrong there should be a remedy. The question remains however whether there has to be a wrong *committed by* somebody or merely a wrong *suffered by* someone. The expectation that the law is part of a welfare system is one that some Judges seem to share with many members of the public. Critics could point to some decisions of the New Zealand Court of Appeal in addition to *Takaro Properties* in this regard. As a small indication see [1988] NZLJ 33.

Lord Templeman concludes that Parliament ought to consider the recommendations of the Whitford Committee. It is a legislative issue par excellence. As for the case before their Lordships he states at p 16 of the typescript:

> In these proceedings the court is being asked to forbid the sale to the public of all or some selected types of tape recorder or to ensure that advertisements for tape recorders shall be censored by the court on behalf of copyright owners. The court has now power to make such orders and judges are not qualified to decide whether a restraint should be placed on the manufacture of electronic equipment or on the contents of advertising.

Immediately before this statement, and by way of emphasising the unsatisfactoriness of the present state of the law in terms of its application Lord Templeman expresses himself with felicitious force:

> From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly – lavish expenses, extravagant earnings and exorbitant profits – and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the *Miserere* from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.

PJ Downey

Case and Comment

New actions in Negligence and Contractual Mistake?

Ritchies Transport Holdings Ltd v Education Board for the District of Otago (Unrep, High Court, Dunedin, 10 December 1987 CP 96/87, Tipping J) involved an application to strike out a statement of claim on the grounds that it disclosed no reasonable cause of action. The Court refused the striking out, but in doing so raised the prospect of some novel causes of action.

The defendant had invited tenders for school bus services in Otago and stipulated that the closing time was 9.00 am on 20 July 1987. Because this tendering was a new procedure and the plaintiff was the existing contractor, the defendant wrote to the plaintiff, advising it of the new procedure and informing it that formal advertisements would be placed inviting tenders. In this letter the closing date was mentioned, but no reference was made to the specific time. The plaintiff's tender was delivered at about midday and was accordingly rejected by the defendant. The claim was founded on two alternative causes of action: (a) the defendant owed the plaintiff a duty of care not to mislead it as to the closing time for tenders; and (b) by virtue of s 2(3) of the Contractual Mistakes Act 1977, a contract would have come into existence but for the plaintiff's mistake as to the closing time. (This would depend on what emerged by way of discovery and interrogatories.) Both of these raise interesting questions of law and they will be examined in turn.

Duty of care

The argument here seems to have been that because the defendant wrote to the plaintiff, advising it of the tendering exercise, a duty arose not to mislead. The defendant was negligent in not drawing the plaintiff's attention to the closing time, which the Court accepted to be unusual. Tipping J found this to be arguable:

> Calling for tenders in ordinary circumstances does involve a certain amount of time and effort and it seems to me to be arguable, putting it no higher than that, when one is inviting tenders one owes some duty to those who are going to that time and trouble not to carelessly mislead them as to the date upon which those tenders close. (at 3-4)

He also found that on the facts before him it was not possible to say with certainty that there had been no negligence and therefore declined to strike out the claim.

The establishment of a duty of care in the post *Rowling v Takaro Properties Ltd* ([1988] 1 All ER 163 (PC)) era is not a simple matter and the state of confusion in the law may explain partially the reluctance of the Court to strike out the statement of claim. The tendency of the House of Lords and Privy Council appears to have been restrictive *(Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Yuen Kun-yeu v A-G of Hong Kong* [1987] 3 WLR 776), yet Tipping J had no difficulty in finding a duty to be arguable in a novel situation. It may well be that the New Zealand Courts are continuing to follow the broader line taken by the Court of Appeal in *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 regardless of the implicit disapproval of the Privy Council. This is also evidenced by the decision in *Williams v A-G* [1988] BCL 404 where Tipping J found a duty of care to be owed by the government in looking after a yacht subject to forfeiture which was subsequently returned to its original owner. While adopting the test of the Privy Council in *Takaro*, that the ultimate question was whether it was just and reasonable that there should be a duty of care, the Court also held that the *Anns* test was extremely helpful, although not decisive, in reaching a conclusion. Likewise, in *Shotter v Westpac Banking Corporation* [1987] BCL 352 Wylie J, relying squarely on *Anns v Merton London Borough Council* [1977] 2 All ER 492, found a duty of care to rest on a banker to explain the contract to a customer signing a guarantee where the bank ought reasonably to suspect less than complete understanding of the contract or lack of knowledge of special circumstances. (Note, however, the disapproval of this duty expressed by Hardie Boys J in *Westpac Banking Corporation v McCreanor* [1988] BCL 234.

The duty in *Ritchies Transport* seems to have been based chiefly on the time and trouble involved in tendering. The Court also stated that the duty was owed by the plaintiff "when writing the relevant letter", which raises the question as to whether the duty is as broad as the general statement quoted above tends to suggest. The probable explanation is that the duty arises out of the calling for tenders; the writing of a "misleading" letter is a breach of that duty. There does not seem any reason in principle why this should not extend to every invitation to treat; the victory may

well be a hollow one, though, for as long as there is no compulsion to accept an offer or tender, no loss would be suffered.

Contractual Mistakes Act

The essence of the plaintiff's argument here was that but for the lateness of the tender, a contract would have come into being between the plaintiff and defendant. The plaintiff would therefore have to establish that its tender would have been accepted by the defendant. This alone appears to place a formidable onus on the plaintiff, but it is not the end of the matter.

In order for relief to be available under s 7 of the Contractual Mistakes Act 1977, there must be a mistake falling in one of the three categories set out in s 6(1)(a). Each of these categories refers to a situation where a mistake has occurred in "entering into a contract." While s 2(3) provides that for the purposes of the Act, there is deemed to be a contract if a contract would have come into existence but for circumstances of the kind described in s 6(1)(a), that does not assist the plaintiff in this situation. The mistake was not made in entering a contract, but in making an offer which was never accepted.

The reason for inserting s 2(3) in the Act was to overcome the difficulties where a mistake vitiated a "contract" entirely and to remove the difference between "mistaken contracts" and "mistaken apparent contracts" (see para 16 of the *Report on the Effect of Mistakes on Contracts* prepared by the Contracts and Commercial Law Reform Committee). To give it the effect contended for by the plaintiff not only violates the plain meaning of the words, but raises the spectre of an entirely new method of contract formation.

A further point not considered by the Court is what category of s 6(1)(a) would have been satisfied. In truth this was a unilateral mistake of which the defendant was unaware and the jurisdictional test of s 6(1)(a)(i) was not satisfied. Sections 6(1)(a)(ii) and (iii) cannot apply because there was no decision by the defendant to enter a contract with the plaintiff. On this basis, too, therefore, the contractual mistakes aspect should have been rejected.

Tipping J entertained greater doubts on this score than with regard to the duty of care. Nevertheless he considered it to be arguable that relief could be claimed under the Act and therefore declined to strike out even this part of the statement of claim, seeing no great benefit in such a course of action. It seems that this was perhaps an unfortunate decision. The striking out application would have achieved a significant saving for the parties if its effect had been to limit the cause of action to one in negligence. One can only hope that, should this matter get to trial, the Court will dismiss the contractual mistakes argument without further ado: the Contractual Mistakes Act has given rise to enough problems without this additional – and entirely spurious – attempt to snatch at relief.

Conclusion

As acknowledged by Tipping J the conclusions in this matter were tentative because of the procedural framework. Nevertheless, it seems that some indication has been given as to the judicial approach to the duty of care in a tender situation and persons calling for tenders will have to bear this in mind. While the general reluctance to strike out can be understood, it seems that a rather undesirable type of claim under the Contractual Mistakes Act has been permitted to slip through the net; a slightly more rigorous approach might have rid both the litigants and the law of this ugly beast at an early stage.

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Recent possession and the need to prove a particular offence

Attorney-General of Hong Kong v Yip Kai-foon [1988] 1 All ER 153

Pursuant to the so-called "doctrine of recent possession", evidence that D was in possession of recently stolen property and failed to provide an innocent explanation (or provided one which is rejected) is evidence which allows (but does not require) a finding that D was either the thief or a guilty receiver of the property. If it is inferred that D was the thief, such possession is also evidence that D was guilty of any other offence committed by the thief at the same time (such as burglary or robbery). In some cases such evidence may support a finding of theft by D, but not receiving (eg when it appears that there was no opportunity for the goods to change hands), and in other cases it may point to receiving rather than theft. But it will often be the case that the evidence is consistent with D being either the thief or a receiver.

In this last kind of case an indictment should contain counts for both theft (or any associated offence, such as burglary or robbery) and receiving, it being for the jury to decide which (if either) was committed by D. If D is found guilty on one of these charges no verdict should be taken on the other, to preserve the possibility of proceeding on it should the conviction have to be set aside (*R v Seymour* [1954] 1 All ER 1006); if one of the charges is graver than the other the graver offence should be considered first, and a verdict agreed upon before the other is considered: *R v O'Grady* [1960] NZLR 585; the headnote to this case wrongly implies that there is also a rule that as between theft and receiving the latter should be considered first.

Possession of recently stolen property is merely a common item of circumstantial evidence and, although it may provide sufficient evidence to support a conviction, it does not relieve the prosecution of the burden of proof. When, however, such evidence is consistent with D being either the thief or a receiver, a problem arises.

In such a case the evidence entitles the jury to infer that D's possession of the property was dishonest, "and that he was either the thief or the receiver according to the circumstances": *R v Langmead* (1864) Le & Ca 427,441,169 ER 1459,1464, per Blackburn J. It may be, however, that the evidence satisfies the jury beyond reasonable doubt that D was either the thief or a guilty receiver, but leaves them quite uncertain as to which – they may have real doubts but think one answer is more probable than the other, or they may think the probabilities are equal. This latter possibility is implicitly recognised in *Seymour*, supra, when the Court says that alternative counts should be included when the evidence

is "as consistent with larceny as with receiving".

Sir Francis Adams thought that it will commonly be the case that the evidence establishes that D committed one of these offences, but is nevertheless such that it is impossible to be satisfied beyond reasonable doubt as to which one: [1967] NZLJ 495. His view was that in such a case the choice is to be made "upon the probabilities", a solution which he took to be supported by the judgments in *Langmead*, supra, and which was apparently adopted by Macarthur J in *Devereaux v Police*, unreported, Christchurch, 11 July 1967 (where it was also held that in summary proceedings the charge should be amended if at the end of the hearing the Judge concludes that the wrong charge was laid: *Police v H* (1985) 1 CRNZ 580,582). Similarly, Sir Francis thought that if only theft or receiving was charged D should be convicted if it was proved beyond reasonable doubt that D was guilty of one of them, and that it was more probable that it was the one charged (originally or after a permissible amendment). On this basis he was critical of the apparent suggestion in *R v Keenan* [1967] NZLR 608 that in such a case D must be acquitted altogether unless the jury has no reasonable doubt as to which offence D committed. (See Adams, *Criminal Law and Practice in New Zealand* (2 ed), paras 1763-1776.)

This view of the law has now, however, been flatly rejected by the Privy Council. In *Attorney-General of Hong Kong v Yip Kai-foon* [1988] 1 All ER 153, D had been acquitted of robbery but convicted of handling (ie receiving) the stolen goods, the jury having been directed that if they were satisfied beyond reasonable doubt that D had committed one of these offences he was not entitled to be acquitted altogether merely because there was doubt as to which it was, and that he should be convicted of whichever was "more probable or likely in the circumstances". Their Lordships noted that this was not a case which depended entirely on evidence of "recent possession" (there being ballistic evidence pointing to robbery, although this was apparently not regarded as adequate), but held that even if it had been, and even if the charges had been of theft and receiving, the direction that D should be convicted of the more probable offence was wrong. At p 159 Lord Ackner said:

> Their Lordships are firmly of the opinion . . . that such direction is wrong in law. It detracts, or may be thought to detract, from the obligation of the jury to be satisfied beyond reasonable doubt that the accused is guilty of the particular offence before they enter such a verdict.

The jury should simply have been directed to first consider the charge of robbery and if, but only if, they were left in reasonable doubt on that they should then ask themselves whether the alternative offence of handling had been proved beyond reasonable doubt.

When the evidence suggests that D committed one of two offences which are of different degrees of gravity, it seems clearly right that D should not be liable to conviction of the graver offence merely because it was the more probable of the two offences. This was the position in *Yip Kai-foon* (the choice being between robbery and handling) and *Keenan* (burglary or receiving). But even when the choice is between offences of the same degree of gravity (which in New Zealand is generally the position with theft and receiving), or when it is suggested that D should be convicted of the lesser of two distinct offences, the conclusion of the Privy Council seems to be right in principle: cf Archbold, *Criminal Pleading, Evidence and Procedure* (42 ed), para 18.5. Here, however, adherence to principle would seem to mean (at least at first sight) that it will not be uncommon for it to be necessary to acquit D altogether, even though it is clear that D committed either theft or receiving. This is thoroughly undesirable and suggests the need for an offence of dishonest possession of or dealing with property which has been stolen or obtained by a crime, of which D could always be guilty whether or not D was also guilty of the theft or other offence. (cf Adams, *Criminal Law and Practice in New Zealand* (2 ed), paras 2116-2118) But although that would be a practical solution in the context of theft and receiving, where the potential problems are perhaps most acute, similar difficulties can arise in other contexts: Adams, ibid, paras 75, 1005, 1161, 1872.

There may be, however, another way in which the Courts might seek to prevent the complete acquittal of D in these cases. In *Yip Kai-foon*, supra, 160-161, it was held that it had not been necessary for the Judge to direct the jury that before they convicted of handling they had to find that D had not handled the goods in the course of stealing them, even though such conduct would exclude the possibility of his being guilty of the offence of handling. Such a direction was held to be unnecessary because once D was found not guilty of robbery the issue of whether or not he was the thief was no longer a "live issue", and the presumption that he was innocent of theft remained unrebutted.

This approach might be capable of avoiding all the difficulties in the subject of this note, but it is unconvincing. If there is no evidence that D had committed an offence inconsistent with that charged, or if the jury reject any such evidence or suggestion, then the possibility will be rightly ignored. (cf *R v Griffiths* (1974) 60 Cr App R 14; *R v Cash* [1985] QB 801) But if there is some such evidence which in fact leaves the jury in reasonable doubt on the question it seems wrong to suggest that the "presumption of innocence" means that this fact must be ignored: cf J C Smith [1985] Crim LR at 313-314. After a verdict of acquittal the principle of res judicata will prevent D's possible guilt of that offence being an issue in any later proceedings against D, but the mere fact that a jury (or Judge) concludes that the evidence does not establish guilt should not mean that in the same proceedings D must be deemed to be innocent, regardless of evidence which raises doubts about this. Such a rule would contradict the rule in *Yip Kai-foon* that the jury has an obligation "to be satisfied beyond reasonable doubt that the accused is guilty of the particular offence before they enter such a verdict".

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The lawyers behind LA LAW

By Kim Lockhart

(Reprinted with permission from the Canadian publication, The Lawyers Weekly, *January 29, 1988)*

LOS ANGELES — Scores of Canadian lawyers are among the vast millions who are making a habit every Thursday of watching the televised adventures of a fictitious Los Angeles law firm. *LA Law*, featuring the McKenzie Brackman firm, has become a hot ticket in the world of network television. Lawyers might ask: What is one to make of all that hot romance, black comedy and so-called legal realism?

Travel to Los Angeles in pursuit of answers, and you hear the story of a local judge, a real judge, known as "The Bitch on the Bench." It seems her trademark is not only arrogance, but a pet poodle that she keeps constantly at her side in court.

The poodle used to wait in chambers, until one day another judge tossed in a tough alley cat and closed the door. After that, the judge vowed never again to abandon her poodle, and so far she hasn't. That is a strange story.

Should one expect less of *LA Law?* Now in its second season, the NBC series on a heavy-breathing and indecorous law firm has earned (a) high ratings (b) a coveted Emmy award for best dramatic series (c) star status for its performers and (d) the distinction of parody.

Mad magazine, still entertaining adolescents after all these years, called its takeoff "LA Lewd" and the show's producers were amused enough to purchase the artboards. In it, senior lawyer Leland McKenzie complains, "My colleagues here are a true cross-section of LA — four horny guys, three sex-crazed nymphos, one cheating husband and a token airhead."

They perform extremely well, except, of course, when their work gets in the way. Says managing partner Douglas Brackman — renamed Rugless Barfman — "I'm ruthless, relentless and devoid of all human compassion. After all, somebody here has to come off like a real lawyer."

The US legal press, however, has been less amused. The *National Law Journal* headlined its critique: "What's wrong with *LA Law*," Too mean-spirited, assessed the managing editor, while confiding she forced herself to watch every week. She and her Manhattan lawyer friends concluded there was not a single likeable human being among the money-grubbing cast.

Ironically Grant Tinker, the man behind TV shows legendary for their likeable people (*The Mary Tyler Moore Show, Lou Grant*) was the first to think of dramatizing a 1980s law firm for television.

He tossed the premise to Stephen Bochco, co-creator of the heralded show about a police precinct, *Hill Street Blues.*

Bochco saw the possibilities, as they say, and sought out Terry Louise Fisher, a former LA prosecutor then working as writer-producer for a series — *Cagney and Lacey* — about two female police detectives. Together, they came up with a law firm where romance and litigation share equal time on the docket.

Each episode of *LA Law* busily glues together five or six separate stories involving the ensemble of actors. Certain of them are regulars in court, lawyerly white knights in the tradition of Owen Marshall and Perry Mason.

However, McKenzie Brackman also handles business law, divorce, tax, real estate — name your poison — the firm is nothing if not versatile. Its lawyers make mistakes, compromise, hound each other. They're selfish. Their feelings and egos affect their file work.

They struggle with issues of self-doubt and amorality. Sometimes, they resort to tactics out of sync with the shining ideals of the profession. In short, they're much like high-powered attorneys of the real world.

How close lies the resemblance is where the arguments about *LA Law* start. Judith Chirlin, a judge (without poodle) for two years on the California Superior Court, said she watched the show for the first time and told herself, "This is reality. This is what a law firm is really like."

A prominent LA lawyer, Pat Boltz, says when a trial takes him across the country, the lawyers he meets expect him to act like a character from McKenzie Brackman.

As one might expect, lawyers have been vigilant critics whenever *LA Law's* principals appear to stray, unpunished, across ethical lines.

More generally, the show's persuasive look at the workings of a post-modern law practice causes mingled emotions. Attorney Jonathan Kotler, a USC professor, probably spoke for many when he said, "The show is funny, accurate and not very flattering to the legal profession." That's just what the show's writers, most of them lawyers, want to hear.

It is the night of the Emmy awards, and *LA Law* has just scooped the big prize. Among the acceptors is Terry Louise Fisher, who pays tribute to the writers.

"It has got to be the hardest show on television to write," she said. "You've got to be funny, to write drama." Radiant grin.

"You've got to be extremely in touch with your female side."

In the show's publicity material, the first lady of *LA Law* repeats her theme: "Probably the contribution

to the show of which I'm proudest is that the women are just as interesting as the men."

Fisher's insights carry special weight, since she's been the ranking lawyer involved in shaping episodes for the screen. By published account, Fisher is a "tall, vivid and spirited brunette" of 40 years who is more than willing to speak her mind. Twenty years ago Fisher was married to a lawyer, and she enrolled in UCLA law school with the idea that they would practise together. They were divorced in her first year. These days, her quip is that she soldiered on because of the high ratio of males taking law.

"I had always been very male-orientated and proud of it," she says. But she soon concluded that the male students were boring and in professional lock-step while her woman classmates were older with more interesting backgrounds.

After she graduated, she says she came across tokenism in her job searches. Finally she pulled some strings to get her first job, as LA County deputy district attorney. Soon she was prosecuting murder, rape and armed robbery cases.

It was a rough life. One day, a 17-year-old defendant physically attacked her in front of armed marshals. The police advised her to pack a gun, and so she did.

"I was in total despair," she told a *Los Angeles Times* writer a year ago, recalling her days as prosecutor.

> People were in my office, screaming. And not liberals from Bel Air. Nice working-class people from Watts who would get off a bus and get hit on the head and get their paycheques stolen. They'd ask me: "Why don't you do something?"

She commented she still had her gun, and wouldn't hesitate to use it on an attacker. She was talking with a small smile and some excitement, the writer remarked.

> I know, there's a romance to it. When I talk about it, I feel kind of *macho*. Women like to know they can fight back.

After two years in the criminal courts, Fisher changed sail. She did entertainment law for three studios while arranging a personal metamorphosis into a writer and producer. To research her novel about a love story in a co-ed prison, she posed for two months as a weekend prisoner at a federal penitentiary.

The cast of *LA Law*
(standing, left) Susan Ruttan, Corbin Bernsen, Alan Rachins, Jimmy Smits, Richard Dysart, Michele Greene;
(seated front left) Blair Underwood, Susan Dey, Michael Tucker, (Centre, left) Harry Hamlin, Jill Eikenberry

Four years ago, on the strength of accumulated television credits, she joined *Cagney and Lacey* as writer-producer. Two years ago, Stephen Bochco called.

Not forgotten are her down and dirty days in the LA courts. Her assessment of the US criminal justice system is that it doesn't work.

> It works in England. There justice is swift, sure, certain. You go from trial to appeal in three or four months. Here, the system can drag out cases for 17 years.

She called American courts "an elaborate win-lose field where lawyers get to play games" and society is the steady loser.

On *LA Law*, she said, the lawyers often represent clients who are guilty and get them off. She acknowledged that lawyers, because they are trained to argue any side of any issue for pay, are basically flawed as human beings.

Provocative thoughts, considering that the others at *LA Law* are inclined to say the show's focus is almost accidental, and that the dramatic purposes of McKenzie Brackman might as easily be served by a firm of accountants.

The woman at the top does not say this. Terry Louise Fisher says *LA Law* is "about what the practice of law does to people".

On a warm September day, inside one of the many hangar-like buildings on the sprawling 20th-Century Fox lot, shooting is underway on this season's premiere episode.

The family of a chain-smoking emphysema victim is suing the tobacco companies, and actor Harry Hamlin, who plays Michael Kuzak, is arguing their case in the mock courtroom that is a replica, plank by nail, of a California Superior Court.

The way the taping works, a production crew of perhaps 100

people does a slow shuffle of lights, cameras and portable equipment that every 45 minutes or so, results in the actors being called to their marks and a brief scene being taped. A lot of extras drink a lot of coffee. It is, faithful to legend, a boring process to watch.

Distant from this, down the road in a mock chateau known as the Old Writers Building, the writers of *LA Law* are labouring on future scripts. Five writers to turn out 22 hours of television in nine months, sums up one of them, Bill Finkelstein.

Only a year ago, he was practising law in the Empire State Building, writing appellate briefs and doing matrimonial work at a small firm.

When he was growing up, he never missed an episode of *The Defenders* (1961-65), in which a father-and-son law firm took on high-minded cases.

> Those lawyers were impeccably moral, but it's hard to be that and practise significant law. There's a lot of gray in the law. More than in any other profession, except maybe cops.

He was asked if *LA Law* has captured the mood of the '80s, the willingness to celebrate the kind of get-it-done professionalism that made a national hero, however briefly, out of Ollie North.

Perhaps so, Finkelstein says, but what will be remembered longer is Stephen Bochco's ability to introduce moral ambiguity to network television. "Drawing plots that were not black and white was what *Hill Street Blues* was all about," he said. "Even Furillo had a dark side. He had a drinking problem, was prone sometimes to indecision. And *LA Law* draws on that tradition.

> This is not a detective show. We consciously avoid stories that have a pat resolution. It's not like at the end of *60 Minutes*, the bad guy gets discovered and dies in a hail of bullets, go to main titles. We don't do that.

At the age of 35, Finkelstein is a late bloomer in two respects. Before he graduated in law from Brooklyn College in 1983, he says wryly, "I had a career as an unsuccessful writer. I did construction work, commercial fishing, lots of jobs."

Eventually, he wound up practising law for two years with a Manhattan firm that was part family. "I got my feet wet," he says, and then the *LA Law* producers commissioned him to write a sample episode on the strength of a play he had written.

Written in New York, his episode in which an attorney blows his brains out in court was later among the show's two submissions for the Emmy award.

When the offer of a staff job followed, Finkelstein left the law and packed his bags for Los Angeles.

> Part of the instinct that you develop as a lawyer never leaves. I'll hear and see things and immediately go on point as a lawyer. You know, what's the first step, the second step. Sue the pants off the bastards.

Does he draw on impressions of real attorneys?

> Parts of them, sure. You take little hits off lawyers you've known and see where they fit into the characters. Arnold Becker definitely has a lot of the qualities of the divorce lawyers I watched operate.

Down the hall is another refugee from the practising Bar, David E Kelly. Like Finkelstein, he carries the title of "executive story editor" — television's way of saying staff writer.

Until a year ago, the 30-year-old Kelly was climbing the ladder as a litigator at a respected old-line Boston firm. Up to then, the only creative writing he had done was college sketches.

But one day he got this idea for a movie involving a trial lawyer, and he sat down to write it. Two things happened. The first screenplay of his life found West Coast backing and was made into *From The Hip*, a film released in 1987 and advertised with the slogan: "The way he practises law should be a crime."

Meanwhile, the *LA Law* producers were approaching lawyers who could write drama. Kelly delivered a teleplay in which a television anchorwoman filed suit after being fired for discussing her mastectomy on the air.

Kelly was soon out of the law and in Los Angeles. "I'm delving into more interesting legal issues here than I was as a lawyer," Kelly says. He's dressed in casual jeans, has his feet on the desk in his small Fox office.

Next he's standing to harass Bob Breech, the supervising associate producer, about a quote in that day's newspaper that according to Kelly, has Breech sounding like he regularly saves the show from defamation, hell or worse.

Kelly's pet hound is bounding in and out of his office. "We're out of soft drinks," he says. "Have a mineral water."

Officially, Kelly is still on leave from his law firm and he observed that "my name has steadily climbed the letterhead since I left."

He reflected on that. "Maybe I can stay here another three years and go back when it's decision time on making me a partner."

That's David pranking again, says a colleague. "Quite apart from *LA Law*, David has a lot of projects going."

Kelly readily agrees *LA Law* bends reality here and there in the interests of drama.

> A firm that size doesn't handle that variety of law. Four or five great cases are on the go at one time, and that simply isn't the case.
>
> Ninety percent of what lawyers do is boring. Probably 85 to 90 percent of what they do is administrative or procedural. In our law firm, compelling events are going on all the time.

Kelly is buoyant about the rich soil afforded by the practice of law, how lawyering poses "great drama and storytelling" and how "anything we do on the show can happen at a given law firm."

But above all, he says:

> the show is about people, and these people happen to be lawyers. We build a history of each character that can be taken further to unforeseen crossroads.

Kelly's attitude is, the law is the law, and *LA Law* is a television show. And, he asks, who out there can make definitive statements about the practice of law anyway?

He recalls attending a luncheon of attorneys. The first questioner told Kelly he liked the show, but had to say that one particular incident would never happen in a real law firm.

> Then a second lawyer stood up and disagreed – he had personally seen it happen – but he had the same complaint about somethng else in some other episode.
>
> A third said no, that part was realistic enough, but something else wasn't. A fourth disagreed, and a fifth contradicted him. It went around the room like that. I never got to talk.

Another lawyer on the premises, Bob Breech, remarks that he is amused how lawyers

> no matter how compartmentalized they might be, impose their own narrow experience on the length and breadth of the profession. They tell us confidently that something in an episode would never happen in the practice of law, when of course, in a documented way it already has.

The flak from lawyers at large usually lands on Breech's desk, and not always lightly. He once picked up the telephone to take issue with a Denver attorney who wrote a scathing letter about the show's "mean-spirited and ultimately dishonest" characterizations of lawyers. "We heard each other out," he says. "I think he came around a bit."

Breech thinks most lawyers have come to recognise that the show "humanizes their experiences." He says:

> Our guys handle cases that are not pretty. It's inherent that the law is confrontational and is often not pretty.

And:

> it's not a show about lawyers. It's about people who happen to be lawyers.

Breech only happens to be a lawyer himself more or less. He practised law for four years after graduating in 1973. "Then I waved the white flag of submission and went to UCLA for a masters in film management," he says drolly.

> Some of my best friends are still lawyers. I'm surrounded by friends who are attorneys. It is said that lawyers and agents run this town.

As supervising associate producer, Breech regularly straddles three *LA Law* episodes at a time as they move through script stage, taping and post-production. Being a lawyer helps, since his duties include liaison between the writers and Rosenberg, the technical adviser.

He says:

> On the California Bar exam, as I recall it, addressing the issue was the key element. The bottom line was not so important as how you got there. On *LA Law* we only have an hour to state legal issues, so they have to be expressed cleanly and simply. When our writers address legal issues to create drama, they write great scenes. When verisimilitude blends with drama, we're very pleased.

Last season, the writers on *LA Law* dreamed up the idea of having a dying client pursue his right to be flash-frozen, somewhat like a piece of cod, until medical advances caught up to his ailment. They were at a loss about who would oppose such a plan, and with what arguments, and in what procedural setting.

"I did some research and discovered the California health and welfare code has a section called Dead Bodies," Chuck Rosenberg says. "The writers were delighted."

Of the five lawyers with input into *LA Law* scripts, Rosenberg is senior in terms of experience. A Harvard graduate – class of '71 – he practised for some years with 70-lawyer Tuttle and Taylor of Los Angeles, helping set up its Washington branch office.

Over the years, he has taught legal analysis at the UCLA management school, written about the use of lawyers in business journals.

These days, his bread-and-butter practice is business litigation involving breach of contract, collections, leases. Now and then, he does white-collar criminal defence work. His *LA Law* retainer is "a small but not insignificant" part of this.

> The change of pace is fun. If a real trial goes badly, all you can do is appeal. In television, you can decide overnight that you're unhappy with the result and change the script.

Rosenberg talks about his role in terms of "the small fixes" and "tilting some scripts a few degrees". When a script is close to taping, he'll insert qualifying words or phrases. At an earlier stage, he'll sometimes research the correct legal path. In a story line involving a boy killed in a traffic collision, for example, he cited California law and suggested putting a surviving sister in the car to sue for punitives.

Rosenberg got his start as technical adviser on *The Paper Chase*, the PBS series that examined a law school through the eyes of a group of students.

"Because that show had the academic world as its focus, there were long stretches when I was the only lawyer involved in the scripts," Rosenberg says. He does not remember this as an advantage.

His job at *LA Law* is

> to help keep the show within the ballpark. We don't aim for pristine accuracy, because that would get in the way of dramatic imperatives.
>
> Often, a script starts out with quite substantial legal underpinnings which get stripped away as the writers draw a tighter focus. The legal analysis is more talked about than displayed in the script. What you see is the tip of the iceberg.

He credits *LA Law* as bringing a new form of realism to lawyer drama:

> Take Perry Mason, a classic in the genre. Mason never really struggled with issues of self-doubt. His clients were always innocent, and were so proved.
>
> *LA Law* lawyers act for the bad guys too, have to face up to that responsibility. People don't like lawyers because they don't like to look in the mirror. Their dislike is a form of self-loathing. Lawyers are the agents, not the cause, of our litigious society.

And as *LA Law* seems to say, lawyers as agents have to pay a human price. □

Trial by media

By Celia Battersby MA (Oxon)

(Reprinted with permission from Solicitors Journal, *6 May 1988)*

In a democracy, journalists consider it their duty to expose any miscarriage of justice. An undoubted triumph for investigative journalism was the free pardon granted to Patrick Meehan in 1976 after seven years' imprisonment. But the peculiar circumstances of this case later became the subject of an official inquiry; its findings were published in the Hunter Report in 1982, and provide a clear and sometimes disturbing revelation of media methods of investigation.

Scene of the crime

Meehan had been convicted of the murder of Mrs Rachel Ross. The elderly Mr and Mrs Ross lived at 2 Blackburn Place, Ayr. In the early hours of Sunday, 6 July 1969, masked men broke into their home. Mr Ross was savagely beaten with an iron bar until he produced the key to his safe. He was beaten again until he convinced his attackers that he had no wall safe. Mr and Mrs Ross had been tightly trussed up with rope and nylons, and were left bound when the criminals departed. They were not released until Monday morning; the following day Mrs Ross died.

In his first statement Mr Ross said his assailants had addressed each other as "Pat" and "Jim". On the night of the murder, Patrick Meehan, known to his associates as "Pat", had travelled by car from Glasgow to Stranraer, and back again; the route passed through Ayr. The car driver was Jim Griffiths, who had a long record of violent crime; and Meehan was a known safe breaker.

On 14 July Meehan was charged with the murder. On 15 July unarmed police went to interview Griffiths. He attacked them with a shortened shotgun, escaped, and shot 12 people, killing one. Finally, in an exchange of shots with the police, he was killed.

Meehan was tried for Mrs Ross's murder. He was defended by Mr Nicholas Fairbairn. He was convicted, and refused leave to appeal. But from prison he continued to protest his innocence.

Soon after the crime the police had heard rumours that Ian Waddell, another Glasgow criminal, had been involved in the murder but when interviewed, his alibi was thought to be satisfactory. Meehan now said he had heard on the prison "grapevine" that Waddell, together with an unnamed associate, had committed the crime.

Rightful conviction

From prison, Meehan wrote lengthy letters to MPs, to his legal advisers and to journalists. As a "crime informant" Meehan had long had contact with well known journalists; they took up his cause, and the public became aware of a possible miscarriage of justice. But after further investigation the Crown Office concluded that there had been ample evidence on which the jury had convicted Meehan.

Waddell, meanwhile, had been imprisoned for perjury at Meehan's trial. After his release he was arrested on a firearms charge. Through his solicitor he offered to help Meehan by being interviewed under the "truth drug", sodium pentothal, on his release. The prospect of a truth drug confession was hailed with enthusiasm by the media, despite expert advice from the Home Office that the information would be "about as reliable as that obtained from a drunken man; and a hardened criminal could still maintain a false denial of guilt".

On his release Waddell was met by a freelance journalist and a BBC staff director. Waddell asked for a large sum of money, and it was hoped that a newspaper might provide the funds. Preparations were made for a television programme. Waddell's intermittent confessions and denials were uncritically accepted by the media personnel; perhaps they were unaware that

> according to the law of Scotland a person cannot be convicted of murder solely on the evidence of an admission.

A Patrick Meehan Committee was formed, with the well known author and journalist Mr Ludovic Kennedy as its chairman. A statement from the committee was sent to the Secretary of State for Scotland, drawing attention to the growing number of people who had the gravest doubts about Meehan's guilt.

Professional confidence

Meanwhile, in 1972, a greatly feared criminal, William McGuinness, had been arrested for murder, but was released for lack of evidence. He told his solicitor, who had previously acted for Meehan, that Meehan was innocent; but the information was a professional confidence.

To further the cause, Mr Kennedy wrote a book, *Presumption of Innocence*. He visited Mr Ross, and in his preface acknowledges the help he was given. "Mr Ross", he writes, "was unfailingly courteous and co-operative; I greatly enjoyed our

several meals and meetings". Curiously, Mr Ross did not seem to reciprocate these sentiments. In 1976, in a statement to the police, shortly before his death, Mr Ross said:

> I am sick of newspaper people and Mr Kennedy. Mr Kennedy has been to my home asking questions, and although he was very nice to me, I now know he made a fool of me. I told him so the last time he telephoned me.

The Patrick Meehan Committee continued to make representations to the authorities. But these were dismissed on the grounds that all the matters raised had been before the jury, and it was rightly emphasised that the verdict of a jury cannot lightly be overturned. However, the press remained indignant, and powerful articles continued to appear.

Then in 1976, William McGuinness was murdered. Rumours immediately began circulating that he had confessed to Mrs Ross's murder. His family believed he had left a letter of confession; but it was never found.

First hand knowledge

At about this time, in very mysterious circumstances, a gold watch was handed to McGuinness's solicitor; he was told that it had been stolen from Mrs Ross at the time of the murder. Though the watch was identical in make and design to the one worn by Mrs Ross, forensic examination proved conclusively that it had never belonged to Mrs Ross. The implications were grim; someone with first hand knowledge of the crime was at large.

Two senior police officers were appointed to investigate the whole matter of the watch. While they were searching the murder files at Ayr, they found a report stating that a police patrol car had, on the night of the murder, given a lift to a passer-by in the close neighbourhood of Blackburn Place. The officers were traced, and now seemed convinced that their passenger had been McGuinness; though it was never satisfactorily explained why they failed to recognise the notorious McGuinness seven years previously.

However, it was now believed in official circles that McGuinness had been in the vicinity of the crime at the relevant time. This entirely new evidence caused a flurry of parliamentary activity, which ended with the Lord Advocate recommending to the Secretary of State the exercise of the Royal Prerogative to to pardon Meehan. The advice was taken, the pardon granted, and on 19 May 1976, Meehan was released. Three months later Waddell was charged with the murder of Mrs Ross. Trial by media had apparently brought the culprit to trial by the judiciary.

But on 1 December, Waddell's trial came to a most unexpected conclusion. The jury brought in a verdict of not guilty. The press were astonished at this outcome. But the verdict was not perverse; it was known that Waddell had received money from the press and the prosecution had failed to prove his confessions were truthful and reliable.

So the murder of Mrs Ross remained unsolved. It was decided to hold an official inquiry, and Lord Hunter was appointed to report on the whole circumstances of the murder of Mrs Ross at Ayr in 1969.

Hunter report

The Hunter Report was published in 1982. Obviously, I can only comment very briefly on its scrupulously fair conclusions on some of the leading topics.

It had always been maintained by Meehan's supporters that the identification parade in 1969, when Mr Ross recognised Meehan by voice, had been rigged by the police. Over the years it came to be believed that Mr Ross was not, as the police had always stated, the first person to view the parade, but was in fact the last; and that he only identified Meehan because he had been given the opportunity to speak to two key witnesses who had already viewed the parade. These witnesses were two young girls to whom Meehan and Griffiths gave a lift on the night of the murder after leaving Ayr on their way back to Glasgow.

During the years following Meehan's conviction the report revealed that one of the girls had been visited on no less than 12 occasions by people claiming to be acting on Meehan's behalf. Some of her unwelcome visitors identified themselves falsely. She had been badgered and threatened in an effort to make her admit, against her will, that the police account of the parade was untruthful.

Over 100 pages of the report analyse the evidence relating to the parade. It concludes that:

> it has not been established clearly, or even as a matter of probability, that the identification parade was rigged in the manner alleged. The allegation that Ross was the last, and not the first of the witnesses to view the parade is considered to be against the weight of the information available to the present Inquiry.

In propounding Meehan's innocence, Mr Kennedy in his book, stated that the Judge at Meehan's trial had not put the defence case fairly to the jury, the most glaring instance of this being his quoting the very misleading police evidence that the journey from Stranraer to Ayr could have been made in an hour. "For the police, or anyone else", says Mr Kennedy, "to have motored the 52 miles from Stranraer to Blackburn Place in 60 minutes would have been a total impossibility".

Test drive

This statement reflected very seriously on the veracity of the police evidence. So on the night of 8 January a test drive was made, with Lord Hunter as a passenger, from Stranraer to Ayr. The report says:

> The car left at 1.05 am, there was no impression of undue risks being taken; information about the road improvements made between July 1969 and January 1978 does not suggest the speed of the drive was materially affected thereby. The car was stopped at the junction of Racecourse Road and Blackburn Place at 2 am precisely. The journey had taken 55 minutes; and had speed limits not been observed the journey could have been completed in 50 minutes.

Very serious allegations had also been made about the planting of evidence by the police. It was said that senior police officers had conspired to place fragments of

paper in the pocket of a coat belonging to Griffiths; these were identical to pieces found in the Ross safe. Apparently even Mr Fairbairn believed this. So when Mr Kennedy was having lunch with Mr Fairbairn at the St James's Club in October 1974 (at the table by the fire), he raised the matter again. At first Mr Kennedy said:

> he didn't say anything about it, as though he had forgotten having told me before I reminded him; he said he couldn't comment until I reminded him exactly what he had said. He said I couldn't use it. I said in the book I would not mention any names, but promised to name names in confidence at any inquiry.

At an interview with Lord Hunter, Mr Fairbairn did not to any substantial extent support the assertion that he had been told the paper had been planted in the clothing of Griffiths; he said the inspector had "dropped a hint". The inspector told Lord Hunter that Mr Fairbairn had once said "I think that stuff was planted" adding hastily "not by you, of course", and that was the finish of it.

Slender evidence

Such slender evidence, incompetent in any Court of law, became the foundation of an irrebuttable journalistic presumption of police corruption, and inspired Mr Kennedy to dismiss all the evidence at Meehan's trial about the scraps of paper as "highly unsatisfactory and part of cloud cuckoo land". Lord Hunter comments that

> allegations of planting are quite often made, but seldom proved. Experience may suggest that such allegations are more often than not a last resort of the guilty; but this must never be assumed.

The media, convinced that the police had rigged the evidence against Meehan, had to find a reason to explain why he had been framed. In contemporary journalism British Intelligence has replaced witchcraft in providing for the credulous a convincing explanation of matters otherwise beyond rational belief. In 1963 Meehan escaped from HM Prison Nottingham and fled to East Germany, remaining there for over a year. So his claim that the "Dirty Tricks" Department had engineered his conviction was readily accepted and relayed by the press. "Pawn of the secret service" and "MI5 framed me because I knew too much" were typical headlines. Even the murder of McGuinness was attributed to the Secret Service by a journalist writing in the *Scottish Daily Mail*. However, the author of this work admitted that most of it was pure speculation. "He denied having seen any leading member of the underworld, and admitted this was a lie."

In 78 cogent pages Lord Hunter considers the allegations made against the intelligence services. He concludes that:

> the plot which Meehan has supported by elaborate and often misleading accounts of events is to be considered the product of a fertile imagination, relatively ingenious presentation, and a frequent disregard for the truth. An objective and detailed examination of the allegations has shown them both generally and in detail to be without substance.

The report comments on the difficulties faced by the police at this time when there were relatively frequent mergers and amalgamations of police forces, and suggests that this may have had a an adverse effect, to some extent, on the performance of the police. This may explain why, when Lord Hunter was making a page by page search of the photocopy of Meehan's diary, he found an entry which had hitherto escaped the notice of the police. It was the name and telephone number of William McGuinness. In an interview with Lord Hunter, Meehan admitted having had contact with McGuinness two or three months before the crime, and when questioned about the diary entry "he gave a most unfavourable impression".

The report concludes that none of the allegations of planting or of falsifying or fabricating evidence by the police has been established.

No judgment made

The terms of reference of the inquiry excluded the making of any judgment about the guilt or innocence of Meehan or Waddell. But Lord Hunter states that the theory of possible involvement in some capacity of Meehan and Griffiths had not been disproved either by clear and convincing information, or on a balance of probabilities. "It is highly probable", he says, "that both these men were in the very close proximity of Blackburn Place at the time the crime was being committed".

Lord Hunter points out that in his evidence Mr Ross had originally said he heard one of his attackers say "They haven't arrived yet, Jim". He added "I don't know whether he said 'they' or 'he' ". Nevertheless, the police had always worked on the assumption that the crime was a two man job, in which Meehan and Griffiths were involved. Meehan's supporters have also assumed it was a two man job, but were convinced that Waddell and McGuinness were the perpetrators. However, the crime was a premeditated safe breaking, and neither Waddell nor McGuinness was a safe breaker. But Meehan did have convictions for safe breaking, and had admitted that he was in contact with McGuinness two or three months before the crime. So Lord Hunter feels it to be possible that all four men were in some way involved; though, as he says, it is in the end "a matter of opinion in which direction the probabilities of the situation are balanced".

Miscarriages. . .

We shall never know the truth. But the Hunter Report's accurate and scrupulously fair account of the whole matter contrasts most strongly with the slipshod approach of the journalists. It must never be forgotten that journalists earn their living by purveying news; and a miscarriage of justice, real or imagined, makes eminently saleable copy.

A free press is essential in a democracy. But that freedom is abused when journalists use any story, however dubious its source, to attack the judiciary and the forces of law and order. Trial by media, tendentious and flamboyant, can never be a substitute for prosecution fairly presented and defended by competent advocates before a jury, in accordance with the rules of evidence. □

Victim Impact Statements

By John Rowan, Barrister and Solicitor of Wanganui

In this article the author considers the practical aspects of the provision of Victim Impact Statements as provided for in s 8 Victims Offences Act 1987. On the basis of his own experience in Court he suggests some guidelines that might be of assistance.

Background

This note on Victim Impact Statements has its genesis in the writer's recent experience in two cases in the High Court each involving Victim Impact Statements being tendered before sentencing.

In the first the offender was being sentenced following his being found guilty by a jury of three charges of indecent assault on different complainants. A few minutes before the case was called for sentencing, the writer was handed by counsel appearing for the Crown, a written Victim Impact Statement prepared by the police officer in charge of the case. The complainants had not been physically injured in the assaults and the Judge had had the benefit of the evidence given before the jury as to their immediate emotional reaction to the assaults. The Victim Impact Statement emphasised the emotional effects and how fearful the complainants and their families were of the offender. The report stated among other things that "the word around town was" that if not convicted the offender would return to the place where the complainants lived and "get" them. That was a somewhat remarkable comment as the offender had been in prison (a period of ten months) from shortly after the offences were committed to the time of trial and barely knew the complainants.

In the second case, the accused had pleaded guilty on arraignment to three counts of rape and one of abduction. The case was most serious with a number of aggravating features and the accused was facing a possible sentence of preventive detention in respect of the rape charges.

There counsel appearing for the Crown handed a Victim Impact Report to the writer immediately after the offender had entered pleas of guilty two weeks before sentencing. The report consisted of a statement by the victim herself as to how the offending had affected her physically and psychologically and concluded with some very forthright comments about what she felt about the offender and what the Court should do to him. It was accompanied by letters from a registered psychologist who had been counselling the complainant and a general practitioner who had been attending her. On a significant matter, the information in the letter of the general practitioner contradicted a statement made by the complainant herself about one of the consequences of the violations of her.

The legislation

Victim Impact Statements are permitted by s 8 of the Victims Offences Act 1987. It provides:

> "8 *Victim impact statements* — (1) Appropriate administrative arrangements should be made to ensure that a sentencing Judge is informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim.
>
> (2) Any such information should be conveyed to the Judge either by the prosecutor orally or by means of a written statement about the victim."

Also relevant are the general provisions of s 3 of the same Act which deals with the treatment of victims of crimes. It reads:

> "3 *Treatment of victims* — Members of the Police, prosecutors, judicial officers, counsel, officials, and other persons dealing with victims should treat them with courtesy, compassion, and respect for their personal dignity and privacy."

There is a special definition of victim in s 2 of the Act which says:

> "2 *Interpretation* — In this Part of this Act, the term "victim" means a person who, through or by means of a criminal offence (whether or not any person is convicted of that offence), suffers physical or emotional harm, or loss of or damage to property; and, where an offence results in death, the term includes the members of the immediate family of the deceased."

Judicial comment

So far as the writer is aware, there have been no judicial decisions concerning the operation of the new Act, but one Judge has commented about Victim Impact Statements in the press. Quoted in a feature article by Pauline Swain on Violent Offending in *The Dominion* on 16 March 1988 Mr Justice Holland said about Victim Impact Statements:

> I don't believe that any judge, in imposing sentences, isn't aware already that people suffer as a result of crime. We sit through it day after day, seeing the people

giving evidence. The victim is not in a good position to give a reasoned view of what is appropriate. They are after revenge; it's an ordinary human reaction.

I rather think if we get too carried away by what victims say we will be influenced in some cases by revenge.

What should be the proper practice with such reports?
It is suggested that the following guidelines may be of assistance.

1 The statements should (following the wording of s 8) be *about* but not *by* the victim. While it is perfectly legitimate for them to contain statements about the emotional and psychological effects of the assault it is undesirable that they contain statements by the victim of the nature described in the second example above.

2 It is only in the case of the death of the victim that the statement may contain information about the emotional harm to members of the immediate family of the deceased.

3 The statements should contain assertions of fact that are capable of being verified by sworn evidence. Prosecutors, be they police prosecutors or counsel, not only have a general duty in this regard as part of the prosecution process but it is made more important by the provisions of s 3 of the Act. If extreme or unsubstantiated statements are made then defence counsel may wish to cross-examine the authors of the statements. If the author is the victim then there may arise a conflict between the desire to cross-examine and the provisions of s 3 of the Act. In any event counsel may not wish to cross-examine the complainant because counsel may want to stress in mitigation that cross-examination of the complainant has been avoided and thereby obtain some reduction in sentence. This approach is supported by the decision of the Court of Appeal in *R v Te Pou* [1985] 2 NZLR 508 which deals with sentencing in rape cases where pleas of guilty are entered. In any event it is the writer's view that if prosecutors are responsibly discharging their duties then such cross-examination or questioning of authors of Victim Impact Statements should not be required. Obviously Crown prosecutors should not unthinkingly hand in statements prepared by the police officer in charge of that particular case.

4 If the statement contains disputed matters of fact then defence counsel should be given leave by the sentencing Judge to require the author to be available for cross-examination and if necessary to call evidence in rebuttal. Where leave to cross-examine is given and the author is the complainant personally, the circumstance that an accused person has sought leave to cross-examine a complainant should not be to that person's detriment when considering sentence.

5 Particularly where serious physical or emotional harm is reported, the Victim Impact Statements should be in writing and supported, where applicable, by reports from medical advisers or other health professionals who have been involved in the treatment or counselling of the victim. Often this may not be necessary if the injuries have been sufficiently described in depositions or in evidence at the trial, however it is permissible under s 8 for statements to be made about the emotional harm to the victim and often evidence would not be adduced about such matters. It is in this area that prosecutors should take particular care with the statements and have them supported if possible.

6 Victim Impact Statements should be handed to defence counsel at the earliest opportunity. If a guilty plea is intimated beforehand, then they should be made available to the Court and defence counsel immediately the plea is entered. If an accused is found guilty of the offences then again they should be made available promptly. Police officers in charge of the case should already have on file or be able to obtain very quickly sufficient particulars to complete the statement with little delay. Provided this is done, defence counsel will have a reasonable opportunity to consider the reports, discuss them with the offender and if they take issue with any matter in the report, confer with the prosecutor before the final plea in mitigation is made before deciding whether or not to seek leave to cross-examine or call evidence. If supplied at the last minute in an extreme case, counsel should seek an adjournment of the sentencing to consider the matter.

7 The NZ Police should prepare guidelines on the preparation of Victim Impact Statements by the police officer in charge of the case and the use of them by police prosecutors. These guidelines should be included in the Police General Instructions.

8 There may be rare occasions where it could be helpful to the victim of a crime that he/she be provided with information on the background of the offender. This may be in the form of a psychiatric or other report supplied to the Court on sentencing. If that happens defence counsel will need to obtain the consent of the offender and the writer suggests it be made a condition of the Crown Solicitor supplying such report to the victim that it be kept confidential to the victim and his/her medical advisors or counsellors.

These proposals are not exhaustive and there may be other points which come to mind or will need to be considered by the Courts. If Victim Impact Statements are to become a useful part of the sentencing process then they must be able to be relied upon. It is hoped that if the suggestions in this article are followed then not only will Victim Impact Statements be of more value to the Courts but also the position of offenders will be reasonably safeguarded. □

Shareholder's protection: The s 209 remedy — a survey

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

The marked decline in share values in the latter part of 1987 has concentrated attention on various aspects of company law. Various aspects of the "rights" of shareholders have been discussed in the news media. In this article Dr Andrew Borrowdale analyses the case law that has developed in respect of the remedy available to a shareholder who complains that there has been oppressive or unfair discriminatory or prejudicial conduct that affects him or her. Dr Borrowdale suggests that s 209 of the Companies Act 1955 implies that the majority shareholders owe a duty to minority shareholders to refrain from oppressive conduct.

Introduction

Mark Twain once said of a classic that it is "something that everybody wants to have read and nobody wants to read".

A similar sense of lassitude assails the lawyer who must digest the mushrooming case-law on the shareholder's remedy provided by s 209 of the Companies Act 1955. What follows is an attempt to place the cases, English and New Zealand, in context. (Needless to say the literature on s 209 grows at an accompanying pace. For recent articles see A J Boyle "The Judicial Interpretation of Part XVII of the Companies Act 1985" in *Company Law in Change* ed B Pettet (1987) 234; J F Corkery "Oppression or Unfairness by Controllers – What Can a Shareholder Do About it? An Analysis of s 320 of the Companies Code" (1985) 9 *Adelaide L Rev* 437; Giora Shapira "Statutory protection of minority shareholders: towards the 'squeeze-out' " in *Contemporary Issues in Company Law* ed John H Farrar (1987) 203.)

As everyone knows, until 1980 a petition under s 209 was unlikely to succeed; there are only a handful of reported cases in which an order was obtained (*Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 (HL); *Re Harmer Ltd* [1959] 1 WLR 62 (CA); *Re Anticorrosive Treatments Ltd* (1980) 1 BCR 238; *Re Federated Fashions (NZ) Ltd* (1981) 1 BCR 297). In 1980 s 209 was amended to widen the grounds upon which an order could be granted; now the test is, crudely –

(1) has there been oppressive, unfairly discriminatory or unfairly prejudicial conduct? and
(2) is it just and equitable to grant an order?

Section 209 lends itself to the situation where one or more members in a closely held company is excluded from participation in management and profits (see, for example, *Re London School of Electronics* [1985] 3 WLR 474; *Re a Company* [1986] BCLC 362; *Re a Company* [1987] BCLC 94, *Re XYZ Ltd* [1987] PCC 92; *Re a Company* [1986] BCLC 376, [1987] PCC 372). But of course s 209 has potentially a much broader application. It is impossible to say in the abstract what the phrase "oppressive, etc" encompasses (cf the judgments in *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA)). More profitable is a piecemeal attack which chips away at some of the questions of construction and application.

Construction and application

1 Objective or subjective?

It is established that the test of unfairness is objective. There is no need to show that the conduct complained of was unfair to the knowledge of the perpetrator. It is simply a question of whether a reasonable bystander would regard it as unfair (*Re Noble & Sons Ltd* [1983] BCLC 273). In *Thomas* Richardson J said that it was not necessary for the complainant to point to "a lack of probity or want of good faith towards him on the part of those in control of the company" ([1984] 1 NZLR 686 at 693).

2 Capacity as member

The English equivalent of s 209 is still plagued by the qualification that the complainant must show conduct prejudicial to himself as *member* (see, for example, *Re a Company* [1983] BCLC 126, [1983] 2 All ER 36). (In *Hahlo's Cases and Materials on Company Law* 3 ed by H R Hahlo and J H Farrar (1987) at 524 et seq there is usefully set out the equivalent provisions of the British, Australian, Canadian and New Zealand statutes.) Section 459 UK Companies Act 1985 allows a petition on

> the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself).

However in recent cases the English Courts appear more willing to allow a remedy even if the complainant's rights as a member are strictly not affected (*Re a Company* [1983] BCLC 151, [1983] 2 All ER 854, [1983] 1 WLR 927). Alternatively the interests of a member are widely interpreted (*Re a Company* [1986] BCLC 382).

Fortunately this is irrelevant as far as New Zealand is concerned for s 209(1) expressly states that a complaint may be considered whether it affects the complainant in his capacity as member or in any other capacity. But with one exception only a member may complain. Section 209(6) defines a member to include the legal representative of a deceased member, and every person to whom shares of a member have been transferred by operation of law.

"Transfer" is an elastic term when used in relation to shares (see, for example, *Safeguard Industrial Investors Ltd v National Westminster Bank Ltd* [1980] 3 All ER 849, [1981] 1 WLR 296, [1982] 1 All ER 449 (CA), [1982] 1 WLR 589; *Bond Corporation Pty Ltd v White Industries Ltd* [1980] 2 NSWLR 351). In the context of s 209(6) the English cases decide that "transfer" means something more than a mere agreement to transfer the shares; there must have occurred at least the delivery of the certificates and signed transfer forms. In *Re a Company* [1986] BCLC 391, *Re Mossmain Ltd* [1987] PCC 104, a director had been appointed to the board in the place of her husband who was unable to participate because he was subject to a covenant in restraint of trade. When she was dismissed from the board, she sought an order under s 459. She failed. In the first instance her name had not been entered on the register – was she therefore not a member in terms of s 22 of the UK Companies Act 1985? Nor was there any assistance to be had from s 459(2) which confers the right to petition on persons to whom shares have been "transferred or transmitted by operation of law". There was no question of transmission, and Hoffmann J, following Harman J in *Re a Company* [1986] 2 BCC 98, 951, said that "transfer" required at least that a proper instrument of transfer should have been executed and delivered, which it had not.

It is not clear whether the same interpretation will be adopted by a New Zealand Court. In *Re Fidelity Life Assurance Co Ltd* (1987) 3 NZCLC 96-151 Thorp J said, in reference to s 209(6):

> That extension of the meaning of the term "member" indicates the intention that persons having beneficial interests in shares should be able to apply, whether or not they have been able to obtain registration of their rights in the company's register of shareholders. (at 100, 056)

The general rule is that the equitable title in shares passes on the conclusion of specifically enforceable agreement of contract and sale (*Oughtred v IRC* [1960] AC 206 (HL) at 240; Borrowdale "Voting Rights on the Sale of Shares" (1986) 3 *Canterbury L Rev* 35). There is no necessity for the delivery of documents of transfer. If then Thorp J in *Fidelity Life* really intended that all transferees who have acquired a beneficial interest should have standing under s 209(6), then this necessarily means that the term "transfer" cannot be restricted to the meaning of the transfer of documents. At another point, however, Thorp J appeared not to intend this result. In *Fidelity Life* a former member who had sold her entire shareholding to a director of the company petitioned under s 209 on the basis that the sale had taken place at a gross under-valuation of the shares, to the knowledge of the purchaser. Thorp J held that she had no standing: "member" does not encompass former members. On being told from the bar that the petitioner had subsequently entered into a contract for the purchase of a share, Thorp J said that this could not affect her right to claim under the present petition (at 100,057). Since the petitioner, by this agreement would have acquired the equitable title in the share, ie a beneficial interest, Thorp J evidently considered that "transfer" as it is used in s 209(6) does not extend to transfer of the equitable title without transfer of the relevant documents.

Although a former member has no standing to petition, he can be joined as co-respondent with the company notwithstanding that the individual has since transferred all his shares to a third party (*Re a Company* [1986] BCLC 69, [1986] 1 WLR 281; *Re Fidelity Life Assurance Co Ltd* (1987) 3 NZCLC 96-151, at 100-057).

3 Can conduct which affects all shareholders equally be prejudicial or discriminatory?

In *Re Carrington Viyella* (*Financial Times* Comm Law Reports, 16 February 1983) one ground of complaint was that the board had entered into a disadvantageous service contract with its chief executive. It was held that this could not form the basis of a complaint under s 459 because if it were true, it was a breach which would affect all shareholders equally. Vinelott J said that to succeed the complainant must show conduct which is unfairly prejudicial to *part* of the shareholders. (See too *Re a Company* [1986] BCLC 376 at 380.)

Some support for this is found in the wording of the English provision which requires conduct "unfairly prejudicial to the interests of *some part of the members*" (emphasis added). There is no such wording in s 209 of the New Zealand statute, and in *Thomas's* case Richardson J said that the section refers to "conduct which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only" ([1984] 1 NZLR 686 at 693).

However, a contrary view seems to have been taken in the most recent New Zealand case on s 209, *Vujnovich v Vujnovich* [1988] BCL 233. Three brothers were the only shareholders in three companies. Their primary business was property development. The plaintiff sought an order under s 209 that he should be entitled to purchase the shares of his two brothers, the defendants, while they in turn counter-claimed for an order that they should purchase his shares. The conduct of which the plaintiff complained was that his brothers

failed to work, were obstructive (in failing to execute certain documents, etc) and had acted unreasonably in failing to agree to proposals for resolving the deadlock. For their part the defendants complained that the plaintiff had excluded them from decision-making, had pressurised them to sell their shareholdings, diverted an investment opportunity to a company owned by the plaintiff's family, and so on.

Henry J accepted a failure to act could give rise to a legitimate complaint for which an order under s 209 could be given. But His Honour considered that this category of conduct could not constitute "conduct of the affairs of the company" (see below), and in any event was not oppressive, discriminatory or prejudicial to the plaintiff. Henry J said:

> I do not see how it can be said that the failure to work is oppressive, discriminatory or prejudicial to [the plaintiff]. The effect of the failure to work could only mean the less efficient running of the company or the need to have others do the work not done, which has a financial consequence to all three shareholders, not singularly to [the plaintiff].

It is a curious argument; the fact that the wrongdoers are prepared to suffer the consequences of their own conduct precludes the complainant from a remedy.

4 Must the complainant show diminution in the value of his shareholding?

In *Re Bovey Hotel Ventures Ltd* (1981, unreported) Slade J said that a member of a company will be able to bring himself within s 459 of the UK Companies Act 1985 if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised through the unfair conduct of those in control. But it is unlikely that diminution in value is a pre-requisite. In *Re Noble & Sons Ltd* [1983] BCLC 273 Nourse J accepted Slade J's statement, but accepted also that exclusion from participation in management could amount to unfairly prejudicial conduct in cases such as *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL), even though the value of the complainant's shareholding would not have been seriously diminished.

Nor is it necessary that the complainant demonstrate actual infringement of a legal right (*Thomas's* case [1984] 1 NZLR 686 at 693; *Re a Company* [1986] BCLC 382 at 387).

In *Re Posgate & Denby Ltd* [1987] PCC 1 the company, which was engaged in the business of a Lloyd's underwriting agency, had an issued share capital of 100 voting shares and 25,000 equity shares which carried no voting rights except upon a resolution to wind up the company. The petitioner Posgate held 25 of the voting shares, and personally, or through his family or trustees, had an interest in just over half the equity shares. Because the company was unable to insure its operations by way of a so-called error and omissions policy, as required by Lloyd's, it could not continue and therefore was compelled to sell off the parts of its business. It received no offers for the three main syndicates handled by the company, and it was proposed to sell these off in a "management buy-out" to certain directors and managers of the company. Posgate then sued under s 459 for an injunction restraining the company from proceeding with the sales without the approval of the equity shareholders. The element of unfairness arose from a combination of factors, viz a conflict of interest between a number of the directors approving the sale to themselves of the syndicates and the serious undervaluation of the syndicates (although counsel for Posgate conceded that they could not have been sold for any more to a third party, since no offers at all had been received).

Hoffmann J began with the principle that –

> the concept of unfair prejudice which forms the basis of the jurisdiction under s 459 enables the court to take into account not only the rights of members under the company's constitution but also their legitimate expectations arising from the agreements or understandings of the members inter se (at 9, drawing an analogy with the principle in *Ebrahimi)*

Hoffmann J then went on to ask whether Posgate could be said to have had a legitimate expectation that in the circumstances of the present case the board would not dispose of the syndicates without the approval of the holders of a majority of the equity shares, although it was perfectly entitled to do so in terms of the articles. To succeed, Posgate had to show some special circumstances which created a legitimate expectation that the board would not do so. In this he failed, because –

(1) the articles made it clear that the whole of the conduct of the company's business was entrusted to the board, to the exclusion of the equity shareholders, who had no right to vote except in one immaterial respect;

(2) the articles expressly permitted empowered directors to participate in decisions on transactions in respect of which they had disclosed conflicts of interest;

(3) although there was a risk that the syndicates were being disposed of at a price below value, this did not distinguish the decision to sell from other decisions to be made by the board for by definition all business decisions involve an element of risk.

5 When do acts of the directors amount to "conduct of the affairs of the company"?

It is difficult to extract any statement of principle from the cases on this point; everything depends on the facts. It is an important consideration, not least because the decision in *Vujnovich* goes some way in restricting the scope of the s 209 remedy on this very basis, in contrast to other New Zealand cases suggesting a more liberal approach (*Re The Great Outdoors Co Ltd* (1984) 1 BCR 677 at 680; *Re Fidelity Life Assurance Co Ltd* (1987) 3 NZCLC 96-151).

Re a Company [1986] BCLC 382 concerned partly the recommendation of a takeover bid to the shareholders by the board. For the respondents under a petition under

s 459 it was argued that advice to shareholders is something which the directors do in their personal capacity and for which they accept personal responsibility. It is therefore not part of the conduct of the company's affairs or an act or omission of the company within the meaning of s 459. However Hoffmann J thought that the fact that the directors accept personal responsibility for advice to shareholders was not inconsistent with the advice being given on behalf of the company; for one thing, it would be quite legitimate for the directors to incur expenses which the company would have to pay in obtaining independent advice.

In *Re a Company* [1987] BCLC 141 the two petitioners were, together with the respondent, the only shareholders and directors of the company, the principal ground of complaint was that the respondent had personally paid off a loan which the company owed to its bank without informing the company and had taken a transfer of the bank's security. Harman J allowed a motion by the respondent to strike out the petition as disclosing no cause of action. To obtain relief under s 459 it was necessary for a petitioner to show that the unfair prejudice arose from the way in which the affairs of the company were conducted or was attributable to an act or omission on the part of the company, and not from the acts of a shareholder carried out in a personal capacity outside the course of the company's business. The repayment by the respondent of the loan involved the respondent acting in her personal capacity and was not conduct in the affairs of the company. In any event it did not involve conduct that was prejudicial in any way since the repayment of the loan and the transfer of the bank's security did not alter the position of the company.

In the English cases at least the distinction that is material is whether the directors are acting in their personal capacity. (This is no bar of course to an order for winding up under s 217(f) of the Companies Act 1955; see, for example, *Re Rongo-ma-tane Farms Ltd* (1987) 3 NZCLC 96-165.) In *Vujnovich* Henry J was prepared to go rather further in finding that the conduct complained of was not conduct of the affairs of the company. For example, His Honour considered that the failure by two directors to pull their weight in the management of the company was not conduct of this sort. He said:

> I do not see how the failure of a director or shareholder in a partnership type company to continue working in a full and meaningful way in accordance with the original intention of the members can be part of the conduct of affairs of the company or constitute acts of the company. The company's affairs are still being conducted in the same manner as before, albeit with less working input from a particular source. The quality and extent of the work carried out by an executive director cannot, in my view, be conduct of the affairs of the company or acts of the company – they are simply elements of an obligation which may be owed to the company, and have nothing to do with the way in which the company is controlled, what its policies are or what powers it exercises.

The reasoning is that the instrument of oppression, etc, must be the company itself. It may well be that in a particular case the failure of a director to act does not affect the company. But if the company's affairs are adversely affected, and the complainant is prejudiced, it seems a fine distinction to say that the origin of the prejudice lies not in the manner in which the company's affairs are conducted but in the conduct of the directors.

6 Is a bona fide complaint enough?

This arises from the wording of s 209 which in 209(1) says that "anybody who complains . . . may make application" and in 209(2) says that "if on any such application the Court is of the opinion that it is just and equitable to do so, the Court may make such order as it thinks fit".

In *Vujnovich* it was argued for the plaintiff that all that is necessary to get into Court is a bona fide *complaint* of oppressive, unfairly prejudicial or unfairly discriminatory conduct. It may be that this complaint cannot be substantiated. Nonetheless, the Court may grant an order on the just and equitable ground if there is reason to do so.

This was rejected, quite rightly, by Henry J. He said:

> The section must be read as a whole, and when that is done I think it clear that the establishment of "oppression" is a necessary pre-requisite to the making of an order. If that were not so, the words in subsection (1) would be otiose – there would be no point in requiring a complaint to be made of specifically defined kinds of conduct if the existence of that conduct was not a necessary foundation for an order.

Section 209 is not a catch-all provision for the processing of every grievance, however justified. In *Re a Company* [1986] BCLC 362 at 368 Hoffman J warned against the statutory remedy becoming an instrument to serve the tyranny of the minority:

> the very width of the jurisdiction means that unless carefully controlled it can become a means of oppression. The threat of such proceedings by a dissident and possibly legally-aided shareholder in a small company can be used to bring pressure on a majority to accept the price he demands for his shares. (See too *Re a Company* [1987] BCLC 94 at 102; *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 at 697; *Mellon v Alliance Textiles Ltd* (1987) 3 NZCLC 96-158 at 100,090).

And in *Vujnovich* Henry J said that an order under s 209 should not be lightly made.

7 The self-help principle

A complainant cannot expect an order under s 209 if either it is in his own hands to remedy the wrong of which he complains, or if machinery is provided by which he can be bought out. In *Vujnovich* the two defendants, being in the majority could themselves have taken steps to ensure their rightful

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Certifying pre-nuptial agreements under the Matrimonial Property Act 1976

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

Pre-nuptial agreements are likely to become more significant in the field of family law. This article looks closely at the recent decision of Smellie J in C v C *[1988] BCL 626. In the particular circumstances of that case the Judge held that the agreement had not been duly certified and that it would not be just to enforce it. As the author concludes, this case illustrates the need for considerable care and skill in drafting such agreements, and that the duty of the certifying solicitor cannot be seen as a mere formality.*

The case of *C v C* [1988] BCL 626, is noted only upon the complex and comprehensive facts necessary to show why Smellie J held that a s 21 pre-nuptial agreement had not been duly certified and further that it would be unjust to give effect to it. The applicant wife, Mrs C, had sought orders declaring her interest in matrimonial property and the respondent husband, Mr C, had applied under s 21(8)(b) and s 21(10) for a declaration that a deed entered into between them on 24 March 1982 was void.

The parties' background

In 1978 the parties had begun to live in a de facto relationship at Mr C's home, Mrs C bringing with her her two daughters. The parties eventually married on 23 July 1982. In the events which happened, the marriage proved to be a "short" one within the meaning of s 13 of the Act.

His Honour found that it was probable that, up until late 1981, Mrs C was under the misapprehension that the period of the de facto relationship would automatically be taken into account in the event of her later making a claim under the Matrimonial Property Act 1976. Whether that was so or not, however, she was clearly of the view that, morally, she was entitled to consideration for those four years. In answer to Smellie J, she said that she considered the four years should weigh equally with the two years of marriage that followed. Towards the end of 1981, it was Mrs C who was anxious to have a s 21 agreement drawn up recording some recognition of her contribution to the first matrimonial home – it was later exchanged for a second one – and providing for her, as she put it, some security for herself and her children in recognition of the four years she had spent with Mr C. Mr C on the other hand, was lukewarm about the idea and unwilling to recognise her claim to any greater extent that he was obliged to.

Apparently Solicitor X received some instructions during late 1981 and, on 25 January 1982, he wrote to Mr C enclosing a suggested deed. This recorded that the parties were living together and that they would "shortly marry". It also recorded that, pursuant to s 21, they desired to enter into a deed settling all matters relating to matrimonial property in the event of a dispute. There were six clauses and, broadly, the effect of the deed was that Mrs C was to receive half the gross value of the first matrimonial home in excess of $85,000. That figure was clearly regarded by the parties as Mrs C's equity in the first matrimonial home at the time. They were to hold as separate property their respective cars and bank accounts

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place in the management of the companies, but did not. If the articles provide, for example, that any member wishing to sell his shares should give notice to the company, so constituting it his agent to offer his shares to the other members at a fair value certified by the auditors, then he cannot seek an order for the purchase of his shares until he has exhausted the procedure laid down (*Re a Company* [1986] BCLC 362; *Re a Company* [1987] BCLC 94, [1987] PCC 92).

Conclusion

Much of the above describes technical subtleties. We have yet to see the procedural tail wagging the substantive dog, but it cannot be far off. To afford the minority a remedy for oppressive and lesser conduct by the majority implies that the latter owe the minority a duty to refrain from such conduct. Section 209 may well be the peg upon which the Courts hang the duty of controlling shareholders. □

and, in particular, Mrs C's $11,000 (derived from the settlement following the break-up of her former marriage) was to remain her separate property. All other family chattels were to be divided equally and all other property save after-acquired separate property as defined by the Act was to be matrimonial property and dealt with according to the provisions of the 1976 Act and its amendments. The deed was not limited as to time and did not seek to depart from the provisions of the Act in respect of after-acquired property.

Neither party was, the Court observed, happy with this document. Mr C did not like it, as far as the Court could judge, partly because he did not want to enter into any deed and partly because he was reluctant to provide a half interest in any increase in the value of the first matrimonial home to Mrs C. Mrs C, on the other hand, regarded the provisions as unfair and an inadequate reflection of the fact that she and her husband had been together for four years. The Court was satisfied that the provisions of this draft deed were discussed extensively by the parties and that the issue caused some tension between them. Mr C remained reluctant to commit himself and Mrs C held to her belief that she was entitled to something more by way of recognition.

The parties consequently went back to see Solicitor X on 24 March 1982. The Court was satisfied that Mr C was not then in the best of health and felt himself under some pressure from Mrs C to make some specific provision for her in a deed in the event that their contemplated marriage should fail. It was significant that Solicitor X, who had first acted for Mrs C and for whom, consciously or otherwise, he felt the primary obligation, nonetheless volunteered when giving evidence that, out of fairness to Mr C, he had gained the impression at some stage during the discussions in March 1982 that Mr C was entering into the deed because Mrs C wanted something settled. Also, Solicitor Y, the solicitor who witnessed Mr C's signature to the deed signed that day, recalled specifically that Mr C appeared nervous. Solicitor Y attributed that to the fact that the deed was required urgently and he, Solicitor Y, had gained the impression that the parties were going to be married that very afternoon. By comparison, Solicitor X's clear impression was that that Mrs C was concerned for security for herself and her children and was anxious that the matter be finalised.

Apparently the interview with Solicitor X occurred shortly after midday on 24 March 1982. Having received instructions, he sent the parties away to have lunch and arranged for the deed to be available some time prior to 1.45 pm. When the parties returned to his office, Solicitor X advised Mrs C (in the absence of Mr C) on the provisions of the deed, witnessed her signature and provided the necessary certification. Solicitor X had apparently arranged for Solicitor Y to be available in what was otherwise solicitor Y's firm's lunch hour to see Mr C, who presented himself at Solicitor Y's office (which was in the same building as Solicitor X's office) with the deed at approximately 1.45 pm.

Solicitor X described his instructions on the day as "rushed" and, said His Honour:

> upon perusal the document impresses as one prepared under pressure and contains on the face of it an internal conflict. It commenced by naming the parties and there then followed three recitals which recorded that the parties intended to marry in March or April and that in the event of a dispute arising in the future they had agreed pursuant to s 21 of the Act, and further they had agreed that the deed should not come into force until they married. The operative provisions of the deed then read as follows:
>
> "*NOW THEREFORE IT IS AGREED BETWEEN THE PARTIES* that should a dispute arise between them as to the property the following provisions shall apply:
>
> *1. THE* property will be sold or valued and the said [Mrs C] will be forthwith paid twenty-five percent (25%) of the gross value of the property.
>
> *2. THAT* the sum of *ELEVEN THOUSAND DOLLARS* ($11,000) being the present bank balance standing to the credit of [Mrs C] shall when the parties marry be transferred into a joint bank account in the names of [Mr C] and [Mrs C].
>
> *3. ALL* other existing property of the parties is deemed to be separate property.
>
> *4. ALL* future acquired property during the period of this Deed shall be deemed to be jointly owned property.
>
> *5. THIS* agreement shall cease to operate at the expiration of three (3) years of the date of the marriage of the parties."

Solicitor X acknowledged when giving evidence that the deed did not make sense as drawn but he contended that the parties were well aware that cl 1 referred to the first matrimonial home. His affidavit (dated 24 February 1986) was made one month short of four years after the event and his evidence before the Court six years after the event. Shortly before the hearing he had unearthed and made available to counsel for both parties his file on the matter and, although it enabled him [Solicitor X] to fill in some details, it contained no record of the instructions received on 24 March 1982 or other information which might have been used to refresh his memory of the events of that day. As a result, although endeavouring to be helpful and impartial, he was unable to say with any certainty what the attitudes of the parties were or who, for example, had suggested that cl 5 should be included.

Solicitor Y's affidavit was sworn on 1 November 1985, some three and half years after the event. He recalled the occasion, however, partly because of the urgency that was impressed upon him by the request to see Mr C during the lunch hour and partly by the fact that he recalled Mr C's nervousness. Solicitor Y said in evidence before the Court (though not in his affidavit) that he believed that he had perceived the conflict between clauses 1 and 3 and had telephoned Solicitor X about it and ascertained that cl 1 was intended to refer to the first matrimonial home. He said he had contemplated having the clause changed and was unable to explain why the deed was signed without amendment. It was not put to Solicitor X (who gave evidence before Solicitor Y) that this telephone conversation had taken

place. Mr C, on the other hand, denied that it had occurred.

Solicitor Y's affidavit stated that he explained to Mr C "the effects and implications" of the agreement and his certificate on the deed was to that effect. Before the Court, however, Solicitor Y acknowledged that he had inquired in a general sense of Mr C and had been satisfied that the client knew what was involved and what he was doing. His Honour asked certain questions, some of which were:

Q What did you tell [Mr C] were the effects and implications of the deed as it stands?

A Comparatively little, Sir. Having read it through myself and discussed a general preamble with [Mr C] little seemed to be raised by him and there was little discussion further, Sir.

Q I take it you had no occasion to explain to him clause by clause what the effect of it was?

A No.

His Honour then discussed with Solicitor Y the reference he said he had made to Solicitor X regarding the ambiguity between clauses 1 and 3, and asked:

Q Why did you let him sign it like that?

A Basically because, having had some reservations myself, I asked him if he wished to proceed and the answer was an unequivocal yes.

Q Why did you put your certificate on the end saying you had explained the effects and implications of the deed?

A Because, Sir, my measuring of the man as a personal opinion was that he did understand the effects and implications of the deed having read it through and [answered] what questions I asked.

His Honour concluded, on the basis of the affidavit and viva voce evidence of the two solicitors, that he was not satisfied that the effects and implications of the agreement were explained to Mr C. On the face of it, without the introduction of parol evidence to clear up the ambiguities, no rational explanation as to meaning could be given. In addition, and most importantly, the Court was not satisfied that it was ever explained to Mr C that he was contracting out of the provisions of s 13 of the Act dealing with marriages of short duration. "By that contracting out, of course," continued the Court, "he was providing for a share in [the first matrimonial home] or any subsequent matrimonial home, which [Mrs C] might otherwise not be able to sustain in the event of the marriage failing within the first three years."

So far as the parties themselves were concerned, His Honour was satisfied that they both understood that cl 1 was intended to refer to the first matrimonial home. Mrs C appears to have recognised that cl 1 represented a significant advantage for her over and above the earlier proposed deed. Mr C, however, possibly because of his ill-health and desire to get something signed for the sake of peace, appeared to have misunderstood the effect of cl 1 because he thought the reduction from 50% to 25% in the clause was in his favour. In reality, the original 50% only related to any recovery beyond $85,000, whereas the subsequent 25% represented one-quarter of the gross value of the property, irrespective of encumbrances or value at the time of any dispute arising. Mrs C made it clear in evidence before the Court that, even when she signed, she still considered she was entitled to half the first matrimonial home. (She pointed out that she was putting in her $11,000 and in that sense sharing equally with Mr C everything she had.) But she said she was not greedy and 25% was as far as Mr C would go and she was content with that. Significantly, in the Court's view, she also conceded that she appreciated that, if the first matrimonial home was sold and another purchased, then pursuant to cl 4, the replacement home would become joint property. She said (though Mr C denied it) that the first matrimonial home was on the market at the time the deed was signed and she had in mind that, before too long, the probability was that the deed would secure to her an equal interest in a replacement home.

Mr C, on the other hand, labouring under a misconception as to what cl 1 provided, appeared not to have understood the significance of clauses 4 and 5 except that he had the idea (and said it had been discussed often with Mrs C) that they were both agreeing that, if the marriage did not last for three years, then the agreement would be of no effect and neither of them would be hurt.

Much was made, on behalf of Mrs C, of the fact that Mr C was, at the time, a real estate agent and must have understood what was going on. His Honour said he had watched Mr C carefully and noted the various answers that he gave concerning some of the more technical aspects of the transaction. His previous occupation, before moving into real estate agency about 1980 (when he was in his late 40s), was that of taxi-driver and greyhound-trainer. His Honour said:

> He may have the personality to operate reasonably successfully as a real estate agent but my assessment was that his understanding of property transactions and of this transaction in particular was unsophisticated and inaccurate. [Mrs C], on the other hand, struck me as being much more astute.

His Honour went on to say that, without intending to be unkind or critical to the parties, with hindsight the marriage had had little prospect of success from the start. In his view, the marriage had been preceded, and perhaps, delayed from time to time by the bickering and negotiating about the deed. Solicitor X's office had received a telephone advice in June 1982 that resulted in one of the staff solicitors drawing up a fresh deed which increased the wife's interest in the gross value of the first matrimonial home to 50%. Neither party acknowledged having given that instruction, but His Honour drew the inference that the subject of shares in matrimonial property in the event of dispute was still under discussion a month

before the marriage.

There was a peripheral problem. When the first matrimonial home was swapped for the second, Solicitor X handled the transaction on Mr C's behalf. Mr C's evidence was that he specifically inquired of Solicitor X as to whether or not a straight exchange of the properties would be affected by the provisions of the deed. His evidence was that Solicitor X assured him that the second matrimonial home could go into his name and that it would not be affected by the deed. Solicitor X denied that and said that, in fact, the deed was not mentioned to him and that, had it been, he would have drawn Mr C's attention to the provisions of cl 4 and pointed out that the second home would become jointly owned property. Furthermore, Solicitor X acknowledged that, had he thought of it, it would be been appropriate for him to have advised his client on that point so that he could take it into account before completing the transaction.

His Honour observed that both Solicitor X and Mr C were obliged to rely on their respective recollections of something that happened four and a half years ago, and that he found it extremely difficult to make a finding as to what actually happened. In view of his conclusion regarding the validity of the deed, however, it was not necessary for His Honour to record a final conclusion on this issue. He observed, however, that it was quite possible that Solicitor X once again assumed that Mr C understood the significance of the deed in a way which the Court had already held not to be the case. In short, Mr C may well have directed a question to Solicitor X which he, Mr C, thought was sufficient to indicate his concern, but his question was not perceived by Solicitor X as opening up an area for advice in respect of clauses 1, 4 and 5. It was also apparent that, having advised Mrs C originally on the effect of the deed, Solicitor X may have felt some embarrassment in then advising Mr C some 18 months later on the same issues in areas where Mr C was seeking to conduct the transaction in a way which was adverse to the potential interests of Mrs C. Be all that as it may, in September 1983 Mr C effectively swapped the first home for the second, carrying over a mortgage on the old home to the new one. (This had been raised in order to assist Mr C in settling up matrimonial matters with his former wife.)

Was the deed void because s 21(4)-(6) were not complied with?

His Honour said that s 21(4) was complied with, and subss (5) and (6) had not been complied with. While he was satisfied that Mr C was seen by an independent solicitor, the legal advice he had received "clearly fell short of what the Act requires". The effect and implications of the agreement he was entering into had not been explained to Mr C and His Honour's finding was, contrary to the impression gained by Solicitor Y, that Mr C did not understand the effect and implications of it. There was also the fact that, without the introduction of parol evidence, the effect and implications of the agreement as a whole were not capable of explanation. (This matter is pursued below.) His Honour cited from para 5.71 of the second edition of *Fisher on Matrimonial Property* and referred to the decision of Barker J in *B v B* (1979) 3 MPC 25, saying:

> That was not a case of contracting out but one of agreement after a dispute had arisen. Nonetheless His Honour's perceptive comments regarding the emotional overtones not uncommonly found (and which were clearly present in this case) and the necessity for solicitors advising "to get to grips" with the client's particular situation and to "make some . . . approximate assessment of what the person would receive if the matter were to go to Court" are all very relevant.

Smellie J accordingly held the agreement to be void under s 21(8)(a). He observed that the challenge had been made under s 21(8)(b). Pursuant to s 34, however, he held that he had jurisdiction to make a finding under s 21(8)(a).

Counsel for Mrs C had invited the Court to declare, under s 21(9), that the agreement should still have application in whole or part on the basis that the non-compliance had not materially prejudiced the husband's interests. His Honour could not accept this in all the circumstances of the case. The rushed nature of the instructions, the internal conflict within the document and his finding that the parties perceived the effect of the agreement differently, in particular the absence of any explanation to Mr C that he was contracting out of the provisions of s 13, were among the major factors leading him to his conclusion on this point.

Was the agreement void because unjust?

His Honour proceeded carefully to consider s 21(8)(b) and (10) and concluded on the facts that it would also be unjust to give effect to the agreement. As to the provisions of the agreement, he mentioned that the conflict between clauses 1 and 3 was immediately apparent. The deed did not say what was to happen to the joint bank account in cl 2 in the event of a dispute. Nor did it say in what proportions future acquired property would be held relative to cl 4. Counsel for Mr C had, indeed, submitted that, as a preliminary point, the deed was so vague and uncertain that it should be held void on that ground alone. Counsel for Mrs C, on the other hand, submitted that the parties clearly intended cl 1 to refer to the first matrimonial home and argued that "jointly owned property" meant property owned in equal shares. His Honour said:

> The approach to the interpretation of such a deed made pursuant to the Matrimonial Property Act 1976 should not be too technical but I observe in passing that no application for rectification was made by [Mrs C] and on the evidence I heard (particularly the viva voce evidence of the parties and solicitors) I would have some doubt as to whether such application would have been successful.

His Honour then considered the time that had elapsed since the agreement was entered into, saying

that, on the face of it, there had been "a very long lapse of time". It appeared perfectly clear that immediately after the parties' separation, the then counsel for Mr C challenged any concept of equal sharing so far as the matrimonial home (which had always been the major asset) was concerned. It was true that the husband's application to have the deed declared void was not filed until 26 June 1985, but it seemed to the learned Judge inevitable that such a challenge had been heralded well prior to that date. Even if that were not the case, however, the Court would not regard the delay in formally challenging the deed until June of 1985 as such an elapse of time as would justify the denial of a remedy to Mr C.

As to the matter of the agreement being unfair or unreasonable in the light of all the circumstances at the time it was entered into, His Honour considered the cases showed quite clearly that the issue of reasonableness must be measured against what would have been available under the Act in the absence of the agreement. He assumed, as did Counsel for Mrs C, without necessarily deciding the point, that under clause 4 of the Deed the second home became jointly owned property, giving Mrs C a right of succession and, pursuant to the usual rules of equity, a 50% interest. That had to be measured against the 20% interest which the Court found to be her entitlement under the Act. Making that straightforward comparison, Smellie J concluded that the agreement was unreasonable in the light of all the circumstances at the time it was entered into. His Honour added that he did not propose to make a finding as to whether it was unfair at the time it was entered into. He simply recorded that, in that area, he was left with a feeling of anxiety that Mr C was under pressure, unwell and ill-advised, and that all those factors might have added to a finding of unfairness had it been necessary to make a final decision.

On the matter of whether the agreement had become unfair or unreasonable in the light of any changes in circumstances since it was entered into (whether or not those changes were foreseen by the parties), His Honour observed that the switch from a 25% interest in the first home to a 50% interest in the second one was, according to Mrs C, foreseen by her at the time the contract was entered into. But, as was clear in this context, what the parties foresaw was irrelevant. What mattered was what actually happened. In the Court's judgment what actually happened subsequent to signing rendered the agreement unreasonable.

As to any other matters that the Court considered relevant, His Honour noted that there was an overlap between, eg subss (6), (7) and (10)(e). The undue haste with which the deed was prepared, its internal conflict and the absence of any explanation of the effects and implications to Mr C, in particular the contracting out of the provisions of s 13, were all matters that were relevant under this sub-heading.

For the sake of completeness, the Court also referred briefly to s 21(11), noting that, had a full investigation of the submission of counsel for Mr C as to uncertainty been undertaken, it "may have led to the deed being held void outside the provisions of the Act in any event. I have not felt called upon, however, to pursue that matter in view of my firm findings under s 21(8)(a) and (b)."

The moral here is not far to seek. Section 21 agreements, whether pre-nuptial or post-nuptial, require considerable care and skill in the drafting. The certifying solicitor's duty is not to be seen as a mere formality which may be perfunctorily performed but as one of a serious nature, very likely calling for the expenditure of some considerable time and effort and calculation. It would also seem to be a wise practice for those in the respective positions of Solicitor X and Solicitor Y to keep full records of their instructions and their explanations of the implications and effects of agreements. □

Correspondence

Dear Sir,

Re: Restraint of trade clauses

Concerning the efficacy of restraint of trade clauses (see [1988] NZLJ 106) the drafter must surely contend with the Commerce Act 1986 and in particular s 28:

> (1) No person, either on his own or on behalf of an associated person, shall—
> (a) require the giving of a covenant; or
> (b) give a covenant—
> that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

Subsection 4 of s 28 provides:

> No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

In s 3 a market is defined as:

> . . . a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense.

Does this mean that if there is one bakery in the town of Te Teko one cannot have an enforceable restraint of trade clause in an agreement for sale for it, but if there were twelve bakeries there would not be substantially less competition if the former proprietor was restrained by a covenant? On the basis that the sale of the good will of a business provides the justification for and the measure of enforceability of the restraint of trade, prospective purchasers of business may well be disinclined to pay very much for goodwill in the future, if s 28 applies.

P J Sara

The criminal proviso: the question of inadmissible evidence

By Professor G Orchard, Faculty of Law, University of Canterbury

In the criminal field the technicalities of the law are not in themselves sufficient to gain an acquittal nor an order for a new trial on appeal unless the Court of Appeal is of the view there has actually been a substantial miscarriage of justice. Professor Orchard considers the effect of this provision as illustrated, particularly, in the two recent cases of R v Johns *and* R v Blackburn. *The author puts forward the view that in general terms it would not seem appropriate for the proviso to be used in respect of an essential part of the prosecution case when the Crown has deliberately chosen to rely on material which was received in evidence but that the prosecution should have realised was inadmissible, or failed to meet certain necessary preconditions for admissibility.*

The proviso to s 385(1) of the Crimes Act 1961 empowers the Court of Appeal to dismiss an appeal against conviction notwithstanding that a point is decided in favour of the appellant, if the Court considers that "no substantial miscarriage of justice has actually occurred"; and the first proviso to s 382(2) requires dismissal of an appeal unless the Court finds that "some substantial wrong or miscarriage of justice" has occurred. Notwithstanding the shift in onus it is doubtful whether there is any difference in practice in the effect of these provisos: Adams, *Criminal Law and Practice in New Zealand* (2 ed), para 3330.

The Courts have not been content to apply such provisions without some analysis of the concept of a "substantial miscarriage of justice", and in cases where it is found that inadmissible evidence has been received it has long been held that the appeal should nevertheless be dismissed only if "a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict": *Stirland v DPP* [1944] AC 315, 321; cf *R v Harz and Power* [1967] 1 AC 760, 824. Although the question has been raised whether this test might be "stricter than the language of the statute warrants" (*Myers v DPP* [1965] AC 1001, 1025, per Lord Reid), it appears to have been consistently applied in New Zealand. Two recent decisions of the Court of Appeal, however, indicate that some qualification to it is necessary.

Johns and *Blackburn*

In *R v Johns* [1987] 1 NZLR 136, D had been convicted of two drug offences after the trial Judge had held that tape recordings of private conversations (and transcripts thereof) were admissible in evidence. The Court of Appeal held that this was wrong because the mandatory requirements of s 24(b) of the Misuse of Drugs Amendment Act 1978 had not been complied with, the prosecution having failed to supply D with a statement disclosing the surnames and addresses of the parties to the conversations, although they were known to the police. Nevertheless, although the evidence was probably essential to the Crown case, the Court held that there had been no miscarriage of justice and applied the proviso to s 382(2) to dismiss the appeal.

In *R v Blackburn* [1987] 1 NZLR 143, D had been convicted of possession of a Class B drug for supply, the nature of the substance having been established by production of a certificate of analysis. The Court of Appeal concluded, however, that the certificate was not admissible because s 31(3)(a) of the Misuse of Drugs Act 1975 had not been complied with in that D had not been informed that the prosecutor did not propose calling the analyst at the trial (although such notice had been given in relation to the preliminary hearing). It should be added that no objection was taken until after the certificate had been received, or, indeed, until after each side had addressed the jury. The Court does not discuss whether in such a case a deliberate decision to delay objection might be held to prevent the point being taken on appeal, or whether the statutory bar might be held to be inoperative on the basis of waiver by D. This was the novel view adopted in *R v Banks* [1972] 1 All ER 1041, a decision which may well be

questionable and which was based on a supposed analogy with waiver of a defect in pre-trial procedure which did not affect admissibility of evidence; cf *Free v Police* (1986) 2 CRNZ 298, 299. In any event, in *Blackburn* the Court unequivocally held that the certificate of analysis was not admissible, but then refused leave to appeal on the ground that there had been no substantial miscarriage of justice.

Comment

No doubt there are many who would applaud these decisions as revealing a healthy disinclination to allow technicalities to hinder the course of justice. On the other hand, the result is that the Court has affirmed convictions although there was apparently no sufficient evidence before the Court to support them, apart from evidence which was inadmissible, and which Parliament had explicitly provided was inadmissible (in *Johns* the statutory provision was that it "shall not be received in evidence by any Court", and in *Blackburn* the statute provided that it "shall be admissible in evidence only if" the specified notice was given). It is submitted that as a general rule it is wrong in principle to apply the proviso in such a case, although the question remains whether it might have been justifiable in these particular instances.

These decisions involve such a departure from the *Stirland* test that it is surprising that in *Johns* no reasons are given. Presumably the Court concluded that D had not been prejudiced by the failure to supply the information in question, which in essence was the justification offered in *Blackburn*: it should have been anticipated that the analyst would not be called at the trial, and it was conceded that the defence did not want such evidence called. But where the evidence relied upon was not legal evidence the mere fact that the objection is "technical" in the sense that the reason for inadmissibility did not itself mislead or prejudice D can hardly justify basing a conviction on such material, even if it seems clear that other evidence which would support the conviction could have been called. If in these cases the trial Judge had held the evidence to be inadmissible, as the Court of Appeal held was the case, it seems that D should have been discharged, or acquitted on the direction of the Judge (and even if the proceedings had been summary the Judge would not have been obliged to dismiss the information without prejudice to its again being laid, although possibly that could be done: *CIR v Ryburn* [1977] 2 NZLR 553; *Morgan v MOT* [1980] 1 NZLR 432; *Tongotongo v Dept of Labour* [1981] 1 NZLR 505). If this is correct it seems odd that the position is different merely because it is only on appeal that the vital evidence deliberately relied on by the prosecution is held to be inadmissible. Moreover, it seems that in affirming the convictions the Court of Appeal must have had regard to material which, because it was not admissible, should have been ignored.

It is submitted that these decisions must be regarded as, at best, quite exceptional. The sparseness of the reasons makes it difficult to be confident about their future impact, but it seems likely to be crucial that the evidence in question is not inherently inadmissible. In each of these cases the material actually relied upon would have been admissible if correct pre-trial procedure had been followed, and it may be arguable that the proviso was fairly applied because the defect could have been cured, either by further evidence at the first trial or upon a new trial.

The possibility of further evidence

On the question whether the trial Judge's error might have deprived D of a right to acquittal a distinction might be drawn between *Johns* and *Blackburn*. In the latter, if D had successfully objected to the certificate the prosecution could then have filled the gap in its case if it was then permitted to call the analyst, and the Court might have allowed this even after each side had completed its case: *Murray v MOT* [1984] 1 NZLR 610 (and this possibility is not necessarily excluded even if counsel have addressed, although it seems to be otherwise if the Judge has commenced summing up, when, moreover, application of the proviso might depend on whether improperly adduced evidence might have influenced the verdict: eg *R v Owen* [1952] 2 QB 362; *R v Corless* (1972) 56 G App R 341; *R v Davis* (1975) 62 Cr App R 194). It seems that D did not suggest that a successful challenge to the substance of oral evidence from the analyst was a possibility, and in these circumstances application of the proviso seems to require only a limited modification of the *Stirland* test, for if the trial Judge had ruled correctly the resulting deficiency in the prosecution case could have been cured by an adjournment which would have enabled sufficient admissible evidence to be adduced. On the other hand, there is some High Court authority which suggests that it is wrong to allow the prosecution to re-open its case, or for the Judge to call or recall a witness to fill the gap, if the prosecution has deliberately chosen to prove essential facts by material which is inadmissible because of a failure to adduce evidence of facts which the prosecution should have foreseen would have to be proved: *Ramsay v Radford* (1986) 2 CRNZ 180; cf *Free v Police* (1986) 2 CRNZ 298.

The possibility of a new trial

One may speculate that in both *Johns* and *Blackburn* the Court might have had it in mind that there was no real injustice because on a new trial the prosecution could readily remedy the fault and establish the admissibility of the very same evidence by giving the required notice. This of course assumes that ordering a new trial would be the appropriate course if the appeal were allowed. The Court has not evolved hard and fast rules governing when a new trial should be ordered rather than an acquittal entered, but the approach is said to be "substantially the flexible one" supported by the Privy Council in *Reid v R* [1980] AC 343: *R v Samuels* [1985] 1 NZLR 350, 356. In *Reid* the Board emphasised that it could not exhaustively describe the factors relevant to the exercise of such a discretion, but it did say that "save in circumstances so exceptional that their Lordships cannot readily envisage them" a new trial should not be ordered if the reason for setting aside a conviction is the insufficiency of the evidence adduced at trial. "It is not in the interests of justice as administered under the common law system of

criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant": *Reid v R* [1980] AC 343, 349-350, per Lord Diplock; cf *Au Pui-kuen v AG for Hong Kong* [1980] AC 351, 357-358.

It has already been held that this should not be read as preventing the ordering of a rehearing of a summary prosecution "where evidence of a technical or formal nature has been inadvertently overlooked" (*Morgan v MOT* [1980] 1 NZLR 432), and there have been earlier cases in New Zealand where a new trial has been ordered when the deficiency in the prosecution case arose from an apparently deliberate decision to rely on evidence which is found to be inadmissible: eg *R v Morgan* [1976] 2 NZLR 61; cf *R v Forrest and Forrest* [1970] NZLR 745; in the United States the propriety of this was left open in *Greene v Massey* 437 US 19, 27 (1978). Perhaps it is implicit in *Johns* and *Blackburn* that a retrial remains permissible in such a case, at least if the inadmissibility of the evidence originally relied upon can be cured, although it is noteworthy that in *Free v Police* (1986) 2 CRNZ 298 Chilwell J declined to order a rehearing of a summary prosecution for a drug offence when the police had chosen to rely on a certificate of analysis without adducing evidence that it complied with the statutory conditions of admissibility – even though the objection had not been taken in the Court below, and it was said that the deficiency could be made good. It might be suggested that the result of allowing a new trial in such cases is that D is doubly prejudiced by the erroneous reception of inadmissible evidence: at the initial hearing D is wrongly deprived of the chance or right of acquittal, and the prosecution is then given the opportunity to repair an evidential deficiency of its own making. This may be in the interests of justice in the sense that the guilty do not escape, but if the prosecution should have anticipated the objection it seems to be contrary to the interests of justice in allowing the prosecution an unjustified second chance to make good its case (or "get its tackle in order": *Au Pui-kuen v AG for Hong Kong* [1980] AC 351, 357, per Lord Diplock).

Conclusion

In *Johns* and *Blackburn* convictions were affirmed although it was or might have been the case that no admissible evidence had been adduced which was sufficient to support a verdict of guilty. It seems quite unclear when such a course might be proper, but, as well as the apparent reliability of received but inadmissible evidence, it may be that the Court should consider whether the prosecution was wrongly prevented from making good the deficiency at the first trial, and whether the inadmissibility of the evidence relied upon could be cured on a new trial. But it is submitted that even if these decisions have to be accepted the proviso should not generally be applicable if in respect of an essential part of its case the prosecution has deliberately chosen to rely on material which it should have realised was inadmissible, or would be inadmissible unless certain conditions were met, and when it should have known that these conditions had not been met.

There is one other related point. If an appellate Court may affirm a conviction which depends on prosecution evidence which could be, but was not, made admissible, this presumably is also a proper course when the trial Judge wrongly rejected a submission of no case, if D then in fact supplied admissible evidence which supports the prosecution case. This has been held to be the case in New Zealand, but it is the subject of apparently conflicting decisions in England: *R v Peddle* (1907) 26 NZLR 972; *Davies v Glover* [1947] NZLR 806; *R v Cockley* (1984) 79 Cr App R 181; [1984] Crim LR 429. □

Retributive Justice

. . . even if the reader is not disposed to rank retribution before other social considerations, he should at least acknowledge that the desire to see justice done is one of the abiding aspirations of all forms of society. The public's desire for harsher punishment for crimes of violence is, I believe, to be attributed in the main to this desire.

The continued search for Nazi war-criminals, for example, is not animated by any hope of producing a deterrent effect. It is inspired by an unquenchable desire to avenge the pitiless murder of millions of innocent people. And the declared policy of the Israeli government – one that has earned it some grudging respect in countries of the West – is that of exacting retribution, of striking hard at terrorist groups whose members attack and kill Israeli nationals, whether or not it deters them.

Indeed, the pursuit of retributive justice is a theme of much of our heritage of legend, fable, saga, romantic drama, ballad, poetry and, of course, fairy-tales. Far from being an ignoble impulse, it is quintessentially human. A man whose concern and compassion extend as far as mooting therapies for the hapless criminal and little else is likely to be so psychologically disoriented as to constitute a positive menace to society.

E J Mishan
(from an article
in *Encounter* No 403,
March 1988)

Lawyers in a competitive environment:

An exercise in successful adaptation

By John D Bell, Michael T Fay and Katherine A Greer, Department of Marketing, University of Otago

This paper examines the views of members of the legal profession towards the change in orientation of professional practice that is occurring. It contrasts the values of lawyers with those of doctors, dentists, veterinarians and accountants. Particular attention is given to the areas of business efficiency, competition and advertising.

Data was derived from self-completion questionnaires containing 40 Likert scales which were mailed to 300 members of each of the five professions. The items on the scale and the percentage agreement are listed in Appendix II. Tables 1-8 treat the items by topic.

The New Zealand economy is undergoing a fundamental reorientation away from a protectionist environment to one that is more market oriented. Although this move towards greater market awareness and the adoption of a more competitive stance began prior to the election of the new Labour government in 1984, there can be no doubt that the policies of this government have brought about the most rapid and significant changes to the New Zealand economy since the Second World War.

Some sectors of the economy, especially the financial sector, have experienced phenomenal growth since being unshackled by the policies commonly referred to as "Rogernomics", while other sectors, such as farming and the Public Service are going through what must be their most traumatic period of the past 50 years.

In this rapidly changing environment where "marketing", "competition" and "user-pays" are the new buzz words, the professions are cautiously moving to align themselves with the current economic and social thinking. Professional associations are having to look very closely at their codes of ethics and professional conduct in the light of the provisions of the new Commerce Act. Some professions have already responded by relaxing their regulations on advertising and competitive practices such as fee setting. Other professional bodies are trying to hold out against the introduction of practices that they perceive as unethical and striking at the very heart of professional integrity.

This paper examines the views of members of the legal profession towards the change in orientation of professional practice that is occurring in New Zealand. It contrasts the position of the legal profession with that of the other professional groups and seeks to explain the differences within a framework of the economic and social roles of the professions.

Changing Attitudes

In the past the professions took pains to distance themselves from the market place and were sufficiently successful in this for certain sets of values and behaviour to become part of the persona of their members. Among these were:

(a) a view of other members of the profession as colleagues working towards a common end;
(b) the concept of dedicated service for its own sake;
(c) a feeling of anathema towards all forms of promotion and self-advertisement.

Typically, these values were formally adopted by the professional bodies who incorporated them in the codes of ethics and other regulations they developed to ensure that their members adhered to a suitably "professional" standard of behaviour. Codes of ethics frequently contained provisions covering such things as the size of name plate a professional could display outside his door, the frequency, size and wording of public notices that their members could place in the local newspaper, and directions on the appropriate procedures one had to follow when accepting a new client who was "transferring" from a professional colleague.

In New Zealand, professional bodies were, and by and large still are allowed to practice self regulation through their disciplinary and ethical committees. In the past, the predominant view had been that the professional bodies were in the best position to ensure the

maintenance of standards and to ensure that their members act in the public interest. That this professional "closed shop" may not in fact be in the best interests of the public has only recently been questioned. However, the changes in economic and social thinking that have accompanied the deregulation and "more market" approach of New Zealand economic policy has turned the spotlight on many of these previously unquestioned professional practices. Actions which were previously defined as acting for the benefit of society at large are being redefined as acting against the public interest and as being barriers to innovation and encouraging inefficiency.

The call for change is coming from within the professions as well as from without but the barriers to a more market-orientated approach have not fallen easily and in many cases remain virtually intact in New Zealand.

Internationally, the process of change has been characterised first by stern rejection and admonition of those members of the professions who have pushed at the boundaries of the codes of practice, and secondly by a legal challenge. This may have been initiated by the government, maverick members of the professions, or by the professional establishment itself in defence of the status quo. The decisions in such test cases have usually been to favour greater market orientation and competition. Finally, there has been acceptance of the inevitability of change and attempts by the professional establishment to regulate the coming state of affairs. This regulation often takes the form of limitation on what may be advertised, how it may be advertised and where it may be advertised.

The study

In 1985, the professions in New Zealand were providing much evidence of a shifting ideological stance. Lawyers and accountants were near to commitment to the new philosophy, veterinarians were concerned as to where they stood, and the *New Zealand Dental Journal* and the *New Zealand Journal of Surveying* had published articles suggesting that their members might usefully adopt a market-oriented approach to their practices. The growth of private medical care seemed to indicate that some doctors would not be averse to the adoption of a less gentlemanly public face.

We surveyed the opinions and attitudes of the members of five professional groups:

Lawyers in public practice
General medical practitioners
General dental practitioners
General veterinary practitioners
Accountants in public practice

The subjects covered included:

the relationship between professional and client
Changes within the profession
Advertising
Competition
Professional fees

Methodology

Resources did not permit a survey of members of all of the professions and which would also allow examination of individual professional groups; a condition that we considered to be necessary. Consequently five professions were selected that:

(a) as a group seemed likely to represent a wide range of positions;
(b) individually, were powerful professional bodies with members having a strong sense of professional belonging.

Membership lists for the five professions were cleaned to eliminate as far as possible those members not in public practice and five systematic random samples drawn. The sample size for each professional group was 300.

A questionnaire containing 40 five point Likert scales and four demographic scales was developed and mailed to each selected person. This was accompanied by a covering letter explaining the purpose of the questionnaire, and a reply-paid envelope. The words "patient" or "client" were used appropriately for the different professional groups. The questionnaires were mailed out in June 1985 and were included for data analysis if returned within six weeks. No follow-up letter to non-respondents was used.

Response rate

An overall response rate of 64% was achieved, which is unusually high for surveys of this type.

	Lawyers	Doctors	Dentists	Vets	Accts	Total
Questionnaires mailed out	300	300	300	300	300	1500
No. returned and analysed	197	165	201	207	192	962
Percentage response	66	55	67	69	64	64

Findings

Frequency counts were carried out using SPSSX and the data factor analysed using BMPD – 1987 (VAX/VMS).

The tables indicate a percentage of respondents within each profession who agreed or agreed strongly with the statement. The statistical significance of differences between the legal profession and other professions was tested using X^2; differences in total responses to each scale significant at the .01 level or higher are listed in Appendix 1.

Discussion

The study set out to describe the prevailing opinions among the legal profession towards the concepts of competition and advertising and compare these views with those of other professional groups.

Demanding and mobile patients/clients:

All the professions, particularly lawyers, perceived their clients/patients to be more demanding of them than in the past, and to be more likely to change from one professional consultant to another. The consistency of this response from groups as diverse as accountants and general medical practitioners, may be taken to indicate a general shift in the relationship between the population at large and the professions. The professionals are less likely to be held in awe with their pronouncements having the force of holy writ. A better informed and less hierarchical society is not only prepared to demand a better service but will switch professional consultants if it is not provided.

This reduction in client loyalty is not a phenomenon that is restricted to professional services but rather

a particular case of a move towards less rigid purchasing habits over a wide range of economic activity. But legal practitioners continue to expect their relationships with clients to be long-lasting, indicating that the process of practitioner-switching may not have reached major proportions. There is no reason to suppose that the shift that has so far occurred is a move from one loyalty level to another. It is just as arguably the beginning of a trend from a very high level of loyalty to a level nearer to that for some other goods and services. If this is seen as a possibility by the more growth and competition-oriented groups within the profession, their actions may work to ensure that loyalty continues to diminish.

The need for business efficiency

There was 87% support for the proposition that legal practices must become more business-like if they are to remain financially viable. The enthusiasm with which this necessity was received was not quite so universal with 65% support.

The concept of efficiency is quite distinct from the concept of competition. Because successful competition may require high internal efficiency it does not necessarily follow that the efficiently run practice will seek to overtly compete with other practitioners. The move from passive competition via efficiency to active competition through a deliberate policy of seeking to attract clients from other practitioners can be argued to require a greater change of behaviour than does the move from inefficiency to efficiency. It requires a market-oriented and pro-active stance rather than an internally oriented and reactive one.

We should also mention, that a highly competitive stance does not necessarily require a high level of internal efficiency. However, long term competitive success may be difficult to achieve without internal efficiency.

Changing behaviour in practice management

In a situation where the profession believes there to be a need for greater efficiency it is not surprising that members of the profession are seen by their colleagues as being increasingly aggressive in the way they handle their business affairs. This increasing toughness can be manifested in relationships with suppliers and towards clients. To the client the most visible aspects of "aggressive" behaviour by lawyers can involve time-related behaviour, level of fees, and fee collection procedure.

As the new toughness develops, causing the relationship between the lawyer and the client to become an overtly financial one, it is unlikely that the client will be a passive recipient of the new relationship. Rather we would expect a reciprocal response by clients which would be manifested in a greater readiness to complain of poor service, to demand evidence of value for money, and ultimately to take their custom elsewhere.

Dedication and service before profit

The traditional ideological position of the professions, of separation between service and remuneration, is still very strongly held amongst lawyers. Eighty-two percent of lawyers believe it appropriate to reduce their fees for those clients who have limited ability to pay.

An interesting situation emerged in the comparison of the responses to item 35, fee reduction for the poor and item 36, fee increases for the wealthy, in that for all the professions a larger proportion were prepared to reduce fees than were willing to increase them.

	Reduce fees to poor	Increase fees to wealthy
Lawyers	82%	45%
Accountants	55%	34%
Doctors	84%	43%
Dentists	67%	26%
Veterinarians	66%	13%

This situation can be seen to contain the possibility of several interrelated causes and consequences. These would include the proposition that:

(i) Fees are set at an overall level that allows reduction for those of limited means. Hence the process of maintaining income is achieved by institutionalising the over-charging of those able to bear the cost.

(ii) The professions are charging lower average fees than they could.

Advertising

The profession does not react to advertising as a unitary phenomenon but rather as a range of activities. The opinions held vary across this range. At one end of the range is informative advertising on behalf of the whole profession and at the other end is persuasive advertising to increase the business of a particular practice.

The use of informative advertising on behalf of the whole profession to increase awareness of its services received strong support from lawyers.

General support for advertising any particular practices is limited to office hours, location, specialisation, and services offered.

The propositions which were unequivocally critical of the effects of advertising, or of advertising itself, No 29, "that advertising would lead to gimmicky work"; No 34, "that only the incompetent need to advertise"; were not without supporters. Of all professions studied the legal profession has the most relaxed attitude towards advertising, but nevertheless 23% expressed agreement with this proposition.

The proposition concerning advertising effect that received greatest support was that it would allow better informed choices to be made by consumers. Approximately a third of the members of the profession believe that advertising would allow expansion of the practice, and a rather smaller proportion took the view that it would lead to an improved level of performance.

Competition

The varying orientation of the professions towards the concept of competition is well summarised by the responses to the proposition "The members of my profession are colleagues, not competitors"—

	Agree	Disagree
Lawyers	38%	38%
Accountants	38%	40%
Doctors	73%	13%
Dentists	68%	15%
Veterinarians	60%	22%

and to the responses to "I look forward to the day when members of my profession can compete openly"—

What should be able to be freely advertised?

	should be able to advertise %	should not be able to advertise %
Office hours	93	6
Location	95	5
Fees	34	66
Years in Practice	44	56
Types of service offered	91	9
New staff	44	56
Age	31	70
Specialisation	77	23
Past awards/ accomplishments	22	78
Credit facilities	40	60

Freedom to advertise ranged from 95% agreement (location) to 22% agreement (awards and accomplishments). In the contentious area of money matters a third of lawyers favour advertising freedom.

The results reflect the pragmatic approach to the use of advertising that was evident in the data from other parts of the questionnaire.

	Agree	Disagree
Lawyers	36%	29%
Accountants	36%	33%
Veterinarians	19%	47%
Dentists	15%	55%
Doctors	9%	61%

These results can be contrasted with the general approval for improved levels of efficiency. It is only amongst lawyers and accountants that a competitive ideology has support that is widely based enough to make comfortable predictions about the further development of market orientation.

Conclusion

This move towards greater efficiency has been welcomed by the vast majority of members. However the proportion of lawyers who have embraced out and out competition as the proper ideological position is at present limited to about one third of the members of the profession. Conversely about a quarter of the profession believe that commercialisation has gone too far. There is a central group, perhaps 40%, of lawyers who take a position of neither wishing to compete like sellers of soap or to return to a gentlemanly past of quiet respectability.

The overall impression is of a strong professional body in the process of sensibly adjusting its values and behaviour to fit a new economic and social environment. Most lawyers do not feel unhappy or threatened by the moves towards more open competition, nor are they as yet inclined to embrace the most overt manifestations of market behaviour. However, there is a very substantial number of lawyers, perhaps a third of the total, who are likely to energetically push at the boundaries of acceptable commercial practice. Given the size of this group and the examples provided by legal practice in the USA it is reasonable to foresee a widening of the accepted limits of competitive activity. While it may be some time before we see TV advertisements proclaiming "25% off all conveyancy for this month only" we would hesitate to predict what legal advertising may look like in ten years' time. □

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Appendix I

Scales where differences between the responses of lawyers and other professional groups yielded X^2 with a probability of 0.01 or less are listed below.

Scale Item	
2	
3	
5	vs Doctors/Dentists
6	
7	vs Veterinarians
8	vs Veterinarians
9	vs Accountants
13	vs Doctors/Dentists
14	vs Accountants/Doctors/ Dentists/Veterinarians
20	vs Doctors/Dentists/ Veterinarians
24	vs Doctors/Dentists/ Veterinarians
25	vs Doctors/Dentists/ Veterinarians
26	vs Doctors
27	vs Doctors
28	vs Doctors
29	vs Doctors/Dentists
31	vs Doctors
34	vs Doctors/Dentists
35	vs Accountants/Dentists/ Veterinarians
36	vs Dentists/Veterinarians
37	vs Accountants/Dentists/ Veterinarians
40	vs Doctors/Dentists/ Veterinarians

Appendix II
Summary Results — Percentage level of agreement

	Scale Item	Doctors	Dentists	Veterinarians	Lawyers	Accountants	Total
1	My professional work is more important to me than my leisure time.	44	39	44	41	54	42
2	The real rewards of the job come from dedication and service to patients/clients.	75	72	69	71	63	70
3	Membership of my profession requires that one puts service before profit.	67	56	59	61	46	57
4	I can't imagine myself in any other occupation.	52	33	41	37	33	39
5	Today my profession is less gentlemanly than it used to be.	62	54	50	72	70	62
6	Members of my profession must become more business-like if they are to remain financially viable.	78	80	85	87	83	83
7	Younger members of my profession are more business oriented than older members.	73	71	42	72	74	64
8	Members of my profession are becoming increasingly aggressive in the way they handle their business affairs.	76	73	74	78	79	76
9	Generally speaking, I welcome the move towards a more business-like approach to professional activity.	67	71	69	65	83	71
10	I have strong views on the issue of advertising by members of my profession.	58	62	59	34	45	52
11	We have already gone too far towards commercialisation of professional practice.	21	19	18	24	20	21
12	I expect my professional relationship with a patient/client to be a long-lasting one.	75	88	87	89	95	87
13	Patients/clients are more demanding today than they used to be.	61	58	71	71	76	65
14	Patients/clients are more likely to change from one professional consultant to another than they were a few years ago.	71	59	63	85	60	68
15	My profession's Code of Ethics on advertising and competition does not take into account the realities facing members today.	23	35	44	31	37	35
16	Professional Codes of Practice protect the professional as much as the client.	77	82	79	62	70	74
17	My professional Code of Ethics has an unfortunate side effect of propping up less competent members of my profession.	50	48	26	27	34	37
18	Advertising on behalf of the profession as a whole to increase awareness of our service is desirable.	53	88	94	78	81	79
19	If advertising is permitted by my profession, marketing skills will become more important than professional skills in determining success.	57	52	38	35	31	42
20	Advertising by individual members of profession in an effort to increase demand for their services would be a good thing.	8	7	15	34	27	18
21	If I was to advertise it would lower my professional standing amongst my colleagues.	68	55	45	21	21	42
22	The members of my profession are colleagues, not competitors.	73	68	60	38	38	55
23	Competition between members of my profession in the levels of fees they charge is undesirable.	61	60	69	26	46	52
24	Competition between members of my profession through advertising is undesirable.	84	86	76	44	53	68
25	I look forward to the day when members of my profession can compete openly.	9	15	19	35	36	23
26	I consider my colleagues' patients/clients to be "fair game".	5	10	22	20	25	17
27	Advertising of professional services would strengthen consumers' abilities to make better informed choices.	26	41	58	49	48	47
28	Advertising would result in higher fees.	48	32	24	31	39	35
29	Advertising would lead to gimmicky and flashy work driving out good solid work.	49	46	37	23	25	25
30	Advertising would enable me to expand my practice.	23	31	32	32	32	30
31	Advertising would lead to an improved level of performance by professionals.	11	33	28	22	28	21

Scale Item		Doctors	Dentists	Veterinarians	Lawyers	Accountants	Total
32	If the members of my profession are allowed to advertise I will make more money.	13	13	16	13	10	13
33	The least competent members of my profession have the most to worry about if the rules on advertising are relaxed.	16	18	23	31	45	27
34	If a person in my profession needs to advertise then he/she can't be very good.	29	21	17	13	13	18
35	Professionals should be prepared to reduce their fees for patients with limited ability to pay.	84	67	66	82	55	70
36	It is quite reasonable for professionals to raise their fees for patients who are clearly able to pay.	43	26	13	45	34	32
37	I am prepared to negotiate the fee with a patient/client.	61	56	55	88	70	66
38	I try to get my patients/clients to pay before they leave the building.	49	47	69	17	2	37
39	I would not oppose any moves allowing members of my profession to place factual and informative advertisements.	44	51	73	81	76	66
40	I would not oppose any moves allowing members of my profession to place persuasive advertisements.	3	4	5	21	20	11

Table 1: Competition

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
25	I look forward to the day when members of my profession can compete openly.	35	36	9	15	19
26	I consider my colleagues' clients to be "fair game".	20	25	5	10	22

Approximately one-third of lawyers appear to have accepted a largely competitive view of their professional situation.

Table 2: Competitive advertising

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
20	Advertising by individual members of profession in an effort to increase demand for their services would be a good thing.	34	27	8	7	15
40	I would not oppose any moves allowing members of my profession to place persuasive advertisements.	21	20	3	4	5
31	Advertising would lead to an improved level of performance by professionals.	22	28	11	33	28
24	Competition between members of my profession through advertising is undesirable.	44	53	84	86	76

A rather greater percentage of lawyers than most other professional groups look favourably on competitive advertising. However, this "favour" is far from universal with almost a half of lawyers believing it to be undesirable.

Table 3: Business and efficiency

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
9	Generally speaking, I welcome the move towards a more business-like approach to professional activity.	65	83	67	71	69
6	Members of my profession must become more business-like if they are to remain financially viable.	87	83	78	80	85

Like all the other professions, lawyers acknowledge a need for greater business efficiency and welcomed the movement in this direction.

Table 4: Dedication and service

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
2	The real rewards of the job come from dedication and service to clients.	71	63	75	72	69
3	Membership of my profession requires that one puts service before profit.	61	46	67	56	59

In spite of the much higher commercial profile adopted by the legal profession, around two-thirds of lawyers stated that service and dedication must take priority over profit. On this factor lawyers are much closer to the health professions rather than to accountants.

Table 5: Mobile and demanding clients

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
14	Clients are more likely to change from one professional consultant to another than they were a few years ago.	85	60	71	59	63
13	Clients are more demanding today than they used to be.	71	76	61	58	71

To a considerably greater degree than any of the other professions studied, lawyers perceive their clients as more ready to move from one professional adviser to another than in the past. However all groups hold a view of an increasingly mobile and demanding clientele.

Table 6: Advertising and superficiality

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
28	Advertising would result in higher fees.	31	39	48	32	24
29	Advertising would lead to gimmicky and flashy work driving out good solid work.	23	25	49	46	37
34	If a person in my profession needs to advertise then he/she can't be very good.	13	13	29	21	17

Almost a quarter of all lawyers believe that there is a danger that advertising could lead to a deterioration in the quality of professional work. This is a very similar proportion to those believing that advertising would improve the quality of professional work.

Table 7: Gentlemen v Players

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
5	Today my profession is less gentlemanly than it used to be.	72	70	62	54	50
7	Younger members of my profession are more business oriented than older members.	72	74	73	71	42
8	Members of my profession are becoming increasingly aggressive in the way they handle their business affairs.	78	79	76	73	74

There is widespread agreement that the legal profession is less gentlemanly and more commercially aggressive than it used to be. Characteristically, younger lawyers are seen to be particularly associated with this change.

Table 8: Social equity

Scale Item		Percentage Agreeing				
		Lawyers	Accountants	Doctors	Dentists	Veterinarians
35	Professionals should be prepared to reduce their fees for clients with limited ability to pay.	82	55	84	67	66
36	It is quite reasonable for professionals to raise their fees for clients who are clearly able to pay.	45	34	43	26	13
37	I am prepared to negotiate the fee with a client or patient.	88	70	61	56	55

Lawyers, with doctors, are the two groups most ready to operate their own private social welfare schemes; charging the rich more and the poor less. Lawyers' behaviour sharply differentiates them from accountants who are the group least likely to reduce fees.

Books

Legal Decisions Affecting Bankers, Volume 9

Professional Books Ltd, Abingdon, UK (1987 reprint) £47.50

Reviewed by D M M Ross, practitioner of Wellington.

This little book is the ninth in a series which seeks to record, for the benefit of bankers, the reports of important judicial decisions of interest to bankers and the development of banking law. The latest volume covers the period from 1967 to 1976, and a further volume covering the period since 1976 is in the pipeline.

The cases recorded in this series have all been decided in the English Courts, including the occasional one on appeal to the Privy Council. An irritating feature of the book is that the cases mentioned are not reported in their entirety; rather, the editors have extracted only those aspects of a particular decision which are perceived to be of interest in the banking area, and the reader feels a bit nervous about which parts of the cases have been omitted.

Many of the cases will be familiar to most practitioners, and these include *Romalpa, Re Introductions Limited, Lloyds Bank v Bundy, Mareva, Miliangos, Charterbridge Corporation, National Westminster Bank v Halesowen* and *Selangor United Rubber Estates.* All in all, the decade ending in 1976 can be said to have been a period in which a number of important decisions were passed down, and the ones just mentioned are a good example of them.

Cases on banking law are relatively dry at best, and for me at least the highlight in this book is the judgment of Lord Denning in the 1974 case of *Lloyds Bank v Bundy*, whose judgment begins as follows:

> Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt.

Needless to say Bundy won his appeal against the bank, and who can argue with that on the basis of Lord Denning's summary? □

Words

By Peter Haig

It is nice to find distinguished (albeit American) support for resistance to two bad usages which I have laboured in these columns to discourage – viz COMPRISE ([1983] NZLJ 228, [1986] NZLJ 56) and PROVEN ([1983] NZLJ 258). Bryan A Garner's *A Dictionary of Modern Legal Usage*, warmly reviewed by the Editor at [1988] NZLJ 141 devotes considerable space to both of these.

Garner's entry under *"compose; comprise"* fills more than a column. Two excerpts from it follow:

> C. *Comprise* for *constitute. Comprise* is more and more commonly used in a sense opposite to its true meaning ("to contain, include, embrace"). It should not be used for *compose* or *constitute:* eg, "To the extent that pension rights derive from employment . . . they *comprise* [read *constitute*] a community asset".
>
> D. *Comprise* for *are.* This is an odd error based on a misunderstanding of the meaning of *comprise*: eg, "The appellants *comprise* [read *are*] nine of sixteen defendants".

Under *"proved; proven"*, Garner writes:

> *Proved* is the universally preferred past tense of *prove*; the form *proven*, like *stricken*, properly exists only as an adjective: eg, ". . . its already *proven* existence", or "a *proven* invasion of the plaintiff's rights". Often, however, *proven* is wrongly used as a past participle: eg, "The serious bodily injury . . . was *proven* [read *proved*] beyond a reasonable doubt".

MUTUAL is another overworked word. Under the heading, *"mutual; common"*, Garner, after explaining the well-known distinction between the two, adds:

> *Friend in common* is preferable to *mutual friend*, although the latter has stuck because of Dickens' novel (the title to which, everyone forgets, came from a sentence mouthed by an illiterate character).

He goes on to warn against the widespread pleonasm "mutual agreement", an example of which can be found in this passage from a recent High Court judgment (which contains also another common solecism): ". . . areas which are between 3,000 to [read *and*] 5,000 acres, the exact size of which being as may be mutually agreed between the parties". □