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Contempt

The Courts and Parliament rank equally in our monarchical constitutional system. On the one hand it is the Queen in Parliament whereby our laws are made, and it is the Queen's Judges who interpret them. It is the function of the Queen's Ministers then to administer the laws so enacted and interpreted. All too often this constitutional reality gets overlooked in the political reality of the presumed powers, the sometimes unrestricted, irresponsible powers, of Cabinet. But Cabinet is only an informal body of Ministers. It has no formal place itself in the legal constitutional framework. This is not to deny of course that the central power base of government is in fact the Cabinet.

The equality of the Courts and Parliament as institutions is often not realised. Politicians (and ideological academics) tend to over-emphasise the role of Parliament because of a too simple identification of democracy with elected representatives. Historical examples abound to show that majorities can be intolerant and oppressive. Lawyers (and perhaps Judges) tend to over-emphasise the Courts because of a single-minded identification of democracy with the rule of law. The point is not that one view is right and the other wrong. Both views are right, and in practice have to be adjusted when there is a tension between them as sometimes will inevitably occur.

It is necessary to be cautious when quoting from the American constitutional context. A comment however, by Justice Scalia of the United States Supreme Court in the recently published *Judging the World* (Butterworths 1988 p 320) expresses the point in one particular way.

> The courts are essentially undemocratic institutions, which is not a criticism; they are meant to be. But to the extent that they are empowered to disregard legislative enactments, and to override the action of democratically elected executive officials, they are undemocratic. They are meant to mark the bounds past which democracy can't go; the inviolable rights of the people that even a democratic majority vote cannot impinge upon.

One aspect of the importance and also of the equality of Parliament and the Courts is the power that each has to punish for contempt. This again is often misunderstood, particularly by journalists and academics. The power exists for the protection of the institution, not of the particular individuals who make it up from time to time. The comment is sometimes made that Judges should not have an inherent power to commit for contempt, but that there should be a statute with the idea of limiting the power of the individual Judge; and similarly that the privileges of Parliament should be restricted so that individual politicans should be able, for instance, to be sued for defamation. But it is neither the individual Judge, nor the individual politician who is really being primarily protected. It is the institution, and only incidentally, and consequentially, the individual office-holder for the time being.

Newspapers and idealogues sometimes invoke the right of free speech or the freedom of the press to claim an unimpeachable position for journalists and editors. But these rights are limited. Newspapers, and the media generally, are not part of our constitutional system. Whatever might be the situation in the United States, it is not yet the position here that the news media are above the law. The timidity of politicians and Judges might indicate that things are tending that way, but an irresponsible news media is as much to be feared as one that is a mere propaganda machine. The privileges and powers of Parliament and of the Courts are different in nature from the freedoms claimed by editors to be free from control by the legal system. Parliament and the Courts need such freedom and privileges in order to operate effectively as constitutional institutions. This is also the basis of their powers.

Cases involving the question of contempt for alleged breaches of the privileges of Parliament by outsiders are relatively rare. Thus a recent case is noteworthy. This is the Report of the Privileges Committee on the question of Privilege referred on 6 October 1988 concerning a letter to Winston Peters, MP, by or on behalf of the firm of Kensington Swan dated 28 September 1988 (Report I 15B).

The question of privilege related to the last sentence of the letter from the solicitors to Mr Peters. The letter denied certain comments made by Mr Peters in a media statement, sought a retraction and then concluded:

> Finally, we also require your assurance that no statement in the nature of the Media Statement will be made by you or any other person under the protection of Parliamentary privilege.

The question before the Committee was whether this sentence constituted an attempt to influence Mr Peters in his parliamentary conduct by a threat. The Report stated at paragraph 10:

> The Committee regards the contempt that was alleged in this case as being among the most serious types of contempt that could occur. If persons are allowed to address threats to members about their conduct in Parliament with impunity, the quality of the service which members are able to give to the House would be seriously impaired. The Committee considers that it is most important that the right of members to be free of improper pressures from outside the House in respect of the actions they take in the House, must be maintained. It has accordingly approached its task in respect of this inquiry with that aim in view.

In the end result the Committee decided to give the author of the letter the benefit of the doubt and to accept that no threat was intended. The Report however then went on to deal with two other matters that are of interest. The first concerned the possible use of statements in the House of Representatives to compound the damages for which a Member might be liable in respect of a statement made outside the House. The second was the possibility of malice being inferred from the repetition in the House of a statement originally made outside it.

On these points the Committee adopted the view expressed by Dr Barton who was appearing as Counsel for the firm of solicitors. He was of the opinion that both of these matters would be contrary to Article 9 of the Bill of Rights of 1688 which effectively prohibits the impeachment or questioning of the freedom of speech of Members of Parliament in any Court. In paragraph 24 the Committee stated:

> The Committee agrees with Dr Barton's submission that to attempt to use a member's statement in the House as evidence of malice would be contrary to the Bill of Rights. The Committee also considers that to use a member's statement in the House to lessen the damages otherwise payable to the member or to increase the damages for which the member is liable is also contrary to the Bill of Rights.

The Report respectfully disagreed with the views expressed in the judgment of the Court of Appeal in *News Media Ownership v Finlay* [1970] NZLR 1089. It preferred the approach of the English Court of Appeal in *Church of Scientology v Johnson-Smith* [1972] 1 All ER 378. In that case the Court refused to admit a parliamentary statement as evidence of malice. The headnote of that case, which was not specifically quoted in the Privileges Committee Report, states the finding of the Court as follows:

> Held – What was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arose out of something done outside Parliament; consequently the evidence sought to be given must be excluded.

Finally the Report noted that in the *Finlay* case the New Zealand Court of Appeal did not appear to have had the point as to the privileges of the House argued before it. In the English case the Court of Appeal itself took the point and requested the Attorney-General to argue it as *amicus curiae*. The Report of the Privileges Committee concludes by suggesting that if a possible question of privilege might arise in a future case then Counsel should be instructed to advance argument on the issue before the Court.

P J Downey

Recent Admissions

Barristers and Solicitors

Amery CL	Auckland	3 February 1989	Isaacs DI	Wellington	14 March 1989
Boyes CF	Napier	12 April 1989	Johnson JB	Wellington	21 February 1989
Callaway FH	Auckland	17 February 1989	Jones KA	Wellington	17 February 1989
Chang AD	Wellington	21 February 1989	Le Grice MA	Auckland	6 September 1988
Chiat L	Wellington	14 March 1989	Loach AE	Christchurch	23 February 1989
Coyne DP	Wellington	17 March 1989	McLay MJKF	Auckland	15 February 1989
Dollimore MG	Christchurch	24 February 1989	Patten NL	Auckland	8 February 1989
Doucas M	Wellington	22 February 1989	Pierce-Durance LW	Auckland	20 March 1989
Fanning PJ	Wellington	3 March 1989	Plummer SJ	Auckland	22 March 1989
Frampton MA	Wellington	7 March 1989	Ramiah K	Wellington	1 March 1989
Goddard DJ	Wellington	2 February 1989	Ryan SJ	Christchurch	7 March 1989
Grace JR	Wellington	15 December 1988	Shepherd NJ	Auckland	22 March 1989
Harrison MT	Auckland	20 March 1989	Sivanantham SV	Wellington	2 February 1989
Haworth JE	Auckland	20 October 1988	Spary LJ	Wellington	23 February 1989
Herzog L	Auckland	3 March 1989	Steele SJ	Napier	8 February 1989
Hui LI	Auckland	3 March 1989	Wolfensohn HF	Wellington	11 April 1989

Case and Comment

Disproportionately greater

The meaning of "clearly been disproportionately greater" in s 13(1)(c) of the Matrimonial Property Act 1976 has now been the subject of a Court of Appeal decision, *Watson v Watson* (CA 81/88; 7 March 1989; Cooke P McMullin and Bisson JJ).

The parties had married in July 1982, the husband, H, being 53 and the wife, W, 45. They separated in June 1985, so that their marriage was "automatically" short for the purposes of s 13. Jeffries J found that W's contribution to the marriage partnership had clearly been disproportionately greater than that of H and divided all the matrimonial property in the proportions 75% to W and 25% to H.

The appeal was difficult to deal with, H's counsel having declined to list or evaluate H's contributions, relying instead on the taking of title to the main items of property, viz, real property in Napier acquired by H and W as joint tenants or tenants in common in equal shares, and on a finding by Jeffries J that H had contributed to the marriage partnership to the best of his abilities. Both these factors were held to be relevant to the issue under s 13 but could not be conclusive, as, indeed, Cooke P, delivering the judgment of the Court, said.

On the meaning of "clearly been disproportionately greater" Cooke P had this to say:

> The expression "has clearly been disproportionately greater" is a notoriously difficult one (see *Fisher on Matrimonial Property*, 2 ed, 12.35 and the authorities there cited) but it is elementary that the Act looks beyond matters of legal title to actual contributions to the marriage partnership; and it would be an odd interpretation that, for the purposes of s 13, excluded any attempt to compare the various contributions coming under any of the heads listed in s 18(1). In the case of a marriage of short duration, s 13(2) poses for departure from equal division of the matrimonial home and family chattels a test deliberately less stringent than s 14. . . . In the absence of any settled interpretation to the contrary, and there certainly is none, we think that "disproportionately" has the sense of inordinately and is a word of emphasis intended to ensure that a clearly demonstrated disparity is not necessarily enough. For instance one spouse's contribution may have been clearly greater, but the Court may not be persuaded that the difference was more than 55.45. Such contributions would be sufficiently close to preclude a finding of disproportionately greater. On the other hand, if the Court was satisfied that one spouse's contribution was half as much again as that of the other (3:2, 60:40) such a finding would be appropriate.

The facts of the case

In September 1982, H and W had moved from Masterton to Napier and began to live together in a Napier house. It was built before their marriage on a section acquired before the marriage. It was a leasehold property vested in H and W as tenants in common in equal shares. After the marriage, it became matrimonial property by virtue of s 8(c) of the 1976 Act. The respective contributions to the acquisition of this property and its construction were on the same pattern as was found in the motel project which is described below save that the former were not contributions to the marriage partnership. From December 1982 to June 1983, H worked as a freezing worker. From March 1983 to November 1983, W worked at Woolworths. Neither had outside employment apart from these periods. In 1983, certain other Napier land was bought in the parties' joint names. In December 1984, a motel business was opened there. W made all the financial arrangements, engaged the builder, paid him and his workmen, and settled all other accounts, supervised the whole project and did a considerable amount of the decorating work. This H acknowledged, though he evidently knew little or nothing of the financial arrangements either then or before the marriage. W conducted the motel business without significant help from H. H did not contradict W's statement that she was obliged to carry out all normal household duties throughout the marriage with virtually no assistance from him.

H had worked as a labourer in the building of the motels, as, indeed, he had in the building of the Napier house already mentioned. H's work on the motels constituted his main contribution to the marriage partnership. The builder testified that he could only entrust H with the simplest of jobs. Nevertheless, H's work must, in the Court's view, have been of some use. Even so, however, it was apparent that, leaving money considerations aside, W's contributions to the marriage partnership was "overwhelmingly greater".

When the motels were completed,

the motel manager's flat became the parties' matrimonial home. The Napier house property referred to above was rented. After the breakdown of the marriage, H either lived in it or received the rent from it. W's mother lived rent-free in a self-contained flat there. W remained on at the motels and received the profits.

It is necessary now to consider in detail the history of the parties' relationship, for their association was a long one. It went back to at least 1954, when W married her first husband, V, a friend of H. V was killed in 1975 in an accident. W and H soon afterwards began a de facto relationship which continued until their marriage.

H and V had been partners in a flat-building enterprise on land in Masterton which was the site of the joint family home of V and W. The whole of this property passed to W on V's death. H did not now suggest that this property was matrimonial property as between himself and W, but he did contend that he was entitled to a half share of the rents of the flats and that the rents had contributed to the cost of the Napier house already mentioned and the motels. This claim was supported by the accounts. W suggested that they showed a false position for tax purposes.

Evidently also, a business in Masterton was purchased in 1974 and sold in 1981. H claimed that he had had a one-third interest in it initially and that he and W later became equal partners in it. The accounts supported this contention, too. W met the point in the same way. She had managed the business. H had worked in it for a wage.

Further still, another Masterton property was bought in 1973 in the names of V and W as to two-thirds and H as to one-third. The income from the flats on it was initially shown by the accounts as being divided accordingly. Later on, it was shown as being divided equally until 1983. Once more, W said this did not present a true picture. The property was sold after the marriage of H and W. The proceeds and moneys from the rents of the other Masterton property went into the motel project.

(There were other sources of finance over the years: in particular, $15,600 accident compensation received by W when V died and $10,000 obtained by H when he sold a property belonging to him alone. They are not relevant to the present discussion).

The Court of Appeal concluded that, in all business and financial matters between the parties, both before and after the marriage, it was undoubtedly W who had had full charge and on whom H had relied. She had not, however, taken steps to have the intended interests of the parties in their various assets defined otherwise than as shown on the legal titles or in the business accounts prepared by a professional accountant.

In the Court's view the evidence was not clear enough to establish constructive trusts of the kind illustrated in *Hayward v Giordani* [1983] NZLR 140; (1983) 2 NZFLR 129 (CA). H had been held out as an equal partner and could reasonably have understood that such was his position. The Court thus saw the situation as one calling for the literal application of the maxim "Equality is equity" and treating the parties as having contributed equally to the capital brought into the marriage partnership when it began in 1982.

It was observed that Jeffries J in arriving at this apportionment, had not clearly distinguished between the period of the marriage partnership and the position between the parties at its inception. He had made his assessment on an overall view of the association of three decades. The scheme of the 1976 Act, however, required a distinction to be drawn between pre-marriage and post-marriage contributions, although the former might be – and here were – reflected to some extent in the matrimonial assets.

The Court agreed with the finding of disproportionately greater contribution by W – a finding, of course, relevant only to the matrimonial home and the family chattels, but nevertheless enabling a division of all the matrimonial property in accordance with the contributions to the marriage partnership. It was, however, held that the proper proportions should be two-thirds to W and one-third to H.

It would appear that their Honours have skilfully stabilised what Fisher (loc cit supra) aptly called the "shaky semantic foundation" of s 13(1)(c).

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Green paper blues

The Lord Chancellor, Lord McKay, has issued three green papers setting out what is euphemistically called a "reform" of the legal profession in England. Similar proposals that are likely to be destructive of the idea of a profession with independence and responsibilities over and above the economic, are likely to be imposed in New Zealand within the next few years. In England, there is much concern about the distinction between barristers and solicitors, and between lawyers and mere pseudo-professions. The following sharp and pointed comment has some relevance for New Zealand practitioners.

The city firms likely to arise, for example, from the Lord Chancellor's proposals should on present form offer the punter the run of an Alice in Wonderland hypermarket in which estate agency is handled by the solicitor, conveyancing by the estate agent, and subsequent litigation by the licensed accountant and probate by the travel agent. Specialist members of the Bar, like prunes, will presumably be stored in a withered condition and boxed to save office space, to be soaked and rehydrated as required. Outside London we can presumably expect to see a different situation; small hybrid firms in which all the professional services are offered in the Basil Fawlty mode by the same person wearing a succession of different hats. . . .

Some comfort for the dispossessed barristers, estate agents, commodity brokers and other members of withered professions may in times to come lie in the opportunities still likely to be made available by the breaking down of other institutions. Where will we next see action?

Charlotte Buckhaven
New Law Journal
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Lender liability for negligent "in-house" real estate appraisals (I)

By Stuart D Walker, a Dunedin practitioner

Appraisal of property by lending institutions using their own valuers is common in New Zealand. Both the lender, on a mortgagee sale, and the borrower in deciding to proceed with a purchase can be adversely affected by an incorrect appraisal. This is the first of two articles in which Stuart Walker considers whether and to what extent a lender is under a duty to ensure that "in-house" appraisals are not conducted negligently.

I Introduction

Where a lender advances to a borrower money secured by way of a mortgage over real estate, the appraisal of that real estate forms an important part of the lending process. Lenders adopt a variety of appraisal methods: use of government valuation, insistence on an independent registered valuation and appraisal by an "in-house" appraiser are all included. "In-house" appraisals are not unique to New Zealand, but their widespread use means that they occupy a key position in the moneylending industry.

An incorrect appraisal can produce adverse results: to the lender it could mean that a loan is not adequately secured; to the borrower who has relied on the appraisal when purchasing the real estate it could mean paying more for the real estate than it is actually worth; at a subsequent mortgagee's sale it could mean a lender receiving a lower than expected sale price with the resultant possibility of having to sue on the borrower's personal covenant to recover the deficiency.

Is a lender under any duty to ensure that "in-house" appraisals are not conducted negligently? To date there has been little comment by New Zealand Courts on this aspect of lender liability. However a lender which negligently conducts such an appraisal is an obvious target where a real estate owner suffers loss as a result of having relied on the appraisal.

II The extended role of lenders

Gone are the days when the lender-borrower relationship was solely one of creditor-debtor. Banks in particular are now chasing business in all sectors of the New Zealand financial market. Many are actively holding themselves out as having specialised expertise in a number of fields including home mortgage lending, and financial and investment advice-giving. Just as professionals who claim expertise in a particular field must necessarily accept the responsibilities which such claims attract, so too banks must accept the greater degrees of responsibility and duty which their new roles attract. This is the very basis for the lender liability judgments which have become so prevalent in the United States.

The expansion of lender liability reflects, quite simply, society's trend towards consumer protectionism. Consumers are relying more and more on banks' professed expertise in the wider banking arena. Given the increased competition amongst banks, that they are, from a marketing standpoint, encouraging such reliance, is not unexpected.[1]

III Survey

In order to obtain a comparative analysis of the policies and procedures of financial institutions regarding appraisal of real estate, twenty-two institutions were surveyed. This survey was conducted primarily in December 1987 and January 1988. Whilst the results of the survey do not purport to record definitively or represent all lenders' appraisal methods in New Zealand, the survey participants did represent a cross-section of lending institutions.

IV Statement of the problem

Not unexpectedly, the survey confirmed the central role that real estate appraisals play in the lending process.[2] An intending borrower will usually know as a matter of general knowledge that a lender will need to confirm the real estate's value and suitability before agreeing to lend mortgage money over it; some lenders specifically disclose their loan and valuation criteria in their advertising and promotional materials. Further, where the lender is to conduct its own "in-house" appraisal, it will usually require the intending borrower to pay a fee for that appraisal.[3]

In these circumstances it is not surprising that some intending borrowers attach significance to the outcome of the appraisal. Where the lender conducts the appraisal "in-house", the intending borrower's perception of the appraisal becomes important:[4] intending borrowers may not bother to obtain an independent valuation of the real estate being purchased, on the basis that if there is anything "wrong" with it the lender will refuse to lend.[5]

Whether the loan is for the purchase of an existing building or the construction of a new one, the lender will invariably exercise some

"control" over the venture. Where a borrower wishes to purchase an existing building the lender can control whether the purchase proceeds by requiring that the dwelling is first approved as suitable security for the loan. In a construction project the lender can control the lending of money by requiring that disbursement of the loan be tied to proper progress of the construction.

In this way such control can be compared with the control which a local authority exercises when approving the construction of a new building. Just as local authorities can find themselves liable when they are negligent in exercising that control, so too lenders can be liable when they negligently exercise that control when appraising real estate.

This article examines the potential liability of lenders for negligent "in-house" real estate appraisals.[6]

V Negligence: establishing the duty of care

In determining whether a duty of care exists Courts are placing increasing emphasis on Lord Keith's observations in *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 534[7] that "it is material to take into consideration whether it is just and reasonable that it should be so." Thus the identification of the elements necessary to establish a relationship of proximity between lender and intending borrower is necessarily wide. Mere foreseeability of harm will not automatically create a duty of care. In the end Lord Atkin's "relationship of proximity" must still exist and "the scope of the duty must depend on all the circumstances of the case." (*Peabody Donation Fund*, supra, at 534, per Lord Keith)

The extent to which Lord Keith's reformulation modifies Lord Wilberforce's two-fold test is arguable, but it does provide the vehicle for a more restrictive approach by the Courts. Whilst this is certainly not inevitable, one senses the march away from the pro-plaintiff decision-making which tended to result from Lord Wilberforce's test. (See, eg, *Junior Books Ltd v Veitchi* [1988] 2 WLR 761 [1983] 1 AC 520.) Indeed in *Yuen Kun Yeu*, Lord Keith (at 191) gave support to Brennan J's view in *Council of the Shire of Sutherland v Heyman* (1985) 59 ALJR 564, 588

> that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed."

At least in developing areas of liability, Lord Keith's reformulation will, in all likelihood, prove to be a higher hurdle for a plaintiff to jump in order to create a new duty of care.

The notion that a lender owes a duty of care to an intending borrower when conducting an "in-house" real estate appraisal certainly has interesting jurisprudential aspects. There is of course no rule of law which requires a lender to inspect real estate which is the subject of a mortgage application, nor is there any rule of law which requires a lender to warrant the condition of mortgaged real estate merely because there exists a lender-borrower or mortgagee-mortgagor relationship.

Suing a lender alleging breach of duty to an intending borrower in respect of a real estate appraisal is not new. However the early results were not particularly encouraging for borrowers. The case of *Odder v Westbourne Park Building Society* (1955) 165 EG 261 illustrates the Courts' initial response. The plaintiff wished to purchase a house and made application to the defendant for a mortgage loan. Prior to the application being approved the defendant's chairman inspected the house, for which a fee was charged to the plaintiff. After the purchase was completed serious defects in the house were discovered. The plaintiff claimed that the defendant had been negligent in its inspection, arguing that the defendant, in conducting the inspection and then in turn making the mortgage advance, was inviting the plaintiff to rely upon the inspection, and accordingly, should have disclosed any defects in the house. Harman J noted that such a proposition seemed to be entirely novel, and dismissed the action on the ground that the plaintiff was owed no duty of care in respect of the survey. Little discussion of the matter was undertaken but what must have been of undoubted importance was the warning printed on the loan application form signed by the plaintiff which read:

> It should be noted that the Society's inspection is made for the confidential information of the directors. The Society does not undertake to advise intending purchasers as to the value of property nor can any responsibility be accepted for its state of repair. If information is required on these points professional advice should be taken.

Harman J (at 261) considered such wording "did no more than to state what the legal position would be even if [the warning] were not there." That little in-depth analysis was undertaken by the Court is not surprising: negligence law was still developing and *Hedley Byrne* was some years away. (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575)

Even after *Hedley Byrne*, development in the United Kingdom of this aspect of lender liability was slow, due mainly to the predominance of building society lending and the almost universal practice of building societies disclaiming liability in respect of the value or condition of mortgaged property.[8] This has not been the trend in New Zealand; the majority of the survey participants do not disclaim liability in respect of real estate appraisals.[9]

Lender liability for negligent real estate appraisals will tend to arise most often in two situations. First, where the lender finances construction of a new building, and as part of its lending procedure appraises the construction. Second, where the lender is asked to finance the purchase of an existing building, and conducts an appraisal to ensure that it provides suitable security for the loan. Three New Zealand cases have involved lender liability under the first category; the Housing Corporation was a party in each one.

The first was *Bruce v Housing Corporation of New Zealand* [1982] 2 NZLR 28 which arose as a result of structural damage to a building, the construction of which was

approved and financed by the Housing Corporation. It provides a useful starting point in analysing the wider lender liability issues.

The plaintiffs were the owners of a residential section at Franz Josef on which they wished to build. They had about $1,000 available for that purpose and decided to build a house constructed of prefabricated fibreglass. This was a design which had only been recently introduced into New Zealand and which was under investigation by the Corporation to determine whether it was suitable for loan eligibility. The Corporation confirmed its suitability and the plaintiffs' loan application for $16,000 was approved by the Corporation with the funds being advanced by way of mortgage and family benefit capitalisation. Soon after the house was constructed it suffered water damage, the cause of which was identified as condensation. This resulted in rotting, dampness and decay, eventually rendering the house uninhabitable.

The company which had manufactured and built the house was in receivership and so the plaintiffs issued proceedings against the Housing Corporation alleging that the Corporation owed them a duty of care

> to consider the suitability of the design and method of construction either generally, or in relation to the intended site of erection at Franz Josef (at 30).

Expert evidence disclosed that the house "was doomed at the outset" in that it broke "every rule of vapour control considered vital in normal building practice" (at 31).

Casey J centred his inquiries on two matters.

1 The role of the Housing Corporation and the assumption of responsibility

The Corporation was seen to be performing three roles. First, that of a moneylender. Second, carrying out government policy of encouraging low-cost housing in order to overcome the housing shortage, such policy being aimed at first home builders who had limited financial means. Third, the consideration of new building materials and construction techniques, and approving them generally for loan eligibility. The second and third roles were to prove decisive, with Casey J (at 34) noting that

> [t]he wide functions and powers conferred on the Corporation in the field of housing indicates that its expertise and concern go well beyond mortgage advances and this is borne out by the evidence of its other activities with housing and properties.

His Honour rejected the Corporation's submission that it was "a moneylender pure and simple" (at 33) and that its other activities were solely for its own uses, holding that the other activities were identifiable as principal, and not merely subsidiary, activities of the Corporation.

2 The plaintiffs' reliance on the Housing Corporation.

The facts disclosed that the plaintiffs had relied on the Corporation's investigation and approval of the house design and construction before deciding to build. But was that reliance sufficient to bring about a relationship of proximity? Was it reasonable for the plaintiffs to rely on the Corporation in this way?

Two aspects of the Corporation's activities were considered important. First, because of the Corporation's role in encouraging low-cost building, it was naturally the first lending choice for those wishing to build within limited financial resources. Second, because of widespread respect for its standards, the Corporation knew that there was general public reliance on the outcome of its investigatory activities.

Casey J gave judgment for the plaintiffs, noting (at 37)

> that the Corporation and its officers did not exercise the standard of care expected in this situation by failing to appreciate the problems likely to arise from condensation and to ensure a proper expert appraisal was obtained, and appropriate measures taken to overcome the defects inherent in this building design.

This decision, based as it was on the unique activities of the Housing Corporation, probably had little effect on the real estate appraisal procedures of other lending institutions.[9] But could liability be imposed on a lender who was only exercising a moneylending function as indeed most lenders are doing?

Casey J had refrained from dealing with this issue in *Bruce*, noting (at 36) that the situation here is unusual and unlikely to be repeated. It goes well beyond the ordinary mortgagor/mortgagee relationship between the Corporation and the public. It was however briefly touched on in the later High Court decision of Holland J in *Askin v Knox* (an unreported decision (Dunedin Registry), 14/84, 3 March 1986). Here the plaintiffs' house became damaged as a result of defective foundations, and proceedings were issued against the builder and the local authority. During the proceedings the builder obtained leave to join the Housing Corporation as third party and claimed that the Corporation as mortgagee was also liable in that it had approved the land on which the plaintiffs had erected their house, had carried out regular inspections of the building works and had approved the foundations. Whilst dismissing such claims on the basis of the plaintiffs' lack of reliance on the Corporation, Holland J, without referring to *Bruce* did note that a duty of care could arise in the context of a mortgagor-mortgagee relationship:

> No doubt there are circumstances where a duty of care will arise on the part of a mortgagee to a mortgagor who is erecting a house either on his own account or by virtue of a contract with a builder. Such a duty has been held to arise in more than one case.

The cases where the duty had been held to arise were not mentioned in the judgment. Neither is there any discussion as to when and how that duty might arise.

The discussion is taken considerably further in the decision of District Court Judge Willy in *Miller v S R Smith Ltd* (an unreported decision (District Court, Dunedin) 4109/83, 23 December 1985) where the plaintiffs sought damages as a result of the subsidence of their house. The local authority and the Housing Corporation as mortgagee were the

second and third defendants respectively. The plaintiffs claimed that the Corporation had failed to ensure that the design of the house and in particular the design of the foundations was adequate, had failed to ensure that the land could properly sustain the load imposed by the house and in particular had failed to inspect the foundations, and had failed to make adequate site inspections to ensure that a stable building site was constructed. Judge Willy accepted that he had to

> decide the point left open in *Bruce*, ie, whether or not the Housing Corporation acting in its "ordinary mortgagor/ mortgagee" capacity should it (sic) be liable to its borrower in the event that it elects to inspect the property the subject of the security and does so carelessly.

Two important facts emerged at the outset. First, the Corporation had told the plaintiffs that it would be inspecting the building works[11] and that the plans and specifications would require its prior approval.[12] Second, the plaintiffs relied upon those inspections and the approval of the plans and specifications as affording them some protection. Had the Housing Corporation assumed a responsibility such as to attract a duty to the plaintiffs as borrowers, to properly carry out an appraisal of the real estate? This issue was considered with respect to each of the plaintiffs' three claims.

1 Failure to ensure adequacy of house design and foundations

The Court held that the Corporation, in leading the plaintiffs to believe that it would check the plans and specifications for the house, was under a duty to do so with reasonable care. Judge Willy felt able to impose such a duty, given that:

> . . .the Housing Corporation lends widely to property owners at the lower end of the scale of value. It must have been aware of the real probability that such persons will look to the Housing Corporation's inspections to provide a measure of protection to them. . . . The Housing Corporation cannot expect that people building in circumstances where they qualify for Housing Corporation assistance will have the benefit of the advice of engineers or other similar professionals.

2 Failure to ensure correct loading ability of land and failure to inspect foundations

It was a condition of the loan offer that the foundations had to be inspected by the Corporation's property inspector. Judge Willy was of the view that:

> . . . a person borrowing from this institution on the terms proved in this case is entitled to assume that the Housing Corporation will ensure as far as may be reasonably possible that its own requirements in the matter of foundations are complied with. . . . [I]t cannot lead the plaintiffs to believe that it will carry out an inspection which relates to the security of the foundations and then fail to do so, or do so negligently.

A duty to inspect the foundations was established and the omission to fulfil that duty amounted to negligence.

3 Failure to make adequate site inspection

As the loan offer recorded that inspections would "be made by the Corporation from time to time" the plaintiffs were held to be reasonably entitled to rely on the Corporation to carry out those inspections. Failure to carry them out or to do so negligently rendered the Corporation liable.

The decision is a good one. It does not suggest that liability arises simply by virtue of the mortgagor-mortgagee relationship but rather as a result of the nature of the undertakings made by the lender and the lender's knowledge that an intending borrower would probably rely on those undertakings. The extent of the duty will be co-existent and co-extensive with the lender's undertakings. The mere reservation of a right to inspect a property does not in itself mean that the lender is warranting every aspect of the property: the extent of the appraisal required has to be tethered to the extent of the lender's undertaking. Integral to the finding of liability in *Miller* was Judge Willy's confining of liability to damage caused "to something as vital as the foundations." The correlationship between "undertaking" and "duty" is crucial to the correct determination of liability.

Suitable security

But what of the situation where a lender is asked to finance the purchase of an existing building and conducts an appraisal to ensure that it provides suitable security for the loan?

Perhaps the best known United States decision in this category is *Larsen v United Federal Savings and Loan Association* (supra). The plaintiffs agreed to buy a house for $45,000 subject to their securing a mortgage loan of $29,000. They lodged with the defendant a loan application together with the required sum of $100 which was to be used in part to meet the costs of appraising the property. The "in-house" appraiser confirmed the value of the property at $45,000. The loan was granted and the plaintiffs completed the purchase. Structural defects in the house soon became apparent with $19,000 being the estimated cost of repairs. The plaintiffs sued the defendant alleging that it owed them a duty of care to correctly appraise the value of the property, and that it had breached that duty by conducting the appraisal negligently.

The Court agreed that there was a duty of care. Even though the appraisal may have been primarily for the benefit of the lender, Reynoldson CJ in the Supreme Court of Iowa noted (at 287) that

> the appraiser should also reasonably expect the home purchaser, who pays for the appraisal and to whom the results are reported (and who has access to the written report on request) will rely on the appraisal to reaffirm his or her belief the home is worth the price he or she offered for it:[13]

This same approach is evident in the landmark decision of Park J in *Yianni v Edwin Evans & Sons* [1981] 3 All ER 592 where the plaintiffs purchased a house for £15,000 having been granted a loan of £12,000 from a building society. Prior to approving the loan the society had required that a survey of the house be conducted at the plaintiff's expense. The society had instructed the defendants, a firm of

valuers and surveyors, who advised that the house provided adequate security for the loan. The plaintiffs did not have the house independently surveyed, and the purchase was completed. It was later discovered that the foundations were cracking with the cost of repair being estimated at £18,000. The plaintiffs sued the defendants alleging that the statement by the defendants as to the suitability of the house for mortgage purposes to support a loan of £12,000 meant that the house was worth that amount, and that such statement was given negligently.

Park J first considered Denning L J's dissenting judgment in *Candler v Crane, Christmas & Co* [1951] 2 KB 164 and then *Hedley Byrne & Co Ltd v Heller and Partners Ltd* noting Lord Morris's observations (at 594) that

> if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

Then, applying Lord Wilberforce's test he held that

> the duty of care would arise if . . . I am satisfied that the defendants knew that their valuation . . . in so far as it stated that the property provided adequate security for an advance of £12,000, would be passed on to the plaintiffs who, . . . in the defendants' reasonable contemplation would prove reliance on its correctness in making their decision to buy the house and mortgage it to the building society.

Park J did not consider there were any considerations which ought to negative, reduce or limit the scope of that duty. Three matters proved important to Park J in reaching his decision. First, the defendants knew that the society would rely on the valuation report in deciding whether to make a loan to the plaintiffs. Second, they knew that because of such reliance, the defendant's valuation of the house would be passed on to the plaintiffs when the loan offer was made. Third, they knew of the common practice of those purchasing "at the lower end of the property market" not to have an independent survey, and to rely on valuers' appraisals which are communicated to them in the society's loan offers.

Similar situation

A similar fact situation, albeit one involving an "in-house" appraiser, arose in *Westlake v Bracknell District Council* (1987) 282 EG 868 where, following *Yianni*, Mr P J Cox QC gave judgment for the plaintiffs, saying (at 872) that

> the defendants owed a duty of care to the plaintiffs knowing that the latter would rely upon the accuracy of the valuation for mortgage purposes.

Yianni was also followed in *Ward v McMaster* [1985] IR 29 where the Court was required to determine whether a relationship of proximity could exist where the results of an appraisal are not conveyed to the intending borrower. The plaintiff had applied to a local council for a mortgage loan to purchase a house. The council advised the plaintiff that in order to carry out is statutory obligations it would have to inspect the house before approving the loan appication. A £10 loan application fee was charged. The plaintiff did not arrange for any independent inspection and not unnaturally "took the view that if the house was passed by the council then it must be all night [sic right?]." Costello J said (at 51):

> I am satisfied that [the council] ought to have been aware that it was probable that the plaintiff would not have gone to the expense of having the house examined by a professionally qualified person and that he would have relied on the inspection which their scheme indicated would be carried out.[14]

But, of course, *Yianni* was decided on the basis of Lord Wilberforce's test. And just as general negligence law is undergoing change at the behest of Lord Keith, so too there is a corresponding change towards a more restrictive test than that enunciated in *Yianni*, a change which was initiated by the English Court of Appeal in its decision in *Harris v Wyre Forest District Council* [1988] 2 WLR 1173 (CA) where Nourse LJ noted (at 1180) that to decide whether there is a duty to conduct a valuation with due care is to "be answered by an application of established principles relating to negligent misstatement". Referring to Lord Pearce's comments in *Hedley Byrne* that "[t]o import such a duty the representation must normally . . . concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer", Nourse LJ noted (at 1180):

> The circumstances must be such that the maker of the statement ought reasonably to recognise both the importance which will be attached to it by the recipient and his own answerability to the recipient in making it. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* itself and in other cases this requirement has been expressed as a voluntary assumption of responsibility or the like. . . .

The Court, faced with an explicit disclaimer of liability, held that the second requirement had not been satisfied, and therefore no duty of care arose. Whilst the Court refused to consider the correctness or otherwise of *Yianni* Kerr LJ expressed some reservations on the case and noted (at 1187) that "its inherent jurisprudential weakness in any ordinary situation is clear."

Outside valuer

In *Davis v Idris Parry* (1988) 20 EG 92 McNeill J adopted the test in *Harris*; as did Ian Kennedy J in *Roberts v J Hampson & Co* (1988) NLJ 166 where, a valuer, instructed by a building society, was negligent in completing the valuation. Ian Kennedy J took as the test:

> [W]ere the circumstances such that the defendants ought reasonably to have recognised both the importance which would be attached to their valuation by the plaintiffs and

their own answerability to the plaintiffs in making it?

Although this was based on the test enunciated in *Harris* which involved an "in-house" appraisal, Ian Kennedy J saw no reason why the same test should not be applied where the building society instructed an "outside" valuer. He held that there was a sufficient proximity between the defendants and the plaintiffs:

1 The defendants undoubtedly knew that it was highly unlikely that the plaintiffs would be relying on some other professionally based information as to the property.
2 They knew of the terms of the building society's notes to applicants and that they contained no disclaimer of liability.
3 That there was a realisation among surveyors that real estate valuations were read and relied upon by borrowers.

Treating *Hedley Byrne* as a case requiring a "voluntary assumption of responsibility" is receiving continued support. In *Yuen Kun Yeu* Lord Keith (at 196) referred to the decisions in both *Hedley Byrne* and *Junior Books* as turning on "the voluntary assumption of responsibility towards a particular party, giving rise to a special relationship".

The *Harris* test can, like Lord Keith's reformulation of Lord Wilberforce's test, be seen to be potentially more restrictive. Both tests essentially resulted from the same judicial desire: that of being able to refuse to impose a duty of care where the overall justice of the case required that no duty be imposed, rather than having to try to justify such refusal under the second limb of Lord Wilberforce's test. In this sense both tests reflect a move away from the pre-occupation (albeit a brief one) of many Judges with the perceived high degree of importance of the concept of foreseeability to a much more broadly based, less strait-jacketed approach. The extent to which *Harris* will lead to a test which is more restrictive than that expressed in *Yianni* may soon be known, as the House of Lords is to hear an appeal of *Harris* this year. However, any restriction is likely to prove most troublesome for a borrower who seeks to show a voluntary assumption of responsibility by a third party, such as an "outside" valuer (as occurred in *Yianni*), whose appraisal is specifically requested by, and the results directed back to, the lender.[15] This is in contrast to an appraisal which is completed "in-house" by a lender, where it will be easier to establish an assumption of responsibility since the undertaking to conduct the appraisal is given directly by the lender to the intending borrower, with the "results" being "represented" back to the intending borrower *by* the lender. The House of Lords' decisions will certainly be awaited with interest. □

1 Competition amongst lending institutions is such that the public is bombarded, in all media forms, with advertising aimed at attracting new customers. Advertisements range from banks offering "one-stop banking packages", to those offering specialist services through "loan and insurance centres". Various enticements are offered to those who become customers of some institutions, and this sort of marketing looks set to become a firmly established practice as lenders battle it out in a deregulated, highly competitive lending market. Some readers may remember the television advertisement run by the Bank of New Zealand to promote the "BNZ Blackboard". The advertisement ended with Ian Fraser saying: "BNZ – Trust them, they know what they're doing"; a clear inviting of reliance.

2 Survey participants were asked in what circumstances they required an appraisal of real estate. Results differed as to whether the loan was to be secured over residential or commercial real estate, and whether the building was complete or in the course of construction. In respect of residential real estate 68% of survey participants required an appraisal at all times; the remaining 32% retained a discretion to dispense with an appraisal where, because of special circumstances (for example small loan sum, or low debt-equity ratio) an appraisal was not seen to be necessary. Where a residential house was being constructed those respective percentages became 77% and 23%. Where lending was over commercial real estate the figures were 81% and 19% and for lending over a commercial building being constructed, 91% and 9%.

3 Of the survey participants who conduct "in-house" appraisals, 77% charge a specific appraisal or valuation fee.

4 Fifty-nine percent of the survey participants listed "in-house" appraisals as among the methods they use to assess the value of real estate for lending purposes; an average of 73% of all valuations which that 59% collectively conducted were carried out by "in-house" appraisers.

5 In the summary of facts in *Larsen v United Federal Savings and Loan Association of Des Moines*, Iowa, 300 NW 2d 281, 284 Reynoldson C J noted: "[The intending borrowers] awaited the appraisal 'to find out whether the house was worth the money.' [The lender] notified [the intending borrowers] through their realtor that the appraisal 'was okay and there was nothing wrong'." Similar situations arise in New Zealand.

6 The majority of Courts who have considered lender liability in this area have confined their examination to the scope of tortious duties, rather than the extent of any implied contractual conditions. Given the Privy Council's comments in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80, 107 per Lord Scarman and the comments of Cooke P and Somers J in the Court of Appeal's decision in *Day v Mead* noted at [1987] BCL 1223 it is submitted that implied contractual conditions will not properly produce any wider scope of liability than exists under the tortious head of liability.

7 See also, *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 2 WLR 761. The Privy Council's decision in *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] 1 AC 175, 194 has restricted Lord Wilberforce's two-fold test in *Anns v Merton London Borough Council* [1978] AC 728 where it is noted that such test ". . . is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care." (Note also Lord Keith's disapproval of Lord Wilberforce's test, in *Rowling v Takaro Properties Ltd* [1988] 2 WLR 418.

8 Such disclaimers are permitted under the proviso to s 30 UK Building Societies Act 1962. It was the existence of these disclaimers which led to the actions in *Yianni v Edwin Evans & Sons* [1981] 3 All ER 592 and *Smith v Eric S Bush* [1987] 3 WLR 889 (CA) (appeal pending) where the disgruntled borrowers directly sued the surveying firms which had been instructed by the respective building societies.

9 Of the survey participants who conduct "in-house" appraisals, 30% disclaim liability.

10 The Corporation now includes the following statements in its "Application for Loan Finance J1/2" form, under the heading "General conditions applying to all properties offered as security for Housing Corporation Loans": "The Corporation may inspect the property to see if it will provide satisfactory security for a loan and to satisfy its own requirements as mortgagee. ALL MORTGAGORS MUST SATISFY THEMSELVES THAT THEIR OWN REQUIREMENTS ARE MET IN RESPECT TO THE PROPERTY THEY ARE ACQUIRING, AS THE CORPORATION IS NOT A PARTY TO ANY BUILDING CONTRACT OR AGREEMENT FOR SALE AND PURCHASE. It is your responsibility to ensure that the property meets all your requirements. The Corporation has inspected the property only to see that it provides satisfactory security for a loan and does not guarantee the property or that it is suitable for your purposes.

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Expert evidence in child sex abuse cases: a comment

By Bernard Robertson, Lecturer in Law, Victoria University of Wellington

This article looks at the evidentiary problems that can occur in child sex abuse cases. The article arises out of a seminar at the Wellington Medical School on 20 March 1989. The article looks particularly at problems related to hearsay, and the possible use of video recordings of interviews between the child and the expert. The author raises the question as to whether the issues that concern child experts might not relate in a wider way to expert evidence in most criminal cases.

On Monday, March 20 1989, a seminar was held at Wellington Medical School on the role of the expert witness in child abuse cases. In fact the discussion centred mainly upon sex abuse cases though mention was made of cases of beating and torture. This event should have attracted more lawyers. The speakers were (in the chair) Judge Mahony, Helen Cull, Barrister and Solicitor, Judy McDougall, psychologist, and Dr Astrid Heger, a physician from the United States.

In the course of the seminar a number of concerns were expressed about the efficacy of the criminal legal system which lawyers would do well to ponder. It may also be of value to those concerned with child abuse to play back some of their concerns and reflect upon them from the point of view of one with an academic interest in evidence.

The first point to be made is that very little of what was said at the seminar was peculiar to child abuse cases. The concern expressed by the experts at the way their evidence is treated reflects the concern expressed by statisticians and other expert witnesses and the concerns expressed about the evidentiary barriers to conviction reflect the concerns of police and prosecutors generally.

Hearsay

Much discussion was devoted to the question of hearsay. The rule against hearsay has two effects in this context. First it prevents the experts giving evidence of what has passed between the alleged victim and themselves and secondly it complicates the giving of expert evidence based upon training and reading of literature. The second is really a matter of form rather than substance but is seen by the non-legal expert as an unnecessary and formalistic complication.

The more substantial point relates to the evidence of interviews with the alleged victim. This is the absolute paradigm of what the hearsay rule is designed to prevent – the story from one witness being told by another. Why?

The problem with hearsay is this: A utters, B records the utterance and subsequently repeats it for the purpose of proving some conclusion. Possibilities for error creep in at two stages. First A may have been unclear or dishonest and secondly B may suffer from faulty recall or distorted perception. When a witness gives evidence of what he himself has observed then all four possible sources of error can be tested through cross-examination. In the case of hearsay evidence B can be cross-examined as to his or her perceptions and memory but not as to the ambiguity or honesty of A.

Video recordings

Discussion revolved around the admission of video recordings of interviews between A and B. The advantage of video recording is that it overcomes problems of memory and allows the viewer to form his or her own perceptions, though these will be shaped by the conduct of the interview. The problems of the honesty and clarity of A can be overcome if A is available in Court to be cross-examined after the showing of the video recording. There is therefore no reason in logic

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Applicants seeking to have their work supervised should employ their own advisers."

11 Clause 5 of the Loan Offer provided: "Inspections. Inspections of the building will be made by the Corporation from time to time. The first inspection must be applied for by you or your builder when excavations for foundations are complete and before concrete is poured. Subsequent inspections will be made by the Corporation without request from you. The inclusive inspection fee is $15.00."

12 Accompanying the loan offer was a document entitled "Minimum Standards of Materials and Construction Otago District" which contained a detailed description of the Corporation's requirements with regard to foundations, and the following provision: "Inspections: The Corporation's Property Inspector must be advised when the foundation excavations are ready for inspection before concrete is poured. Reasonable notice is required."

13 See also counsel's argument in *Harris v Wyre Forest Council* [1988] 2 WLR 1173 (CA) (appeal pending) that the purpose of the inspection was solely for the council's use in protecting its funds and consequently its ratepayers, with protection of the borrower not being part of its intended purpose. Nourse L J noted (*at p 1178*): "But that submission, although undoubtedly correct, does not solve the problem, because it is still possible for a local authority to put themselves into a position where they come under a duty of care to a prospective mortgagor." Of the survey participants who conducted "in-house" appraisals, 50% stressed that appraisals were intended for their own use.

14 Pursuant to the provisions of the Housing Act 1966 and attendant regulations, the council was required to satisfy itself as to the value of the house.

15 See discussion by Hazel McLean in "Negligent Regulatory Authorities and the Duty of Care" (1988) *Oxford Journal of Legal Studies* Vol 8, No 3, 442.

why a video tape of an interview with a person available for cross-examination should not be shown at a trial. Unfortunately the rule against hearsay long ago become rigid, formalised and detached from its rationale!

In such instances other forms of hearsay are not only admitted but not even recognised as hearsay.[2] By virtue of s 4 Evidence Amendment Act (No 2) 1980 such a video tape could be shown where the Judge is of the opinion that its probative value outweighs the probative value of the witness's evidence in Court but only at the conclusion of his evidence or during cross-examination. This limitation means that the child still has to go through the ordeal of giving his evidence in chief. If the alleged victim says anything different in Court he can still be cross-examined on the differences by the defence but if there are mere variations in expression or emphasis the prosecutor does not know in advance whether such evidence will be admitted and cannot ask the witness to elaborate upon his earlier statement.

Furthermore when one is dealing with a professional interviewer who has taken notes and when the interviewee is in Court it may be questioned whether there is any logical difference between admitting a video tape and admitting the expert's notes of what was said. The only question would be as to the accuracy and honesty of the notes and that is a question which, in the context of interviews with accused persons, the Courts deal with every day.

In any case it is not the interview itself which is crucial but the inferences to be drawn from it. A young child in particular may say and do things which are not direct evidence of abuse but which have to be interpreted. This is what the expert witness sets out to do. Because it is precisely those interpretations which are subject to crucial questions and not necessarily the veracity of the child there seems no logic in excluding the expert's notes of the interview and including a video recording.

The paradigm of the scientific method is that events are objectively observed and conclusions drawn. The validity of belief in this model has been increasingly attacked in this century. Scientists it is said, do not observe things at random but they form hypotheses and then conduct experiments to test them. Both the design and observation take place against a background of belief which may cause perception to be more subjective than the scientist would like to think. This is even more the case when the object observed is a human being, since human beings are not prone to the absolutely predictable behaviour of say, an object released a few feet above the ground. Moreover the field of human behaviour is further complicated by the fact that every human inter-action is a two way process and the alleged victim will not react in precisely the same way to any two interviewers.

There is therefore a distinct danger of the expert's perception becoming clouded. Two kinds of intrusion may occur. (And I must make clear that this comment relates to any interview about any type of offence.) First there is the natural thought that if the child had not been abused it would not be here. Secondly there may be erroneous conclusions drawn from second-hand experience. This seems to have been so in the Cleveland case where a survey was circulated which indicated that 10% of people interviewed reported abuse as a child. This caused some social workers to believe that anal and vaginal abuse were much more widespread than commonly believed and therefore not to question the large numbers of children being diagnosed as victims. In fact the definition of "abuse" adopted in the survey was extremely wide, involving a range of behaviour other than sexual violation.

Behaviour of child

There is a further problem involved in the drawing of inferences from the expert's examination of the child victim. As Judy McDougall said, different children react differently to events and part of the expert's role is to help the Court to interpret *this* child's behaviour. Now any attempt to infer fact B from fact A involves the use of generalisations and assumptions. One of the most valuable effects of any system of rigorous analysis of evidence is that it enables these generalisations and assumptions to be identified and examined.

Fact A in this case is the present behaviour of the child and fact B is the proposition that he or she has in the past been subjected to abuse. To reason from fact A to fact B we must employ a generalisation which appears to be that *some* children behave in this way after being abused. The expert is then able to tell us the grounds on which he believes that *this* child is one of that class. The problem is of course that the expert is observing and classifying the child now and the observations include the behaviour in question. That this is potentially a cause for concern is shown by cases in which denials by the children that they have been abused have been taken to mean that they have not yet come to terms with what has happened to them.[3] In other words any form of behaviour is capable of being interpreted as a reaction to abuse.

In *R v S* (unreported, CA 174/88, judgment 8.3.89) this problem arose. The Court heard from a witness whose qualifications were not the subject of argument but which appear unexciting. This may be because the witness undersold herself. A point made at the Wellington Medical School seminar was that experts must give a full account of their training and experience. In this case the witness was a BSc in psychology and held a post-graduate diploma in guidance counselling. She was a trained teacher and had "been involved with cases of sexually abused children". In the relevant part of her evidence she said

> There were definite signs of self-abuse with L, she had sort of pen tattoos on her hands and arms, at times cigarette burns she had done on herself, she had cut her wrists on two occasions. . . . she found eye contact very difficult . . . . she was very secretive about [her home life] and didn't want to talk at all about her home particularly her father.

She went on to say that on the basis of her experience this behaviour was consistent with being sexually abused. Unfortunately she answered a question as to whether L's behaviour was consistent with sexual abuse by saying "Very definitely". As the Court of Appeal found these characteristics "may

very well occur in children who have problems other than sexual abuse." The Court ordered a retrial partly because the defence had not had sufficient warning of this evidence and could not therefore be expected to cross-examine in an informed way.

The Court also discussed dicta in *R v B* [1987] 1 NZLR 362 the effect that

> as child psychology grows as a science it may be possible for experts in that field to demonstrate as matters of expert observation that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be concomitants of sexual abuse.

The Court went on to find that the evidence given in this case failed the *R v B* tests as it did not

> demonstrate in an unmistakable and compelling way and by reference to scientific material that the relevant characteristics are signs of child abuse.

The difficulty is that this assumes that psychology is a classical science and that human behaviour can be explained in scientific terms in the sense that given causes will always have given effects and that given behaviour is always explained by a given cause. It is respectfully submitted that psychology will never "grow" in this way since these assumptions are simply not true of human behaviour. On the other hand this does not mean that such opinions should not be admissible. These are matters which go to weight rather than relevance. If the defence had proper notice and if the jury are properly directed then it is submitted that they should be capable of assessing the weight to give the evidence. If it is argued that such evidence will unduly influence the jury then we must reassess our views of juries. Either they are competent in which case they should hear all the relevant evidence or they are not in which case they should not be used to decide cases at all. In this case the witness stated that the behaviour exhibited was consistent with previous sexual abuse. Of course it could also be consistent with other problems and the jury need guidance as to how to assess the probabilities.

Assessment of probabilities

The Court of Appeal in *R v S* found that, particularly by her answer "very definitely" the witness had usurped the function of the jury. It is respectfully submitted that she did not. What she did was to invite the jury to confuse two different probabilities. It seems likely that by "very definitely" the witness meant that in her experience a high proportion of children subjected to abuse display these signs. But this is to state the probability of finding this piece of evidence if abuse has taken place (in statistical terms Pr(E/G) where Pr= probability, E= the piece of evidence, G= guilt and / means "given"). This is irrelevant. The relevant issue is the probability that abuse has taken place given that we have this piece of evidence (or Pr(G/E)). As the Court pointed out this may be small. To give an example it may be that 90% of children who have been abused bite their nails, (ie Pr(E/G)= .9) but nail-biting may also be explained by numerous other factors so that only say, 5% of children who bite their nails do so because they have been abused (ie Pr(G/E)= .05). The latter is the relevant question for the Court and if the jury might have confused the two probabilities and if, as intuitively seems likely, (Pr(G/E) then a wrong conviction resulted. The lesson of *R v S* is probably that expert witnesses must not just be expert in their fields, they must be expert at being witnesses.

This leads on to another concern expressed at the Wellington seminar which is that the adversarial procedure cannot cope with expert evidence given in the form of probabilities. (Incidentally this concern married uneasily with what seemed to be the underlying assumption that the accused was invariably guilty.) In fact of course all cases are decided on some sort of inarticulate probability calculation. Judge Mahony attempted to improve upon "beyond reasonable doubt" by saying that the standard of proof in a criminal case is "certainly", but it is respectfully submitted that all cases involve probability rather than certainty. There are two uncertainties in a child abuse case. The first is whether the child has been abused and the second is whether if so the accused is the culprit.

Some experts, such as fingerprint experts, adopt restrictive rules so that they only give evidence in cases where the probability of misidentification is so low that in practice they are never challenged on it. Child abuse specialists unfortunately cannot afford this luxury. Their problem as they see it is that they are called either as the expert for the prosecution or the defence. This inevitably causes partisanship. The prosecution in particular are trying to convict someone on a standard of beyond reasonable doubt and are not interested in the evidence being expressed in terms of quantified probabilities since it is at least arguable that if a doubt can be expressed in quantifiable terms it must be a reasonable doubt.

This is not a new problem and Wigmore, no less, called for experts, *all* experts, to be Court-appointed as long ago as 1934.[4] This once again assumes the paradigm of the scientific model where any two experts, observing the same event, will come to the same conclusions and all that is necessary is that they have the opportunity to explain themselves properly. As argued above this is not necessarily the case when one is observing the behaviour of children. The fact that observations of children are inevitably subjective means that there will always be a role for the expert in advising and perhaps even giving evidence on behalf of the defence. The defence task is of course easier since all their expert has to do is point out that there is a quantifiable doubt or an alternative explanation in order to undermine the prosecution evidence.

This last need not be a problem if some rigorous method were agreed upon for combining the probabilistic effects of different kinds of evidence. There is nearly always other sorts of evidence in a case and methods such as Bayes Theorem can help us assess the combined effect of evidence expressed in probabilistic terms. (See *Egglestone: Evidence, Proof and Probability*, 2 ed passim.) These methods have not had a happy history in Court however and cause considerable controversy in the literature.[5] Until this debate is

settled, and it is a debate which involves deep-rooted feelings about the principles of the criminal process, experts are going to have to live with this difficulty.

The prosecution counsel's role therefore is to explain to the jury that all criminal cases are cases of uncertainty, and that not each piece of evidence had to be found to be true beyond reasonable doubt but that the expert's evidence is to be combined with their assessment of the other evidence in order to reach a conclusion. (*Thomas v The Queen*, [1972] NZLR 34, 38) If this is done there should be no harm in putting a figure on the probability of the expert's conclusion and thereby defusing the potential confrontation between experts and allowing the jury to hear evidence which *R v B* and *R v S* may appear to rule inadmissible.

Conduct of the defence

It was also interesting to hear Judge Mahony saying that in future Judges would exercise greater control over the conduct of the defence. (Law Reform (Miscellaneous Provisions) Bill, cl 23F(4)) The complaint that the defence are constantly allowed latitude to confuse issues by raising irrelevancies, particularly when attacking prosecution witnesses, is not confined to child abuse cases. In rape cases legislation has been required to protect victims from cross-examination about their previous sexual history. (Evidence Act 1908 s 23A(2) inserted by the Evidence Amendment Act (No 2) 1985) Opinions are divided as to what the legislation does. It can be argued that its effect is to exclude on policy grounds material which is relevant. It is submitted that the better view is that it does no more than exclude irrelevant material which Judges have failed in their duty to exclude in the past. In any case the history of legislative attempts to control the defence is not a happy one since the opportunities decisions in favour of the defence are so limited.[6] But if it is the case that the defence need to be controlled in these sorts of cases why is it not true in other cases as well?

The concerns expressed by child abuse experts might be characterised as concern at the failure of the trial process as a rational process. They are not alone in this concern. The fact that we are determined through the criminal justice system to protect certain non-rational values does not mean that we can duck out of improving its qualities as a rational truth-finding system when no other basic value is in conflict. These concerns have been voiced by evidence scholars and expert witnesses for generations. Perhaps child abuse will provide the catalyst to hard thinking by the legislators who design the system. □

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1 For the classic example of which see *Myers v DPP* 1965 [AC] 1001.

2 See, eg (US) Federal Rules of Evidence Rule 801(d)(1).

3 See, eg *Dominion Sunday Times*, 26 March 1989, p 1.

4 Wigmore: *To Abolish the Partisanship of Expert Witnesses as Illustrated in the Loeb-Leopold Case.* (1934) 15 J of Crim L&C 314.

5 See, eg *The People v Collins* 438 Pac Rep 2d 33, and the debate it sparked off in the Harvard Law Review: Finkelstein and Fairley, *A Bayesian Approach to Identification Evidence*, (1970) 83 Harv LR 489; Tribe: *Trial By Mathematics*, (1971) 84 Harv LR 1329; Finkelstein and Fairley: *A Comment on 'Trial by Mathematics'* (1971) 84 Harv LR 1801 and Tribe: *A Further Critique of Mathematical Proof*, (1971) 84 Harv LR 1810.

6 Adler: *Rape — The Intention of Parliament and the Practice of the Courts*, (1982) 45 MLR 664.

Books

Pleas in Mitigation

By Robert Hesketh

Published by the Auckland District Law Society, $44.00.

Reviewed by Colin Amery

A new practitioner, faced with his first plea, badly needs a guide into the labyrinth of new legislation that today controls sentencing in our criminal courts.

Robert Hesketh's monograph tries to compensate for the fact that little, if anything has been written on the way a plea in mitigation should be presented. The author is a practising criminal lawyer on the Auckland circuit and so is well aware of the kind of pitfalls that the making of a plea may give rise to.

His 70-page monograph is clearly and concisely written in a style that does not get overly ornate in dealing with the jungle of new statutes the criminal advocate must be acquainted with if he or she is to make a good showing for the client.

The book deals in the first five chapters with the various stages that have to be gone through in preparation of a plea — the first interview, preparation for the hearing, the hearing itself, after the hearing and some applications of the Criminal Justice Act 1985. This is then followed by a final chapter which gives four separate examples of pleas in mitigation. At each stage a checklist is provided of the matters that should be covered in preparing the plea, such as the present personal circumstances, financial details and previous convictions of the defendant. Hesketh also provides the correct form with which to address the particular Judge and suggests that the plea should be both concise and pithy. A small section at the end of chapter three talks of courtroom etiquette and style — a topic on which very little has been written in New Zealand up to this time.

The material of the Criminal Justice Act 1985 raises a very interesting point about procedure under s 121 which deals with psychiatric reports and examinations. It would appear from the wording of the first sub-section that it can only be applied to a person in custody, yet subs (2)(a) goes on to talk about the position of a defendant granted bail. A clear piece of very poor drafting in the latter days of the Muldoon government is brought to light.

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The property rights of de facto partners:
Some proposals for legislative reform

By His Honour Judge David Harvey, a Judge of the District Court

This paper was originally prepared for the Family Law Subcommittee of the Auckland District Law Society. It can be said that "de facto" relationships exist as a matter of preference of the parties or because of a legal impediment to marriage, like a second marriage being the criminal offence of bigamy. In principle therefore it seems at least questionable whether they should be treated at law on the same basis as marriage. A singular solution being suggested, with moral and legal trends being what they are, would be simply to abolish marriage as a legal institution, and have it as a private religious ceremony for those who want to do this. In Maine's classic phrase this would represent a further step in the progress from statutes to contract. Even so this would still leave questions of care and custody of children and rights of property to be determined on the parties ceasing to live together. And these of course are legal questions, even if only those of contract, expressed or implied. The author is not concerned directly with the underlying issues of moral and social principle, but with the more practical questions that can arise in respect of the ending of "de facto" relationships through an extended application of the provisions of the Matrimonial Property Act.

This article was written before the appointment of the writer to the position of District Court Judge.

Introduction

Late in 1987 the Minister of Justice announced that he intended to give high priority to the passage of legislation to enlarge the scope of the Matrimonial Property Act 1976 so that it applies to what have become known as "de facto relationships". The purpose of this paper is to give consideration to some of the areas that the legislation may address and to point out the difficulties that may be encountered by a mere extension of the Matrimonial Property Act to the "de facto" relationship.

Background

In October 1975 the then Minister of Justice, Dr A M Finlay, introduced a Matrimonial Property Bill to Parliament.[1] The Bill was not passed during the term of the third Labour Government but a substantially altered Matrimonial Property Act was passed by the National Government in 1976. Dr Finlay's Bill did contain a proposal for the extension of the terms to de facto relationships. It provided that the provisions of the Bill setting up the property regime would extend to couples who had lived together as man and wife for a period of not less than two years preceding the date of the application.[2] This proposal fell by the way when the Bill was reconsidered. It was suggested, among other reasons, that the proposal was not socially acceptable because it would undermine the nuclear relationship of a marriage, one of the foundations of our society, and could be interpreted as a condonation by the legislature of unmarried persons living together.

During the course of the last twelve or thirteen years society's attitudes have changed. The "de facto marriage" has become common, indeed acceptable, and the stigma of a man and woman " living in sin" appears to have faded, if not disappeared entirely.

Recent statistics indicate that there has been a 30% increase in de facto relationships over a period of five years, with the result now that 4.6% of the adult population is living in a de facto relationship.

The Courts have been required to consider the property interests of parties who have lived in a de facto relationship which has broken down or which has come to an end as a result of the death of one of the parties.

The Courts have utilised the law

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The most valuable part of the monograph from the practitioner's point of view are the four examples of mitigation pleas given in the concluding chapter. These cover Transport Act cases, assault and theft as a servant, clothing the final pages with flesh and blood clients whose situations bring home the reality of what a plea is all about.

Useful appendices on sentencing combinations together with appeal period limitations, plus a helpful bibliography bring this monograph to a close. I can personally recommend it to new and old practitioners alike. Answers to two current problems before me in my practice were provided in this book. For the price of $44 it is to be highly recommended and one hopes that Mr Hesketh will find time in the future to devote more space to writing about the practice of the criminal law in New Zealand. □

relating to implied, resulting or constructive trusts, and throughout the jurisdictions in which the case law has developed, these terms have been utilised interchangeably. Furthermore, as may be expected, the enthusiasm with which the Courts have applied trust remedies has differed from jurisdiction to jurisdiction. At the present time the Canadian and New Zealand jurisdictions appear to adopt a more liberal approach to finding either a resulting or constructive trust than the English and Australian jurisdictions which appear to have been more conservative and restrictive.

When compared with the remedies which are available in legislation for persons who have formalised their relationship by way of marriage (eg the Matrimonial Property Act 1976) or in other legislation (eg the De Facto Relationships Act 1984 in New South Wales), it is perfectly clear that the trust remedies presently applied by the Courts to the property rights of de facto spouses leave much to be desired.

In some cases Judges have expressed concern that the remedy of the resulting or constructive trust does not appear to go far enough. Other Judges however have favoured a more cautious approach, suggesting that the matter should develop by way of the evolution of equitable principles and allowing the remedies to develop on a case by case basis.

An example of the "case by case" approach is illustrated by three recent cases.

In *Hopkins v Sturgess* [1988] BCL 135, Wallace J adopted the reasoning in *Pasi v Kamana* [1986] 1 NZLR 603 and dispensed with the need to make a differentiation between implied and constructive trusts. This is a somewhat novel approach and one which the writer, with respect, supports, especially as it indicates a progresssive approach to a vexed problem. However, the fact that one Judge adopts such an approach (and that approach has not received sanction from other Judges or from the Court of Appeal) is indicative of the need to gather the strands together into some form of code.

In *Sutcliffe v Reid* [1989] BCL 131, a decision of Doogue J delivered four days before the decision of Wallace J in *Hopkins v Sturgess*, the learned Judge extensively reviewed earlier authorities, both reported and unreported and decided the case with reference to implied trusts (arising from expressed or common intention) and constructive trusts.

Earlier in 1988, Anderson J decided *Lanyon v Fuller* [1988] BCL 1309 on the basis of finding a constructive trust. He made reference particularly to *Pasi v Kamana*. Anderson J took into account domestic services when considering contribution. It is submitted that this is a matter which may or may not receive approval in other decisions. Indeed, Doogue J in *Sutcliffe v Reid*, after being referred to *Lanyon v Fuller* said that it was to be dealt with as a decision on its facts and went on to say that there was a clear line of authority "that activities consistent with purely domestic activities and the ordinary range of activity carried out by anyone in respect of the property in which they live are not sufficient of themselves to give an interest in the property."

In *Hopkins v Sturgess*, Wallace J, by implication, recognised the validity of "domestic services" but found in that case that the services did not contribute towards enabling the defendant to earn or otherwise acquire assets or make savings.

It is clear, therefore, that some clarity is desirable in determining what amounts to contribution. It appears to this writer that many of the cases are redolent of the situation that faced family lawyers during the time that the Matrimonial Property Act 1963 was in force, where the minutiae of contribution were subjected to microscopic scrutiny.

Difficulties

There are difficulties with the use of the resulting or constructive trust.

The first difficulty is that the resulting or constructive trust must be applied to a particular item of property.

The second and more significant problem is that it must be established:

1 For a resulting trust that there is an express or imputed common intention that the parties should share in the particular item of property; or

2 In the case of a constructive trust that there have been substantial contributions to the property by the claimant party which would render it inequitable for the other party to retain the full benefit of the property — the concept of unjust enrichment.

Unlike the Matrimonial Property Act which extends the parties' rights to all "matrimonial property" as defined by the Act, the trust remedy can only apply on an asset by asset basis and in this respect bears remarkable similarities to the state of the law relating to matrimonial property which was set in place by the decision in *E v E* [1971] NZLR 859, a decision which attracted considerable critical comment subsequently and which was finally remedied by the Privy Council in *Haldane v Haldane* [1976] 2 NZLR 715, shortly before the passage of the 1976 Act. However, it could be argued that there is justification for an asset by asset approach within the context of the de facto relationship and its property arrangements.

In essence, the rights of marriage partners to matrimonial property pursuant to the Matrimonial Property Act 1976 derive from the fact of the marriage relationship which sets forth certain prima facie presumptions governing the rights of the parties to property. These presumptions may be rebutted in respect of s 11 property by the concept of extraordinary circumstances rendering equal sharing repugnant to justice (s 14) or the marriage of short duration (s 13), or in the case of s 15 property, where the contribution to the marriage partnership has been clearly greater by one spouse than the other.

In contrast, the trust remedy gives little, if any, consideration to the relationship giving any rights to property at all, and therefore casts an onus upon the claimant to establish either common intention to share property or aspects of unconscionability.

Notwithstanding that the constructive trust principle has been given tacit approval by the Court of Appeal in New Zealand, generally the Courts have attempted to find a resulting trust based on the common intention of the parties.

In the case *Oliver v Bradley* [1987] 4 NZFLR 449 the claimant attempted to utilise the provisions of the Domestic Actions Act 1975 to obtain an interest in property. The Court of Appeal was not prepared to allow this remedy. Cooke P did not address the issue in his opinion. Casey J expressed strong reservations about the use of s 8 of the Domestic Actions Act, finding as its real purpose

> the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than in furtherance of some other personal relationship. I do not think the legislation was ever intended to apply to the de facto situation in this case, and, with respect, even less to the "engagement" of some eighteen years in *Young v New Zealand Insurance Co Limited*. (*Oliver v Bradley*, supra, at 454)

Henry J found practical difficulties in implementing the direction of s 8(3) which requires the Court to restore each party to the agreement as closely as practicable to the position that party would have occupied if the agreement to marry had never been made. He found that difficulties

> will frequently arise perhaps inevitably so whereas here the parties have lived in a de facto relationship for a period of years and there has been an intermingling of finances under sharing of the household. (at 456)

With respect, it is my opinion that parties to a de facto marriage relationship are disadvantaged in terms of their property rights by the law as it stands at present.

In many of these relationships all of the ingredients of a marriage may be present with the exception of formalised ceremony of marriage which would automatically give rise to Matrimonial Property Act rights. The elements of contribution that one would expect from a formalised marriage are more often than not present. The parties to such a relationship may carry out all of the tasks and obligations that one would normally associate with a marriage. In many cases there are children of such relationships.

An unfair onus is cast upon a party making a claim to property. That onus relates to the establishing of circumstances which may give rise to a constructive or resulting trust. As the law stands at present this is a heavy probative onus on such a claimant. Should one party to such a relationship become disentitled to an interest in such property acquired merely because he or she has been unable to establish the ingredients necessary for the Court to find a resulting or constructive trust especially when, by the formalisation of such a relationship pursuant to the provisions of the Marriage Act, the Matrimonial Property Act will apply to such property?

Law reform

Certainly law reform is required and the proposal by the Minister for legislation is to be welcomed. However, there are difficulties in establishing the appropriate framework for such legislation. But the situation will not be resolved merely by the automatic engrafting of a de facto relationship into the Matrimonial Property Act 1976.

The problem of definition

The definition of the de facto relationship in itself causes problems.

What precisely is a de facto relationship? Gibbs CJ in *Calverley v Green* [1985] 59 ALR 111 said "the parties to this appeal lived in what is nowadays called a de facto relationship —ie although not married to each other, they lived together as though they were husband and wife". Mason and Brennan JJ stated:

> the term "de facto husband and wife" embraces a wide variety of heterosexual relationships; it is a term obfuscatory of any legal principle except in distinguishing the relationship from that of husband and wife. It would be wrong to apply either the presumption of advancement or Lord Upjohn's inference to a relationship devoid of the legal characteristic which warrants a special rule affecting the beneficial ownership of property by parties to a marriage.

In *Lichtenstein v Lichtenstein* [1986] 2 FRNZ 58 Tompkins J adverted to the difficulties of definition of a de facto marriage relationship. He referred firstly to s 63 of the Social Security Act 1964, finding such definition as of assistance in determining the meaning of the expression. The term "de facto relationship" had been incorporated into the Will of the deceased which was the subject of the case and Tompkins J found undoubtedly that the testator meant that it was

> a relationship where his widow and the other person were not legally married, but I think he did not intend that the condition should operate if they entered into a relationship which, although not a legal marriage, was in the nature of a marriage. (ibid)

Tompkins J then considered the factors or characteristics that would make a relationship in the nature of a marriage and suggested that these could include:

(a) Cohabitation.
(b) Sexual relations.
(c) Some degree of permanence.
(d) A sharing of assets and income.
(e) Joint ownership.
(f) The use of a common surname.
(g) Most importantly, an intention on the part of the couple to regard themselves as married.

However he found that there could be difficulties in determining whether or not a relationship which was not a legal marriage had become a relationship in the nature of a marriage. He felt that the executor could find difficulty in concluding that such a relationship had been entered into. He compared this to a legal marriage which of course is entered into when the legal formalities the law requires have been completed. The marriage exists whether or not all or any of the factors that have been listed are present. There is policy with a legal marriage to determine positively:

(a) That it took place.
(b) When it took place.

The way in which the Courts in Australia have approached the de facto relationship, especially in the light of some of the legislation to be discussed, is of interest.

The decision of the Supreme Court of South Australia in the case of *In re Fagan deceased* 1980 FLC para 90/821 dealt with an application for a declaration that the applicant and deceased person were putative spouses of one another. The applicant claimed that on 22 December 1978 she was the putative spouse of the deceased because she was on that date cohabiting with him as his wife de facto and she had cohabited with him continuously for a period of five years immediately preceding that date. It was argued that the words "cohabit as husband and wife de facto" imported a narrow and restricted view of the concept of putative spouse which would require that some if not all of the criteria of a common law marriage, including a holding out of the de facto spouse as a wife or a husband as the case may be, and at least a monogamous relationship in the sense of cohabition with the putative spouse to the exclusion of all others. The learned Judge held that on a literal meaning of the language he could not find any justification for such limitation. He held that the legislation imported the concept of a putative spouse and clearly contemplated the co-existence of both a putative spouse and a lawful spouse. It was held that the section had nothing to say about marriage in its accepted sense as the "voluntary union for life of one man and one woman to the exclusion of all others". It was held that to cohabit as husband and wife meant no more than living together as husband and wife, the wife rendering wifely services to the husband and the husband rendering husbandlike services to the wife. However it was held it did not necessarily imply that they always have to live together under the same roof and he contemplated that there may be states of cohabitation where they see as much of each other as they can and yet are not separated because there has not been any real suspension of their ordinary conjugal relationship. The Judge held that a man may be cohabiting with his wife even if he is away on a visit or on business because the conjugal relationship is not determined in any shape or form.

The decision of the Family Court of Australia in 1984 in the case of *in the marriage of L v L* 1984 FLC para 91/563 was delivered before the commencement of the De Facto Relationships Act 1984 (which was assented to on 10 December 1984). That case dealt with a maintenance agreement which imposed certain obligations upon the husband during the life of the wife or until she remarried or entered into a permanent de facto relationship. The husband alleged that between 1978 and September of 1980 the wife had entered into a permanent de facto relationship with one C who had died in September of 1980.

The Court had to consider whether or not the wife and C had entered into a permanent de facto relationship. The Court had reference to the common usage of the words "de facto relationship" and to the report of the New South Wales Law Reform Commission on de facto relationships which was published by that Commission in 1983. It was held that a permanent de facto relationship must exhibit the following elements:

(a) It must be a relationship between a man and a woman.
(b) It must be intended to last indefinitely.
(c) The parties must live together as husband and wife.

It then referred to the decision of the full Court of the Family Court of Australia in the case of *Pavy v Pavy* 1976 FLC 90/051 where the constituent elements of a marital relationship were stated. They were said to include:

(a) Dwelling under the same roof.
(b) Sexual intercourse.
(c) Mutual society and protection.
(d) Recognition of the existence of the marriage by both spouses in public and private relationships and the nurture and support of the children of the marriage.

In *L v L* the Court held that not all these elements need be present before a consortium vitae can be recognised as such. It was pointed out that a de facto relationship may be more readily entered into and more easily abandoned. The element of dwelling under the same roof is likely to have greater significance than the mutual and especially public recognition of the association.

The Court then went on to examine the constituent elements to which it had referred. It pointed out that it naturally did not mean that a de facto relationship existed where parties happened to live under the same roof, eg as lodger and landlady. What was meant was whether the parties were living in a common household. The element of dwelling under the same roof involved a sharing of the physical facilities of the house, a sharing of the functions of the household, and a common use of resources to maintain the household. However the Court issued a caveat in that not all of the sub-elements had to be present in every case, stating that it could be possible for parties to live in a de facto relationship even if they kept their financial resources separate and, for example, they did not have to keep a common bank account. The Court pointed out that in many cases the parties may simply pay their share of the expenses, or one party may pay all of the expenses.

In so far as the question of sexual intercourse was concerned, it was perfectly clear on the facts that sexual intercourse did take place. The Court therefore did not have to address what it considered to be the interesting question of whether there can be a non-sexual de facto relationship.

The Court had no doubt that there existed a mutual society and protection, as evidenced from the association of the parties, and in particular care given by the lady to the man during a terminal illness and the provision that he made for her in the Codicil to his Will.

However there was no evidence to suggest that the parties mutually recognised the association to be a de facto relationship as is traditionally done by a woman accepting a man's name, although the Court hastened to point out that this is not the only way in which that aspect can be evidenced. The evidence indeed of the gentleman showed that he consistently opposed the notion. If, however, the parties had formed a consolidated household, such protestations may have sounded hollow. In *L v L* there were no children of the relationship.

All that was established was that there was sexual intercourse and common protection. The Court found it difficult to see how that

could constitute a consortium vitae. Consequently the Court was unable to hold that there had been a de facto relationship.

The legislators have had to grapple with the nature of the "de facto relationship."

The Domestic Protection Act 1982 extends non-violence, non-molestation and occupation orders to men and women who are living in other than a married relationship. Section 4 allows either the man or the woman to apply for a non-violence order where they have been living together in the same household and similarly allows an application for a non-molestation order in similar circumstances. However, the ingredient of "living together" is only one ingredient of a de facto marriage.

The definition of conjugal status contained in s 63 of the Social Security Act 1964 and referred to by Tompkins J in *Lichtenstein* states that for the purposes of determining any application for a benefit or reviewing the benefit already granted or determining the rate thereof, the Commission may in its discretion

> regard as husband and wife any man and woman who, not being legally married, have entered into a relationship in the nature of a marriage and . . . determine a date . . . on which they shall be regarded as having entered into such a relationship.

Section 27A defines "husband and wife" for the purposes of domestic purposes benefits as including

> a man with whom a woman has entered into a relationship in the nature of marriage although not legally married to him; and "wife" has a corresponding meaning.

The Family Relationships Act 1975 of South Australia is of assistance. It defines a putative spouse for the purposes of determining relationships for children. It declares that:

> A person is, on a certain date, the putative spouse of another if he is, on that date, cohabiting with that person as the husband or wife de facto of that other person and:
>
> (a) He:
>
> (1) Has so cohabited with that other person continuously for the period of five years immediately preceding that date; or
>
> (2) Has during the period of six years immediately preceding that date so cohabited with that other person for periods aggregating not less than five years; or
>
> (b) He has had sexual relations with that other person resulting in the birth of a child.

It is important to note, however, that the purposes of the Family Relationships Act 1975 are somewhat limited and the Act does not go towards providing a de facto property regime. The long title states that it is

> An Act to abolish the legal consequences of illegitimacy under the law of this State: to invest the Courts of this State with the power to make judgments declaratory of certain relationships; and for other purposes.

The definition of "spouse" in the Inheritance (Family Provision) Act 1972-1975, again South Australian legislation includes "a person adjudged under the Family Relationships Act 1975 to have been a putative spouse to the deceased either on the date of his death or at some earlier date." The Inheritance (Family Provision) Act is, as the long title states:

> An Act to assure to the family of a deceased person adequate provision out of his estate.

It bears some similarity to the New Zealand Family Protection Act 1955.

The De Facto Relationships Act 1984 of New South Wales is described in the long title as

> An Act to make provision with respect to de facto partners.

It is a specific piece of legislation designed to deal with the property relationships of and maintenance for de facto spouses.

It defines "de facto partner" as meaning:

> (a) In relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and
>
> (b) In relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her;

It defines "de facto relationship" as meaning "the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other.

Some assistance may be derived in interpreting this section from Australian authorities. *Dee v MacKay* (Butterworths Australian Current Law 1986 5.563) was a decision of the Supreme Court of New South Wales. Powell J held in that case that to determine whether a man and woman are or are not living together as husband and wife on a bona fide domestic basis within the definition of a de facto relationship in s 3(1), the Court makes a value judgment in each case having regard to a variety of factors relating to the particular relationship, those factors including but not being limited to:

(a) The duration of the relationship.
(b) The nature and extent of common residence.
(c) Whether or not a sexual relationship existed.
(d) The degree of financial interdependence and any arrangement for support between or by the parties.
(e) The ownership, use and acquisition of property.
(f) The procreation of children.
(g) The care and support of children.
(h) The performance of household duties.
(i) The degree of mutual commitment and mutual support.
(j) Reputation and public aspects of the relationship.

Some but not all of these criteria were referred to by Tompkins J in *Lichtenstein v Lichtenstein* (supra).

In *Wilcock v Sain* (1986 11 Fam

LR 302; Butterworths Australian Current Law 1986 13.28) it was held that a de facto relationship was not equivalent to marriage and the Act was not to be construed so as to deem as married parties who have deliberately refused to enter into a marriage.

The very nature of the relationship, its informality, the difficulty to determine with any precision its commencement, and the ability of the parties to determine for themselves the manner in which they will carry on their relationship, regulate and manage it, makes any attempt to define it with any precision impossible. Indeed the old adage "tot homines quot sentitae" is eminently appropriate for this particular type of relationship.

To go beyond the type of broad definition that has been enacted in the De Facto Relationships Act 1984 would be to set unnecessary metes and bounds to the relationship.

Inevitably, therefore, if legislation in this country were to be enacted containing the broad definition that is present in the New South Wales legislation, there would always be scope for the question to be addressed "was there a de facto relationship in this case on a bona fide domestic basis although not married to each other?"

The second major issue to be addressed in asking such a question is to determine when such a relationship commenced. Pursuant to the Social Security Act it is within the discretion of the Commission to determine whether there is a relationship in the nature of a marriage and the Commission can also determine the date of the commencement of such a relationship. It is quite clear therefore that in any case this will be matter of fact or proof.

It is my view that a broader definition is preferable albeit that the argument on whether or not the relationship was sufficient to bring into effect any property sharing provisions of the legislation may have to be addressed in a number of cases.

De facto relationships and the Matrimonial Property Act

I have already observed that the property sharing rights under the Matrimonial Property Act derive from the marriage relationship itself. These rights arise notwithstanding that all of the accepted ingredients of a marriage may not be present in every marriage. The fact that these ingredients are not present, however, does not make any difference to the property rights of the parties. The only modifiers to the property-sharing regime may arise from an analysis of the contributions of the parties to the marriage partnership, whether or not the marriage was one of short duration, or whether there were extraordinary circumstances which would render the equal sharing regime repugnant to justice in the case of s 11 property.

There may, however, be a number of reasons why a man and a woman may elect a relationship de facto rather than to formalise the relationship pursuant to the provisions of the Marriage Act. At the time that they enter into their relationship, one or other of them, or both, may not be free to marry. They may have philosophical objections to the nature of the "marriage bond". They may even enter into a de facto relationship specifically to avoid the involvement of a matrimonial property-sharing regime attaching to property acquired or bought during their relationship or brought into it at the outset.

To automatically engraft the provisions of the Matrimonial Property Act onto a de facto relationship could, in view of the myriad reasons why people may enter into such relationships, have a restrictive effect upon the freedom of such people to choose for themselves the nature of the relationship that they will enjoy with one another. It would be almost as if Parliament were to say "we shall treat your property affairs in such a way that although you have elected not to marry you shall be treated as married persons for the purposes of resolution of property difficulties".

Yet, it is my opinion that the trust remedies are not wide enough at the present state of development, nor is it foreseeable that they will become wide enough by further judicial activity, to do justice between de facto partners when the question of resolution of property matters arises.

Further it is my opinion that any legislation to regulate property matters between de facto spouses should be the subject of separate legislation rather than bringing the de facto relationship within the ambit of the Matrimonial Property Act.

Having said that, there are areas where the Matrimonial Property Act can be extended to cover the de facto relationship which, after its formation, is subsequently formalised into a lawful marriage.

One of the difficulties frequently encountered by practitioners arises from the situation where a man and a woman may have lived as de facto marriage partners for some years prior to the formalisation of their relationship and yet the lawful marriage relationship as contemplated by the Matrimonial Property Act has subsisted for less than three years. As the law stands at present, such a marriage is one of short duration. It does not take into account contributions made by the partners prior to the marriage relationship whilst they were living de facto. Such contributions are excluded because they are not contributions made to the *marriage partnership*. It is therefore appropriate that the Matrimonial Property Act should be amended to allow contributions to a marriage partnership to include contributions which may have been made to and during the "de facto marriage" partnership prior to the formalisation of the marriage and furthermore, where it can be established that the parties have lived as de facto partners for a period of years prior to the formalisation of marriage, the Court can take that de facto cohabitation into account in determining whether or not the marriage is one of short duration. In many cases, therefore, the result would be that the totality of the relationship could be viewed as being one of other than short duration in which case the equal sharing provisions would apply.

Separate legislation regulating property rights between de facto partners

Inevitably in considering the question of separate legislation, one is drawn to a consideration of the New South Wales De Facto Relationships Act 1984.

I have already dealt with the way in which this Act defines a de facto

relationship.

The Act also provides that it is a prerequisite for making an Order under the Act that the parties to the application must have lived in a de facto relationship for a period of not less than two years. (s 17(1))

However the Court may make an Order other than where the relationship has subsisted for less than two years where it is satisfied:

(a) That there is a child of the parties to the application; or

(b) That the applicant has made substantial contribution for which the applicant would not be adequately compensated if the Order were not made; or

(c) Has the care and control of a child of the respondent.

and that the failure to make the Order would result in serious injustice to the applicant.

The New South Wales Act defines property in relation to de facto partners or either of them as including

> real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property.

Section 19 provides what has become known in this country as "the clean break principle". The Court must, as far as practicable, make Orders that will finally determine the financial relationships between the de facto partners and avoid further proceedings between them.

The Court has the power to declare the title or rights, if any, that a de facto partners has in respect of property. (s 8(1)) Where a declaration is made, it may make consequential Orders to give effect to the declaration including Orders as to possession together with a number of "Mechanics Orders" including the transfer of the property, the sale of the property and distribution of the proceeds, the execution of documents, the payment of a lump sum, payment by periodic sum, securing the payment of any sum in such manner as the Court directs, appoint or remove trustees, make an Order for Injunction, impose terms and conditions, or make an Order by Consent.

Where an application by a de facto partner comes before the Court, an Order is sought adjusting interests with respect to the property of the de facto partners or either of them. In adjusting the interests of the partners the Court is to make an Order as to it seems just and equitable having regard to:

(a) The financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of *any* of the property of the partners or either of them or to the financial resources of the partners or either of them; and

(b) The contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following namely:

  (i) A child of the partners.
  (ii) A child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.

It may make such Orders whether or not it has declared the title or rights of a de facto partner in respect of the property.

The legislation therefore avoids a definition of "de facto matrimonial property". However it embraces all property or financial resources by its extension to "the property of the partners or either of them or to the financial resources of the partners".

However the financial and non-financial contribution which may be made directly or indirectly to the acquisition, conservation or improvement of any of the property is reminiscent of the asset by asset approach to property which characterised the 1963 Matrimonial Property Act in this country.

The definition of property is wide. The concept of contribution is also wide and indeed contribution may be made to *any* of the property of the partners of the partners – be it "matrimonial" or "separate". This concept is redolent of certain aspects of contribution expressed in s 9(3) of the Matrimonial Property Act. The empowering sections in the New South Wales legislation – Section 2(c)(i) and Section 8(1) are wide in that they allow the Court to declare the title or rights the de facto partner has in respect of property. Property has a wide definition and may include what would be in a Matrimonial Property Act situation both separate property and matrimonial property. This is enhanced by references in the Act to "property of the de facto partners or either of them".

However, it must be emphasised that the contributions, financial and non-financial which may be made directly or indirectly are two:

(a) The acquisition, conservation or improvement of any of the property of the partners or either of them; or
(b) The financial resources of the partners or either of them.

Wilcock v Sain (supra) made it clear that any orders made under s 10 and the quantum thereof were discretionary matters for the Court and depended upon what was just and equitable having regard to the matters set out in s 21(a) and (b). It was held that the Act was directed to a situation where the conduct of the parties in the relationship and the respective contributions they made to property legally in the name of one of them justifed the intervention of the Court as to make it, on the balance of probabilities, just and equitable to adjust the property rights.

Clearly therefore there is wide discretion vested in the Court, and it is clear that the De Facto Relationships Act in New South Wales cannot be seen to provide a strict code for determining the property aspects following upon a de facto relationship. Furthermore, as has been noted above, the issue of contributions are not relationship based but property based.

This is in sharp contradistinction to the concept of the Matrimonial

Property Act of contributions being to the marriage partnership. The concept of contributions to property has, as I have observed, an echo of the asset by asset approach in *E v E.* (supra) The asset by asset approach, however, has been the subject of harsh criticism since the decision in *E v E.* The perceived injustices of the asset by asset approach were addressed in the Matrimonial Property Act 1976 and also in the decision of the Privy Council in *Haldane v Haldane.* (supra) However, it must be remembered that both *E v E and Haldane v Haldane* were dealing with the interpretation of a piece of legislation that had already been passed. In my opinion legislation specifically for an asset by asset approach to the property of de facto partners would be a retrograde step. It would be discriminatory in that it would impose a property regime upon de facto partners which has been determined inappropriate both by the Privy Council and by Parliament in 1976 for married couples. It would cause unfair burdens upon both de facto partners, in the event that they required resolution of their property differences or difficulties that are not cast upon an ordinary married couple. It would not promote clarity in terms of their property relationships. Neither party could be entirely sure what the outcome might be.

This approach was criticised from 1971 to 1976 and indeed was one of the particular areas that the 1976 Act set out to address. The concept of contributions to the marriage partnership in the broadest sense was no legislative accident.

Section 20(1)(b) of the New South Wales legislation does extend the concept of contribution to those made in the capacity of homemaker or parent to:

(a) The welfare of the other partner; or
(b) The welfare of the family constituted by the partners; and

(i) A child of the partners and
(ii) A child accepted into the household, whether or not the child is either of the partners'.

This is an alternative to the concept of financial or non-financial contributions and extends the concept of contribution to the non-working homemaker partner. But by differentiating the contributions to property from those of family welfare without a legislative statement they are to be considered of equal value allows for the same sort of "flexibility" that has recently been the subject of criticism in *Bloxham v Bloxham* [1988] NZLJ 63.

It is not suggested that New Zealand should blindly follow the format of the New South Wales legislation. The question is whether or not a return (although perhaps by implication) to the asset by asset approach is appropriate to New Zealand conditions, or whether, considering that we have come so far down the track in the matrimonial property field since 1976, there should be automatic equal sharing. Furthermore, should New Zealand legislation allow for a differentiation of the nature of the contribution in a property resolution question between de facto partners when for ten years marriage partners have looked at contributions to the marriage partnership in the broadest sense?

It may be felt that, having regard to the nature of the de facto relationship, the automatic equal sharing of *all assets* should not apply even if they were to fall within an umbrella of "matrimonial property" if indeed such a definition can be arrived at in the context of the de facto relationship.

Already implicit within the constructive or resulting trust remedy is an asset by asset approach. It may be felt by those who favour the asset by asset approach that it is indeed more appropriate for it recognises the desire by the parties for flexibility in their relationship and in the organisation of their property affairs.

The New South Wales legislation sets up a regime that avoids many of the probative and technical requirements of the trust remedies and introduces other forms of contribution beyond purely monetary ones whilst avoiding the necessity to establish an express or implied common intention. It also avoids the necessity of answering the question of whether the common law should further develop the concept of unjust enrichment in this area.

The New South Wales legislation also contains provisions for maintenance of the de facto partner. I do not address that issue in this article which primarily addresses the issues of property.

From this it may be inferred that the automatic equal sharing regime of the Matrimonial Property Act should therefore apply to de facto partners. As has already been suggested in this paper that may not be entirely appropriate. Should the law dictate that although a couple are unable or do not choose to marry nevertheless their property matters shall be determined as if they were married? There is the question of interference with the freedom of choice of the parties to arrange their affairs as they see fit.

In my opinion, some of the principles of the Matrimonial Property Act can be adapted to suit the de facto relationship. Equal sharing of property owned by de facto partners or either of them should apply:

(a) if the asset was obtained after the relationship commenced, and
(b) the asset is owned or held in the joint names of the parties or in their names as owners in common.

This means that when the parties obtain their asset and determine how it will be held they have made a conscious decision as to the method of ownership and whether or not it is to be brought into the property pool of the relationship.

A presumption of equal sharing of an asset should arise in the case of the principal residence (the "de facto matrimonial home") if it was used by the parties as such. However, this presumption may be rebutted if it can be established that the contribution to the relationship by one of the parties has been clearly greater than that of the other party. In such a situation the shares of the parties in relation to the asset should be determined in accordance with the contribution to the relationship. Such a proposal is in line with s 15 of the Matrimonial Property Act 1976.

It would also recognise a situation frequently encountered in practice where a party, having settled a matrimonial property dispute, ends up with the home,

often as a result of a payment to the non-owning spouse, and frequently after further encumbering the home with consequent increased repayment burdens. The provision of such a major asset would have to be viewed as a "clearly greater contribution" rebutting the presumption of equal sharing.

Flowing from this there would be no presumption as is contained in s 11 that there be automatic equal sharing in respect of the matrimonial home which could only be modified by the exceptions contained in the Matrimonial Property Act.

In this context it is fair to set up some sort of time frame at the end of which the legislation should "cut in". The New South Wales legislation states two years and the 1975 Bill contemplated likewise, although in that case, the de facto partners were treated then as if they were formally married persons. Under the Matrimonial Property Bill the regime applied notwithstanding the informal nature of the relationship.

However, as is the case with the New South Wales legislation, there should be the power given to the Court to make sharing orders where there is a child of the partners or there have been substantial contributions to the relationship within its brief duration or one partner has cared for the child of the other and that an injustice would result from the failure to make such orders.

The separate property of the parties should remain so notwithstanding that the asset has been applied for the common use and enjoyment of the parties, although I see that there is room for a similar concept to s 9(3) of the Matrimonial Property Act applying to increases in value.

It may be seen by these suggestions, therefore, that an equal sharing regime may apply to property owned by de facto partners but there is less rigidity in the regime proposed than in the Matrimonial Property Act. Thus the parties to a de facto relationship can deal with their property with a certain degree of flexibility reflecting in fact the nature of their relationship.

The New South Wales legislation does, however, contain provisions relating to cohabitation agreements and separation agreements. Any legislation that is contemplated of necessity must contain provisions allowing the parties to contract out of the provisions of the Act or modify their property arrangements in such a way that is satisfactory to both of them. Provisions similar to s 21 of the Matrimonial Property Act could be incorporated into such legislation.

It would be opportune also for such legislation to clarify the question of the validity of agreements entered into between de facto partners. Lawyers have experienced a considerable amount of difficulty in ensuring that agreements between de facto partners relating to property or to the arrangement of their property affairs are cast in such a way as to avoid any possible implication of the agreement being declared void as against public policy.

I suggest that the legislation should provide that any agreement entered into between de facto partners for the purposes of regulating their property affairs or other aspects of their relationship should not be declared void on the grounds of public policy. Indeed the New South Wales legislation makes reference to cohabitation agreements and defines them as agreements between a man and a woman made either in contemplation of their entering into a de facto relationship or during the existence of a de facto relationship and which makes provision in respect of financial matters whether or not it also makes provision with respect to other matters.

Ancillary orders

Of necessity, any proposed legislation will have to contain provisions for the making of ancillary orders regarding possession of either real or personal property.

As the law stands at present, the only rights that a de facto partner might have to occupy real property is provided for under the Domestic Protection Act 1982 and only in the circumstances provided for in that legislation may occupancy orders or orders relating to furniture situated in the home occupied by the party be made.

If the provisions of the Domestic Protection Act 1982 are not applicable, a de facto's partner has no rights of occupation of a home owned and occupied by the other partner and indeed any remedies that partner may have in respect of personal property or chattels, must be dealt with under the law as it stands at present.

Given the situation where there may be considerable emotional trauma accompanying the breakup of a de facto relationship, the partner who leaves the home occupied by the party without taking any of his or her property can only fall back upon the remedies that are provided by the civil jurisdiction. If he or she wishes to recover personal or separate property left in the home, he or she is required to commence a civil action for the return of specific chattels. The matter can be neither swiftly resolved nor are the provisions of the Family Proceedings Act relating to counselling or mediation conferences available. Given the length of time that it may take to bring civil proceedings before the Court, the partner commencing such proceedings may be considerably disadvantaged.

Any legislation therefore must contain provisions relating to obtaining possession of property and similar ancillary orders.

De facto relationships and the Family Protection Act

There is another area of the law that will be affected by the de facto relationship, particularly in the family context. This is of course the law which relates to family protection. Already the case of *Hayward v Giordani* (supra) has indicated the difficulties that a de facto spouse may have in respect of a claim against the other deceased spouse's estate. If the law is to recognise de facto property rights inter vivos, there can be no reason why it should deny to a surviving de facto spouse the same rights that a lawfully married spouse has pursuant to the Family Protection Act. The Status of Children Act 1969 implicitly provides for the children of a de facto relationship to maintain a claim pursuant to the provisions of the Family Protection Act. However, if a de facto spouse were to be excluded, it would mean that the mother or father of children who may have a claim would not be entitled to claim against the estate of the deceased de facto spouse.

This in my view is a repugnant situation. Necessarily, therefore, if de facto spouses are to have property rights inter vivos, those rights should extend to the rights that are given to lawfully married spouses pursuant to the Family Protection Act. Therefore the Family Protection Act would have to be amended to enable de facto spouses to make a claim for further provision out of the estate of a deceased de facto spouse.

Conclusion

1 It is accepted that law reform is necessary in the area of de facto property rights.

2 It is inappropriate for the de facto relationship to be engrafted onto or incorporated into the Matrimonial Property Act, but certain amendments can be made to the Matrimonial Property Act to give recognition to the de facto relationship in terms of a marriage of short duration and contributions to the marriage partnership made before the formalisation of the marriage ceremony whilst the parties are residing in a de facto relationship.

3 There should be a separate legislation to provide a property sharing regime for de facto spouses which incorporates a wide definition of the de facto relationship, thus giving the Courts a discretion to determine whether or not a de facto relationship necessarily exists as a precondition to any claim for property rights between de facto spouses and that such relationship has endured for a specific period. Such legislation should provide for the Court to have jurisdiction to make sharing orders in relation to property having regard to contributions made directly or indirectly by the partners to the relationship. The definition of contribution should be wide enough to include contributions of any nature as envisaged by s 18 of the Matrimonial Property Act. Provision should be made to recognise contracting out agreements and validating cohabitation agreements. Provision for ancillary orders relating to occupation of a residence or possession of chattels should be incorporated.

4 Amendments should be made to the Family Protection Act to allow de facto partners to make a claim for further provision out of the estate of a deceased de facto spouse. □

1 For discussion of the 1975 Bill, see [1976] NZLJ 253, 321, 424 and 438.

2 Matrimonial Property Bill 1979 clause 49 – For discussion see Angelo and Aitken "The Matrimonial Property Bill 1975 – Some Further Thoughts" [1976] NZLJ 424, 427 and 428.

3 Richardson J, *Hayward v Giordani* [1983] NZLR 149, McMullin J *Hayward v Giordani*, 153; Cooke P; *Pasi v Kamana* (1986) 2 FRNZ 122.

Books

The Law of Intellectual Property in New Zealand

By Andrew Brown and Anthony Grant

Butterworths, Wellington, 1989; ISBN 0-409-78798l; 716pp; $143.00

Reviewed by Grant Hammond, Professor of Law and Deputy Dean, Faculty of Law, University of Auckland

This work was published early 1989. It is the first comprehensive treatise on the law of Intellectual Property in New Zealand. Given the importance of this subject area of the law today, the work would be welcome on that account alone. The quality of the work makes it doubly so. It will unquestionably become the standard New Zealand reference work on this subject for some considerable time to come.

The authors are partners in one of New Zealand's leading practices, Russell McVeagh McKenzie Bartleet & Co, of Auckland. There had been something of a tradition at the New Zealand bar in recent years of barristers writing treatises which have become standard reference works. The treatises by Dr Molloy on *Income Tax* and Dr Fisher (as he was then) on *Matrimonial Property* come readily to mind. Whilst it is not unique that a partner in a law firm should write a treatise in New Zealand the sheer breadth of the subject area to be covered in a comprehensive text on Intellectual Property amounted to a very severe challenge.

The work was three years in the making and clearly commanded a great deal of time of Messrs Brown and Grant and doubtless some considerable forbearance on the part of the law firm concerned. The country owes both the authors and the firm a debt of gratitude. It is not just matter of billable time forgone in the production of a work of this kind. Solicitors who contribute to a work of this kind are in a very real sense putting out their own considerable "intellectual capital" for consumption by the Bar and the public at large. That the firm and those concerned chose to do so is in the best traditions of the profession and this should not go unremarked. A comprehensive treatise in this subject area was sorely needed. And when as this was, it is accompanied by the

separate publication in Volume 1 of the Intellectual Property Reports (1967-1987) of a number of important but hitherto unpublished, reports of cases in this subject area, a serious gap in the country's jurisprudence has been determinedly bridged.

The work is subtitled "An exposition of the New Zealand law relating to Trade Marks, Passing Off, Copyright, Registered Designs, Patents, Trade Secrets and the Fair Trading Act 1986". That is precisely what it is. The work is primarily doctrinal. It aims to set out as concisely and accurately as possible the existing law on the subject, although a real effort is made where appropriate (as for instance in parallel importing, copyright protection of computer software and other areas) to describe something of the context in which such litigation has become important. In places the authors advance, with due diffidence, balanced and careful criticisms which will doubtless be considered and refined in the case law and legislation as it develops. The President of the Court of Appeal, Sir Robin Cooke, was, with respect, entirely correct therefore when he said that "this work will have enduring influence on the shaping of the New Zealand response [in this subject area]". (Foreword at p vi).

The work is written in the style of and with the aims and objectives of, what might be termed "intellectual practitioners". I detected no New Zealand authority which was not cited, and the citation of Australian, English, Canadian and United States authority, both in case law and articles, was sensible and relevant. The sorts of considerations which Courts have considered and the techniques employed to deal with the difficult and pressing issues in this subject area are concisely laid out.

The test of such a work is likely to be found in the frequency with which the profession will have reference to it, and the reliance which the Courts will place upon it. As to the first, even a cursory glance at the subscription cards in Auckland law libraries attests to the use to which the work has already been put. As to the second matter, there is already evidence of the influence which the learned President of the Court of Appeal thought the work would have. For instance, in *IBM v Computer Imports Ltd* (CP 494/86, Smellie J, Auckland, 21 March 1989), which is the first New Zealand judgment of real significance on copyright protection of computer software it is worthy of note that the arguments which found favour with His Honour were all rehearsed in this particular work which was specifically referred to. That is not to say that the authors have a monopoly on the correctness of their views on all points. It is however a deserved sign that the work is off to a "flying start"."

From the point of view of university law teachers in this subject area the work is also welcome. A reference text was desperately needed for use in the university law schools and the decision of Butterworths to publish a limp covered student edition is a most useful one.

From the point of view of university based scholars and researchers in this subject area the work will always be a useful starting point. That is not to say that there are not some problems with it.

First, the arrangement of the chapters and indeed the structure of the book as a whole. One gets the impression that this was dictated by the exigencies of producing a work such as this. From a scholar's point of view, other arrangements might be more revealing. In this subject area, there is always the problem of entry. What is the law doing in this subject area at all? Normally one starts with the economic torts and contractual restrictions. Through those doors one works one's way into the reasons why the statutory monopolies evolved and the present boundaries and constraints on those vehicles. In New Zealand, one probably would have to finish with the Fair Trading Act and endeavour to explain — as best one can — why it is that the legislature has rushed in where generations of Judges have feared to tread! This work lacks the sort of thematic structure which would carry it over the line into a work of the stature of say a Gower, or a Megarry, a Goff & Jones, or a Spencer Bower & Turner.

Second, there is the problem that this subject area is now awash with difficult policy and economic questions. The authors are not unmindful of this and have, where it is appropriate, indicated, in varying degrees of depth the nature of some of these issues. It is difficult to see how they could have got deeper without first delaying the work for a substantially longer period of time, and secondly ballooning it out to an impossible length. Nevertheless it is most important that neither bar nor the Judiciary delude themselves into thinking that this subject area can always be covered off by "the right application of the right principles". The "correct" policy direction of intellectual property law is a deeply challenging subject, and this is made doubly so when the effect of intellectual property laws in a small scale jurisdiction which is a net importer of technology (as New Zealand is) is at best imperfectly understood. Notwithstanding the references to policy in a number of recent judgments, particularly in the Court of Appeal, it is fair to say that policy insights into this subject area in New Zealand have been but cursorily explored. That however is not the fault of the authors of this work. It is an agenda for the universities and for other researchers for the future.

For the present, the authors have done a very high quality job of giving us the law as it is and this treatise rightly deserves its place as a standard New Zealand reference work. Every law firm should have a copy. The material covered ranges all the way from the daily problems of conflicting company names to consumer issues such as misleading advertising. A good many practitioners will accordingly reap where they have not sown off the back of this particular endeavour. However the authors have followed Sir Owen Dixon's salutory advice:

> To be a good lawyer is difficult. To master the law is impossible. But I should have thought that the first rule of conduct for counsel, the first and paramount ethical rule, was to do his best to acquire such a knowledge of the law that he really knows what he is doing when he stands between his client and the court or advises for or against entering the temple of justice. (*Jesting Pilate* (1965); p 131).

It is pleasant to be able to commend a quality work and an ethical act. □

Deadlock in the Domestic Company: Buyout or Winding Up?

By Giora Shapira, LLM, Mag Jur, Faculty of Law, University of Otago

The case of Vujnovich v Vujnovich *[1988] 2 NZLR 129 concerns (in the legal sense) the issue of when it is appropriate for the Court to order the winding up of a company pursuant to s 217(f) Companies Act 1955, when the only problem of the company was irreconcilable differences between the three equal shareholders who also happened to be brothers. The case also involved the powers of the Court under s 209 to order the sale of the shares as between shareholders.*

It took 19 days before Henry J, voluminous evidence and a Court of Appeal of five to put the parties in *Vujnovich*[1] virtually right where they started. Though the Court of Appeal has affirmed the final winding up orders, it disagreed with some of the learned Judge's points. The judgments highlight the dilemma of minority remedies where both parties in a closely held company share the blame for collapsed relationship and management deadlock. A Privy Council appeal is pending; but there is enough interest in the case already to warrant consideration.

The facts

For the first seven years the three brothers, Tony, Steven and Frank, had co-operated fruitfully in the family business. As equal shareholders and co-directors of three property developing companies, they shared the work, each contributing within his allocated sphere. By 1976 however, it had become apparent that Tony was the more effective partner with demonstrated managerial ability, while the other brothers' roles were gradually diminishing. A management report commissioned that year provided for Tony to act in effect as a chief executive responsible for finance, property and consultancy arrangements; Frank was to look after general organisation and management and Steven had the supervision of construction and maintenance. This arrangement worked reasonably well for a while, but personal differences resurfaced, leading to frequent arguments. The differences between Tony on the one hand and his two brothers on the other became such that by 1982 Frank had ceased all active managerial involvement, while Steven's active role did not outlast the beginning of 1983. Until April 1986 he was suffering a depressive illness which seriously affected his capacity to work.

The dispute culminated in 1987 with Tony seeking orders in the High Court under s 209, Companies Act 1955, allowing him to acquire the shares of Frank and Steven. In the alternative he sought orders to wind up the companies under s 217(f), the just and equitable ground. Frank and Steven jointly counterclaimed for orders under s 209, directed at their acquiring Tony's shareholding. They opposed the winding up.

The judgment

Henry J opened his analysis of the law by citing the relevant parts of s 209:

209 Remedy in cases of oppression. Alteration of memorandum or articles:

(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are or are likely to be, oppressive, unfairly prejudicial, to him (whether in his capacity as a member or in any other capacity) or, in a case falling within s 173(3) of this Act, the Attorney-General, may make an application to the Court for an order under this section.

(2) 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, whether for –

(a) Regulating the conduct of the company's affairs in future; or
(b) Restricting or forbidding the carrying out of any proposed act; or
(c) The purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; or
(d) Directing the company to institute, prosecute, defend, or discontinue Court proceedings, or authorising a member or members of

> the company to institute, prosecute, defend, or discontinue Court proceedings in the name and on behalf of the company —
>
> or otherwise.

Noting the Court of Appeal's liberal approach to the provision in *Thomas v Thomas* [1984] 1 NZLR 686, especially at 690-691, Henry J proceeded to say:

> Any test is necessarily one which can only be expressed in broad terms, and that is consonant with the clear intention of the section. In broad terms the Court is empowered to act if appropriate when the company has conducted its affairs unfairly to the complainant, and unfairness must be judged in the light of all the relevant circumstances, which may well include such matters as the extent of the complainant's shareholding, the nature of the structure of the company, its management history, the rights and obligation of members and directors as they are defined in the articles, and the very corporate nature which a company possesses. (At p 422).

The learned Judge then dealt with Tony's complaints under three headings: (a) failure of the other brothers to work, (b) obstruction and improper conduct and (c) failure to respond constructively to reasonable proposals to resolve management deadlock in the companies. Claim (a), a claim "at the forefront of the case put forward for Tony" was found to be justified. There was a breakdown in the original intention as to the operation of the business of the companies in that the concept of working partners had long since ceased. Tony, the dominant personality, had assumed the major management responsibility since 1981 and had been the one person out of the three who had throughout remained a fulltime working executive. The other two brothers had retreated to positions of non-working directors; and even in that limited capacity ready responsibility "was sometimes lacking". Tony's increasing burden and responsibility were

> a developing situation which became more divisive as time went on, feeding on the growing antagonism between the two factions until any sensible sort of working relationship as partners was impossible and . . . unwanted on either side.

Despite their shrinking role the two brothers continued to contribute to the companies' capital over the years. This indicated interest in the business and willingness to increased financial involvement which had to be acknowledged "when all matters [were] finally weighed in the balance". It did not, however, bear significantly on the finding of absence of active involvement in the affairs of the companies.

Under (b) the Judge recounted certain incidents of maltreatment of staff by Steven. They were, in the Judge's words,

> examples of an inexcusable behaviour for a director in Steven's position. His behaviour . . . on occasions could properly be classed as disruptive, and even if it reflected his views on the way in which Tony was operating or using the business, could not be excused. (at p 426)

Under the third head the Judge reviewed certain restructuring proposals put forward by Tony in an attempt to resolve the management deadlock. They included a proposal for the other two to buy him out, or vice versa. All approaches drew a blank. The complaint was that Frank and Steven failed to respond positively and in a constructive manner. The Judge, however, found that they were not acting unreasonably in protecting their own interests.

Consideration of whole conduct

Was there, then, a case of "oppression, discrimination or unfair prejudice" to Tony? The Judge remarked (at p 428) that in applying s 209 it was important not to be "over analytical" in approach. One must look at the substance rather than the fine detail, the question being whether the whole of the conduct complained of fell within the test of s 209(1).

Two requirements had to be satisfied, he continued. Firstly, the "oppression" etc must be to the complainant. Secondly, it had to be the act of the company, or the conduct of the affairs of the company, which constituted the infringement.

Reiterating his findings as to Tony's industrious efforts, contrasted with his brothers' failure to work in the contemplated manner, the learned Judge proceeded (at p 429),

> I accept that a failure to act, or negative conduct, on the part of a company may come within the purview of s 209(1) but there are two major difficulties in the way of the plaintiff in this part of the case. First, in the context of this case 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 the extent of the work being 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 and what powers it exercises. Secondly, I do not see how it can be said that the failure to work is oppressive, discriminatory or prejudicial to Tony. The effect of the failure 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 Tony. There is no suggestion that he was unable to obtain the remuneration he sought for his work and effort, or his extra work and effort.

The effect of Steven's obstructive and improper conduct, allegedly undermining Tony's position as manager, was judged in a similar

manner. Steven's acts, said the Judge, were not in any sense acts of the company; they were his own personal acts. Neither was he conducting the affairs of the company, but on the contrary was conducting himself as a director and shareholder, even if in a manner which could be criticised. This could not be directly related to the manner in which the affairs of the company were being conducted and was not something within the spirit and intendment of s 209(1).

Hence the Judge reached the conclusion that on both main grounds of complaint the plaintiff failed to make out a case of oppression, discrimination or prejudice, which would provide a basis for the making of an order under s 209(2).

Counterclaim allegations

Allegations in the counterclaim, of "oppression" applied by Tony towards his two brothers were also treated under a number of headings. Of these the most important were exclusion from management, pressure to sell shareholding to Tony and diverting corporate opportunity to Tony's private interests.

The fact that the two brothers were not invited to take part in some important management decisions, the Judge found, was due to their own choosing. They preferred to exercise their powers from a distance and did so when they thought appropriate. Any exclusion from decision-making was not brought about by acts of the company through its directorate or shareholders. Company policy and board control remained with Frank and Steven who were never barred from desired participation.

According to other allegations, Tony had allowed the company's overdrafts to exceed authorised limits very substantially, in order to create pressure for restructuring, with him in control. Even if Tony did embark deliberately on financial policy designed to provide him with a lever for control, it did not, said the Judge, come within s 209(1). Again, Frank and Steven had the legal power to intervene. Moreover — (at p 42)

> running of the overdraft excesses was not conducting the affairs of the company in a manner which was unfairly detrimental only to Frank and Steven — it affected all three shareholders and directors, and importantly it was not something outside the control of Frank and Steven for which the relief of provisions of s 209 would be available.

Another complaint led to the finding that Tony did divert to himself, through his own family company, a real property investment opportunity that legally belonged to one of the companies he shared with his brothers. This was a breach of duty that made him accountable to the company, in principle; but again it was ruled not to have consisted action of the company in the sense required by s 209 (at p 433).

Having thus rejected both parties' claims for a case under s 209 the Judge was left with the plaintiff's alternative remedy — an order to wind up the company as being "just and equitable" in the circumstances. Here the position was clear. The irreversible breakdown in relationship, deadlock and impossibility of effective management provided a classical case for s 217(f) winding up. The Judge nevertheless remarked that he was making the order "in the absence of the availability of s 209", expresssing regret that that situation had been reached, and postponing the winding up to allow the parties to arrive at a last minute solution.

Commentary

As we shall soon see, the Court of Appeal disagreed with Henry J's interpretation of s 209(1) (though concurring in the result). As it did so almost without discussion, one might be excused for elaborating a little.

By Henry J's own analysis, the legal issues arising from Tony's claim can be reduced to the following:

(a) Were Frank's and Steven's refusal to work, and the latter's obstructive behaviour, "acts of the company", or, alternatively, "conduct of the company's affairs" (in terms of s 209)?

(b) If so, were these acts or omissions "unfairly prejudicial" *to Tony*?

While the Judge's "holistic" approach to s 209(1) is perfectly in line with current opinion, his specific application of it is remarkably narrow.

Acts of the company. Whether acts of directors are legally characterised as "acts of the company", of agents for it, of fiduciaries, or of individuals, would depend on the context of the inquiry. Most material actions of directors or officers may be simultaneously described as any or all of the above. Here, two of the working directors — the majority of the board, failed to discharge their executive duties. Could this failure be ascribed to the board, and hence to the company (the board being an organ of the company)? The Judge has been so impressed with the individual nature of the broken obligation to work, that he failed to consider its corporate aspect. And yet — it is in relation to the company's liability for its own acts that the "organic doctrine" has been developed — notably in relation to corporate liability in crime[2] or for certain torts,[3] arising from behaviour of officers considered, for this purpose, to be an organ of the company.

It is therefore at least arguable, by analogy, that the failure of the majority of directors to work could be characterised as "acts of the company". The question however becomes largely academic in view of the much wider meaning of

Conduct of the affairs of the company. While "acts of the company" is a term of art, the preceding term, the manner in which "the affairs of the company are being conducted" must surely be given its ordinary everyday meaning? And surely Frank's and Steven's behaviour has had a considerable effect on the way the company had been run?

In refusing to recognise this the Judge had treated "conduct of the affairs of the company" as almost interchangeable with "acts of the company". He must also have thought that "being conducted" means "being *effectively* conducted" — to judge by his conclusion that the conduct of the company's affairs had not been affected by the two brothers' infringing behaviour. This view, with respect, is compatible with neither the words nor the spirit of the provision. Only a very restrictive interpretation would fail to recognise Steven's and Frank's

"negative input" into the "conduct of the affairs of the company" in terms of the provision. (If authority is required, see, for example the wide meaning given to the expression in *Cotterall v Fidelity Life Assurance Co* (1987) 3 NZCLC 100, 054. The dispute was essentially in respect of a private sale between the shareholders, but was considered possibly to have effect on the conduct of the company's affairs.)

The second major requirement, "unfair prejudice" suffered *by Tony*, is discussed by the Court of Appeal and will be considered accordingly.

The Court of Appeal

The united judgment of the Court (Cooke P, Somers, Casey, Bisson and Gallen JJ)[4] was delivered by Casey J.

Their Honours disagreed with Henry J on the effect of the failure to work. His ruling that it could not be brought within the terms of s 209(1) as being conduct of the affairs of the companies, or acts of the companies demonstrated, they said, (at 64, 478):

> too narrow a view of the section. From the outset it was intended that the affairs of these companies were to be conducted by the three brothers working in the particular spheres allocated to them .... The failure of the others to carry out their tasks (whatever its cause) did, in our view, constitute conduct of the affairs of the companies.

The next question was whether this was oppressive, unfairly discriminatory or unfairly prejudicial to Tony. The learned Judge, observed the Court of Appeal, thought it could only mean the less efficient running of the company, or the need to have others do the work not done, which has financial consequences to all three shareholders. He therefore failed to see unfair prejudice to Tony within the provision. But:

> Again, with respect, we are unable to accept this conclusion. The result of the lack of active input from the others was that Tony had to assume a great deal more responsibility and control and no doubt had to work harder. Although he may have been adequately remunerated, either by salary or the ability to obtain substantial advances, nevertheless the success he achieved for the companies over the past ten years resulted in the others sharing equally in very large gains to which they have contributed little in effort.

This point is of general importance and deserves some further consideration. Oppression, at common law, had to be suffered by the claimant, alone or together with some other members. Detriment to all members alike, on the other hand did not justify intervention, for that very reason. The distinction was a product of judicial policy of non intervention, cast into a narrow interpretation of the "oppression" concept. There had to be *normative* discrimination of the claimant – actual discrimination was not sufficient. An alteration of the company's articles by deleting a right of pre-emption prior to the majority's sale of their shares, for example, was not considered offensive to a minority keen to buy, because in principle, it had the same consequences to all shareholders. (*Greenhalgh v Arderne Cinemas* [1946] 1 All ER 512) Again, directors who consistently refuse to pay dividends out of bulging company coffers, would be immune from Court intervention because, normatively, the witholding of dividend would leave all shareholders in the same position. Another result of this approach would be the barring of all shareholders' actions in respect of directors' lack of care and skill, unless also benefiting the majority personally ("self-serving negligence").

Policy merit

Such stricture has no policy merit whatsoever, but was natural in a climate which regarded Court intervention as essentially undesirable. In the present climate, to bring it back via s 209, as did Henry J, would have been disastrous. Luckily the Court of Appeal set the matter right quickly. But as the matter has been dealt with perfunctorily, (the above quoted paragraph) several other reasons might be added.

Firstly, the language of s 209(1) itself makes it quite clear that "unfairly prejudicial" need not *necessarily* be "unfairly discriminatory" as the two terms are used alternatively.

Secondly, the section allows the member to sue "whether in his capacity as a member or in any other capacity". It stands to reason that a member suing for detriment to his or her interests as a director, employee, creditor, supplier and the like (which he/she were traditionally proscribed from doing), he/she should also be allowed to sue as a member with personal attributes making him/her particularly vulnerable, even in absence of formal discrimination – such as minority status, paucity, etc. (In fact, on a proper analysis of the Court of Appeal reasoning Tony had been affected "in his capacity of a working director". Fortunately, such nitpicking is no longer as critical under the present provision as it used to be in the past.)

Thirdly, and perhaps most importantly, the point has already been decided by the Court of Appeal. In *Thomas v Thomas*, [1984] 1 NZLR 686, a withholding of dividend case, Richardson J pointed out the three expressions in s 209(1) then continued:

> [R]ead together they reflect the underlying concern of the subsection that conduct of the company 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 is a legitimate foundation for complaint under s 209. (At p 693; emphasis added.)

(The different situation in England should be noted. The equivalent provision, s 459 of the Companies Act 1985, allows a member to complain of unfair prejudice "to the interests of some part of the members (including himself) ... This almost forces the conclusion reached most recently in *Re a Company* [1988] 1 WLR 1068 that conduct of directors which affects all shareholders equally cannot found a petition under the provision. For different views see the author's "Statutory Protection of Minority Shareholders", in *Contemporary Issues in Company Law* (CCH, New Zealand, 1987, ed, Farrar) 205, at 212-213.)

Question of remedies

Returning to the Court of Appeal judgment in *Vujnovich*; the remaining points were Frank's and Steven's complaints, and the question of remedies.

The Court found two episodes in which Tony's conduct did amount to oppression. One involved pressure to force the others to sell the shares and restructure the companies. A more serious one was the diversion by Tony into his own family company of a profitable investment originally undertaken by one of the companies he shared with is brother.

Hence they said:

> It will be seen from the foregoing that we disagree with Henry J, finding that each side established allegation that the affairs of the companies were conducted in a manner that was oppressive, unfairly discriminatory or unfairly prejudicial to him or them. (At 64, 480.)

Notwithstanding this, they refused orders under s 209:

> [We] are satisfied that [the Judge] correctly diagnosed all these episodes as symptoms of the collapse of the underlying partnership among all the three brothers. There were faults on both sides, but essentially their differences in character and personality made the breakdown inevitable. (Ibid)

In other words, the Court of Appeal found that mutual oppression was a result, not only a cause, of the breakdown. They added:

> Any decision on whether to make an order for the purchase of shares under s 209(2) requires the Court to be of the opinion that it is "just and equitable to do so". As indicated in *Thomas*, the fairness implicit in that impression is not to be assessed in a vacuum or simply from one member's point of view. There must be balancing of all the interests involved. (Ibid)

Their Honours therefore endorsed the Judge's refusal (even on the assumption that the facts did come under s 209(1)) to make an order against the wishes of one party for the sale of his shares.

On the other hand, the case came clearly within the principle enunciated in *Ebrahimi v Western Galleries Ltd* [1973] AC 360. The circumstances made it just and equitable to wind up the companies under s 217(f). Such an order, said the Court, "although extreme, affords a fairer and more effective resolution of the problem".

Leave to appeal to the Privy Council was later granted to the two brothers, and the winding up stayed.

Further comment

The Court of Appeal

- Restored s 209 to its proper scope by disagreeing with Henry J;
- found unfair prejudice on both sides; but
- diagnosed it as symptoms of collapsed relationship;
- therefore refused s 209 remedies;

and affirmed the winding up orders.

It can be seen that the pattern of the decisions is somewhat irregular.

Henry J's erroneous ruling of s 209 had left him no alternative to a s 217(f) winding up. The Court of Appeal, disagreeing, and having available to it a wide range of discretionary remedies, nevertheless preferred to endorse the winding up conclusion. (This might be the first case where statutory oppression was found yet consequential remedies refused.)

Converse of ordinary case

Squabbles in the family company ending in Court are nothing new ("Cruel is the strife of brothers" wrote Aristotle). This case, however, has a number of interesting distinguishing features.

First, the minority had not been excluded from participation. On the contrary, it had managerial control of the company. The unusual complaint therefore turned on the refusal of the majority to pull its weight – its "self-exclusion from participation".

Secondly, and consequently, the remedy sought was not to be bought out, but to buy out the other side.

In this respect, *Vujnovich* is the converse of the ordinary case, where a locked-in minority seeks to be bought out at a fair value. And while the situation is well covered by s 209, the novelty both in Tony's complaint and the remedy he sought demonstrates a creative use of the provision.

Other points to note are:

"*Just and Equitable*". The power of the Court to order a "just and equitable" winding up is an old one. It dates back to the early Winding Up Acts, being a descendant of the law of partnership. The equitable approach allowed the Court to assist a locked in minority even without proof of overbearing majority behaviour. This stood in sharp contrast to common law oppression and the earlier statutory minority protection, to which majority bad faith was crucial.

The principles in *Ebrahimi* (supra) subjecting the legal rights of the majority to equitable obligations, were developed by reference to the "just and equitable" expression in the winding up provision. They were later imported into the general minority remedies.[5] This was facilitated by the similar expression in s 209(2). (No such expression exists in the English equivalent).

To sum up the point – the historical importance of the Court's power to intervene if it found it "just and equitable" to do so was in the expansion of minority protection to cases which did not *necessarily* involve majority fraud or bad faith. This development first occurred in the winding up jurisdiction and was expanded later to the general remedies against unfair prejudice. Though now undisputed, it is nevertheless a recent major breakthrough.

It is therefore ironic that the words "just and equitable" in s 209 served in *Vujnovich* (CA at 64, 480) in a restrictive sense. Though grounds required by the preceding subsection were found to exist, the Court found it "just and equitable" in the circumstances, to *refuse* s 209 remedies. As statutory interpretation this is perfectly plausible. But it is worth remembering that such application is in direct contrast to the historical role of the expression.

(Counsel for Tony went slightly over the top arguing exactly the opposite – namely, that the expression allows the Court to order s 209(2) remedies even in the absence of subsection (1) grounds. Henry J had no difficulty in

pointing out that the remedies were always consequential upon establishing such grounds.)

Forced buyout of the other party. Both Courts remarked that the applications were unusual in that each side sought to buy out the other, rather than have its own shares purchased by the other.

It is not clear how much the compulsory acquisition element had influenced the Court of Appeal's refusal to order a buyout. It should be pointed out that an acquisitorial element also exists in the more common, converse situation, where the petitioner is granted an order for the buyout of his or her own shareholding. If A is forced to buy B's shares he/she is compulsorily deprived of the consideration which he/she would not have paid voluntarily. And yet it is accepted that a buyout of a locked in minority is often the most effective remedy in this type of case. In the final analysis, from a compulsory acquisition standpoint, an order directed at acquisition by the petitioner of the other party's shares is not that much different from the more common converse. This element, in itself, should not, therefore, be a deterrent to making the order.

Buyout or winding up? The Court of Appeal affirmed the winding up order under s 217(f) although it was opposed by the defendants and only half heartedly sought by the plaintiff (it was added by amendment of pleadings and a cross appeal was lodged from Henry J's order). Thus the Court of Appeal has made an order which no one really wanted, despite available alternatives. It reflected the Court's view that the complete failure of the relationship between equal shareholders, with no excess culpability on either side, rendered the winding up "a fairer and more effective resolution of the problem".

The deadlock for which both parties were equally to blame, made a winding up an apparent solution. But was it the *only* solution, or even the best one? As is well known, a petition for a winding up by a squeezed out minority is often designed to bring the company to honest negotiations, rather than to put it into liquidation. Winding up is an extremely costly exercise which benefits only third parties. The break up value of the assets often falls considerably below that of the company as a going concern; business and goodwill are lost, and finance, realisation of assets and winding up costs can be substantial.

A genuinely locked in minority might, as a last resort, seek to bring the temple down. This option had been re-enforced, until the recent recasting of s 209, by the fact that in a pure deadlock situation the member had a better chance of obtaining a winding up than of obtaining other minority remedies.

In *Vujnovich*, however, the minority had had effective control. Both parties have had a long association with the companies, which they respectively wished to continue. Each sought a complete takeover. The companies have had a long and successful history, with combined value of assets of some $15.2 millions at the time of hearing. The Court however, preferred a winding up to an enforced takeover, because culpability being on both sides it did not seem fair to force any of the parties to sell its shares. In other words, the parties had to come to terms or share in the losses of the winding up, being the fruit of their own folly.

If this is the legal principle to be gleaned from the decision, it is a concerning portent. Accordingly, a deadlock in the domestic company with no outstanding culpability though coming under s 209, would lead inescapably to a winding up — rather than to a buyout or an alternative remedy.

And while disputes of this kind are still considered as an entirely private matter, to be settled according to the respective rights and obligations of the parties, there are further considerations to be taken into account.

Other possible solutions

It somehow does not seem right to send to the wall a perfectly viable company as an almost automatic result of the shareholders not being able to sort out their differences — where other solutions are available.

The recasting of s 209 has given a tremendous acceleration to the minority protection concept. True, the unfair prejudice must be to *the member* — this is an imperative. But when it comes to remedies, the choice should not be restricted conclusively to redressing the private interests affected.

In line with the modern view that sees the company as more than merely a money maker for its shareholders, consideration may be applied on a higher level which transcends the orthodox "collective interests of the shareholders." In a fully developed minority protection regime, there is a place for judicial activism which seeks results not only fair to the members, but also conducive to the general social good.

Vujnovich is a good example. Should not more effort have been made towards saving a successful enterprise, creating wealth and providing jobs? The alternative, a winding up, is a specious, no win solution, a cure by a sledgehammer.

Unlike Henry J, who had only one option, the Court of Appeal could have explored the buyout alternatives. An order directed at one side, for the sale of its shares to the other, could be accompanied by instructions as to compensatory element in the price, for fairness sake.

Better still — Henry J has suggested a solution of a private auction — allowing each party to bid for the other party's shares. He might have made it an order, had he been aware of his power to make it. It had not been take up by the Court of Appeal.

At the end of the day, *Vujnovich* is important because of the restoration of s 209 to the scope it had been deprived of in the first instance; and as an illustration of a vigorous use by the litigants of the provision. It is a bit disappointing though, that the Court of Appeal could do no better than providing the parties with a Damoclean sword. By adopting the orthodox winding up solution, it had forgone the opportunity to provide a constructive solution, well within its powers to order. □

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1 *A Vujnovich v F and S Vujnovich* (1987) 2 BCR 417 (Henry J); Affirmed (1988) 4 NZCLC 64,474 (CA). Leave to appeal to the Privy Council granted (1988) 4 NZCLC 64,557.

2 Eg *Tesco Supermarkets v Nattrass* [1972] AC 153 (HL).

3 Eg *Leenards Carrying Co v Asiatic Petroleum* [1915] AC 705. On the organic theory see Gower, *Company Law* (4 ed 1979) 205-212.

4 See n 1 supra.

5 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686.

The inherent power of the District Court:

Abuse of process, delay and the right to a speedy trial

By Johnnie Kovacevich, Judges' Clerk, High Court, Auckland.

This article considers the implications of two recent decisions viz Russell v Stewart *[1988] BCL 1891 and* Watson v Clarke *[1988] BCL 1890. In addition to considering the questions of abuse of process, delay and the right to a speedy trial in the light of these cases, the article goes on to look at the nature and origins of the doctrine of abuse of process and fairness in criminal trials in general.* Watson v Clarke *has a special interest in that it is one of those rare cases that invokes the* Magna Carta *of 1215. The two cases were considered earlier in Case and Comment, [1989] NZLJ 117.*

Traditionally the District Court – being a creature of statute – has been thought of as lacking an inherent jurisdiction. This has prevented District Court Judges from dismissing criminal cases in which the defendant, through no fault of his own, has been prejudiced in his trial by delay and want of prosecution. Two landmark High Court decisions confirm that the District Court has an inherent power within its statutory jurisdiction – not an inherent jurisdiction – to prevent abuse of its own process.

In addition, these cases establish for the first time in New Zealand that delay in the bringing of a prosecution may constitute an abuse of process. Correlatively, there is a duty on the prosecution to bring its case as expeditiously as reasonably possible. One decision goes even further as to recognise the statutory right to a speedy trial traceable to the Magna Carta of 1215.

These two decisions, one of Wylie J, *Russell v Stewart* [1988] BCL 1891 and the other of Robertson J, *Watson v Clarke* [1988] BCL 1890 affirm that unless a matter is brought to trial expeditiously then the very fact of any delay – if it would cause prejudice or unfairness to the defendant – may be sufficient to warrant the District Court dismissing the case in its inherent power to prevent abuse of its own process. This is so regardless of fault on the part of the prosecution.

It had been the case that once an information was sworn the prosecution in effect had power to decide when to bring the action to trial. The prosecution could seek enlargements for service or adjournments of the trial without a District Court Judge having the power under the Summary Proceedings Act 1957 to dismiss or permanently stay the proceedings unless the case had gone to full hearing.

The effect of these two decisions (cases) is that hereafter the Courts can require greater expedition from the investigating and prosecuting authorities which may lead to speedier and perhaps more efficient justice. To that end they may be a watershed in the criminal law of New Zealand.

Inherent power and inherent jurisdiction

Many confuse "inherent jurisdiction" with "inherent power". As Robertson J points out in *Watson* (at 9 of the judgment) the former connotes an original and universal jurisdiction not derived from any other source whereas the latter connotes an implied power such as the power to prevent abuse of process, which is necessary for the due administration of justice under powers already conferred. Thus the High Court has an inherent jurisdiction as confirmed by s 16 of the Judicature Act 1908 whilst the District Court has an implied power within its jurisdiction as conferred by statute.

In *McMenamin v Attorney-General* [1985] 2 NZLR 274, 276 Somers J delivering the judgment of the Court of Appeal made the distinction between the implied power of an inferior Court to do what was necessary to enable it to exercise its statutory functions and the duty to prevent abuse of process. Wylie J in *Russell v Stewart* (at 10-11) took this to mean that the power in the District Court to dismiss for delay could not be said to be an implied power arising out of its statutory criminal jurisdiction under the Summary Proceedings Act 1957 as there could be no implied power arising from the statute to do something ancillary to a power not conferred by that statute.

Though the power has been implied to correct a mistake on the record as in *Salaman v Chesson* [1926] NZLR 626 and *Rolton v Seeman* [1982] 1 NZLR 60 and to regulate its own procedure as in

O'Toole v Scott [1965] AC 939; [1965] 2 All ER 240; *Clifford v Commissioner of Inland Revenue* [1966] NZLR 1075 and *Re G J Mannix Ltd* [1984] 1 NZLR 309 and it could not confer a power that was not there in the first place. The power to prevent abuse of process was an inherent power over and above a Court's statutory jurisdiction. This power could be demonstrated but not described nor could its categories close.

Robertson J put it another way. In *Watson v Clarke* (at 10) he said that "the power to prevent abuse of process is a necessary implication into a statutory jurisdiction to ensure that the administration of justice itself is not oppressive or prejudicial to those who come before it" citing *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536; [1981] 3 All ER 727, 729 in which Lord Diplock referred to:

> the inherent power which any Court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

This accords with the view of Cooke P in *Pearce v Thompson & Ors* (CA 37/85 11 November 1988) in which he said (at 35):

> inferior Courts have by implication the necessary powers to control their own proceedings and to determine incidental or preliminary questions of law and fact.

Statutory jurisdiction

Section 2(2) of the District Courts Act 1947 confers upon the District Court, only that criminal jurisdiction contained within the four corners of the Summary Proceedings Act 1957. Section 4 of the Summary Proceedings Act provides that the summary criminal jurisdiction of the District Court shall be exercised in accordance with the Act.

The statutory power to dismiss for want of prosecution is contained in s 62(b) in cases where the informant does not appear and by s 63 where neither party appears. The dismissal does not operate as a bar to other proceedings in the same matter: s 64. Section 65 provides that where both parties appear the Court must proceed with the hearing unless an adjournment is granted. The Court, after hearing both the evidence and each of the parties, may dismiss the information on the merits, either outright or without prejudice to it being re-laid: s 68(1). By s 36 it can also consider leave to withdraw the information or it can adjourn the hearing pursuant to s 45 (among others) with or without costs pursuant to the Costs in Criminal Cases Act 1967.

However, as Robertson J pointed out in *Watson* (at 4)

> if a Court possesses jurisdiction in respect of criminal proceedings, it has, by reason of that very fact, a power — indeed a duty — to ensure that its processes are not used as an instrument of oppression or otherwise abused.

The inherent power of the District Court

As early as 1841 Alderson B in *Cocker v Tempest* (1841) 7 M & W 502, 503-504; 151 ER 864, 865 held that:

> The power of each Court over its own processes is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

The locus classicus of the law in this area is the judgment of Lord Morris of Borth-y-Gest in the House of Lords' decision of *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1301-1302; [1964] 2 All ER 401, 409-410 in which he said:

> There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process . . .
>
> The power (which is inherent in a Court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal Court include a power to safeguard an accused person from oppression or prejudice.

Lord Reid said (at 1296; 406 respectively) "there must always be a residual discretion to prevent anything which savours of abuse of process". Lord Devlin said (at 1347; 438) that there was "a general power, taking specific forms, to prevent unfairness to the accused [which] had always been a part of the English criminal law" and (at 1354; 442) that the Courts had "an inescapable duty to secure fair treatment for those who come or are brought before them".

In *Mills v Cooper* [1967] 2 QB 459, 467 Lord Parker CJ said that

> every Court has undoubtedly a right in its own discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court.(See also *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, 220-221 per Lord Blackburn.)

This passage was adopted with approval by Lord Edmund-Davies in the House of Lords' decision of *Director of Public Prosecutions v Humphrys* [1977] AC 1, 53; [1976] 2 All ER 497, 533. Lord Salmon (at 46; 527-528) took the view that though a Judge had not and should not have the responsibility for the institution of prosecutions, nevertheless where "the prosecution amounts to an abuse of process of the Court and is oppressive and vexatious that Judge has the power to intervene".

Since *Mills v Cooper* it has been accepted by the highest authority throughout the Commonwealth that inferior Courts such as the District Court, have an inherent power to prevent abuse of their own process.

In the House of Lords' decision of *R v Sang* [1980] AC 402, 455; [1979] 2 All ER 1222, 1245 Lord Scarman held that not only did every Court have the power to prevent abuse of its own process but that every Court was duty bound to do so.

Miller v Ryan [1980] 1 NSWLR 93 was the first Australian case to follow *Mills v Cooper* and *Humphrys*. In *Barton v The Queen* (1980) 147 CLR 75, 96 although Gibbs ACJ and Mason J in the High Court of Australia took the view that they had yet to decide whether the power to prevent abuse of process extended to inferior Courts, they did state that there was "ample authority for the proposition that the Courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial."

In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536; [1981] 3 All ER 727, 729 Lord Diplock after referring to the inherent power which every Court must possess to prevent abuse of process emphasised that:

> The circumstances in which abuse of process can arise are very varied . . . It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the Court has a duty (I disavow the word discretion) to exercise this salutary power.

To Wylie J in *Russell* (at 15) this passage confirmed that "the categories of abuse of process are never closed". In *R v Jewitt* (1985) 20 DLR (4th) 651, 658 the Supreme Court of Canada unanimously held that there was a residual discretion in inferior Courts to prevent abuse of process where a trial would violate the fundamental principles underlying the community's sense of fair play and decency. This power was only to be exercised in the clearest of cases and when given for an abuse of process, was a substitute for an acquittal. Although on the merits the accused might not have deserved an acquittal, the Crown by its abuse of process was less entitled to a conviction.

In so doing the Supreme Court followed the decision of the Ontario Court of Appeal in *R v Osborn* (1984) 13 CCC (3d) 1, 31 rather than its own decision to the opposite effect in *Rourke v The Queen* (1977) 76 DLR (3d) 193; 5 WWR 487; 35 CCC (2d) 129. In *Moevao v Department of Labour* [1980] 1 NZLR 464 it was the dissenting judgment of four Judges delivered by Laskin CJC in *Rourke* which was referred to with approval by all three Court of Appeal Judges.

The movement throughout the Commonwealth towards accepting the existence of inherent power in inferior Courts is consistent with the New Zealand Court of Appeal's approach in *Moevao* (supra); *Bryant v Collector of Customs* [1984] 1 NZLR 280 and *McMenamin v Attorney-General* [1985] 2 NZLR 274 in respect of our District Court. It led Wylie J inevitably to the conclusion in *Russell* (at 31) that "a District Court Judge in New Zealand does have inherent power to control the Court's process to prevent abuse of process" and that "that power extends to the power to dismiss or permanently stay a prosecution properly brought initially".

New Zealand decisions on inherent power: The High Court

It is a matter of settled law in England[1] and Australia[2] that not only may an inferior Court stay a proceeding unconditionally for an abuse of process but that it also has a duty to do so. Despite the fact that the corresponding provisions of the Magistrates' Courts Acts of 1952 and 1980 (UK) do not provide specific powers for dismissal for abuse of process, the English Courts have consistently read in that power. Consequently there is no need for a party to seek judicial review in the High Court to declare any act an abuse.

Prior to the decisions in *Russell* and *Watson*, the New Zealand High Court had rarely followed suit. The exceptions were: *Henderson v The Police* [1978] BCL 443; *Bosh v Ministry of Transport* [1979] 1 NZLR 502; *Woodward & Ors v The New Zealand Police* [1980] BCL 310; and *Ferris v The Police* [1985] 1 NZLR 314.

In *Henderson v The Police* [1978] BCL 443 informations were re-laid after previously being dismissed for want of prosecution. Chilwell J held (at 3 of the judgment) that

> all Magistrates have inherent jurisdiction to [dismiss an information] arising out of the control by them of their Courts and their procedure and their duty to ensure that Court procedure is not used to harass any individual.

In *Bosch v Ministry of Transport* [1979] 1 NZLR 502 an information was re-laid after the defendant had been discharged because of insufficient evidence. In the course of his judgment Somers J then in the Supreme Court, held that the Magistrate's Court had an inherent jurisdiction to prevent abuse of process. He said (at 509):

> In *Re Arnold* [1977] 1 NZLR 327 I had occasion to consider the existence of a jurisdiction to prevent abuse of process of the Court and concluded that such a jurisdiction existed in the Supreme Court. I see no reason to alter that view. The nature, source and justification of that jurisdiction as defined by Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401, and mentioned with approval by Richmond J in *Taylor v Attorney-General* [1975] 2 NZLR 675, 682, suggests that an inferior Court having criminal jurisdiction has such power.

To Somers J (at 509-510) "the concept which underlies the principle is one of the fairness" but "any consideration of fairness must have in mind the public interest in such a matter as well as that of the accused". After referring to Lord Salmon's judgment in *Director of Public Prosecutions v Humphrys* [1977] AC 1, 46; [1976] 2 All ER 497, 527-528 he concluded that in this context the words "oppressive and vexatious" were exegetical to "abuse of the process of the Court".

In *Woodward & Ors v New Zealand Police* [1980] BCL 310 fresh informations were sworn in terms identical to those previously dismissed for want of prosecution when witnesses had failed to appear for a defended hearing. Prichard J held that the Magistrate did have the inherent power (as opposed to an

inherent jurisdiction) to dismiss informations for want of prosecution in exercising control over its own process.

In *Ferris v Police* [1985] 1 NZLR 314 the defendant was acquitted on a cocaine charge in the High Court but convicted on a cannabis charge in the District Court despite there being no fresh evidence. On an appeal against conviction Hardie Boys J held that the second trial was an abuse of process of the Court. It was incumbent on the District Court Judge to exercise his discretion and discharge the defendant. The appeal was allowed and the conviction set aside.

On the other hand there had been a number of decisions which had held that the Summary Proeedings Act 1967 did not provide District Court Judges with the power to dismiss informations unheard: *Rapana v The Police* [1979] BCL 653; *Kettle v Basil* (Jeffries J, Supreme Court, Wellington, M 558/79 28 November 1979); *Williams v Patterson & Pearson* (O'Regan J, High Court, Masterton, M 9/79 1 October 1980); *Whetton v Auckland City Council* [1980] BCL 1028; *Miratana v Bremner & Osborn* (Sir Ronald Davison CJ, High Court, Wellington, A 132/81 17 August 1982); *Attorney-General v Bradford & McMenamin* [1984] BCL 1240; and *King v Blackwood & Wayman* [1985] BCL 1479.

Wylie J in *Russell* (at 5) suggested that the use of the terms "inherent power" and "inherent jurisdiction" as if they were indistinguishable had led to these conflicting decisions at first instance, When the distinction was recognised "the apparent conflict may well be seen to be resolved" he said.

Inherent power: Court of Appeal decisions

In *Moevao v Department of Labour* [1980] 1 NZLR 464 a number of the leading decisions were considered. In the course of his judgment Richmond P said (at 471)

> I am . . . prepared to assume that the Magistrate's Court in the present case had an inherent jurisdiction of the kind now under discussion. But . . . I prefer to leave that point open.

However on that topic he did say (at 483) that:

> In considering the jurisdiction of a Court to protect its processes from abuse, I have not drawn any distinction between superior and inferior Courts. The point was not argued and on the conclusion I have reached on the merits it is not necessary to express any final view as to the powers of a Magistrate's Court in that regard.

Each Judge referred with approval to the dissenting judgment of four Judges delivered by Laskin CJC in *Rourke v The Queen* (1987) 76 DLR (3d) 193. Woodhouse J (at 476) particularly referred to the statement (at 206) that the "power [to prevent abuse of process] may be invoked by every Court having criminal jurisdiction" and expressed himself as being in complete agreement.

Richardson J stated (at 481-482) that "it is not the purpose of the criminal law to punish the guilty at all costs". It was not a case of the ends justifying the means. The public interest was involved in two ways. The first was in ensuring that the Court's processes were used fairly by state and citizen alike. In exercising its "inherent jurisdiction" the Court was as much protecting its ability to function as a Court of law in the future as it was in the case before it. The second aspect was the maintenance of public confidence in the administration of justice.

He stated (at 481) that

> it is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.

That case left open the question of the power of the District Court but the point was taken further in *Bryant v Collector of Customs* [1984] 1 NZLR 280. Richardson J delivering the judgment of the Court spoke in general terms of the fact that

> the Court, acting in its inherent jurisdiction should take such steps as are considered necessary in the particular circumstances to protect its processes from abuse (at 282).

In considering the particular circumstances of the case he said (at 284)

> in turn the [District Court] Judge's duty at that point was to exercise the inherent power which any Court of Justice must possess to prevent abuse of its processes.

In *McMenamin v Attorney-General* [1985] 2 NZLR 274 Somers J delivering the judgment of the Court, stated (at 276) in the clearest possible terms that:

> An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process. All this is well understood. See eg *Moevao v Department of Labour* [1980] 1 NZLR 464; *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84; and *Bryant v Collector of Customs* [1984] 1 NZLR 280. The latter case and *Bosch v Ministry of Transport* [1979] 1 NZLR 502 were both concerned with inferior Courts.

As to what constitutes an abuse of process he said that "in its manifestations so far recognised abuse of process is the characterisation of the conduct of a party to a case". It was

> only the existence of an abuse of process properly understood [which] could give a Judge the jurisdiction . . . to dismiss cases unheard.[3]

As will be seen, delay has since been recognised as a category of abuse of process not only throughout the Commonwealth but by our own Court of Appeal in a civil case: *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 and is not solely characterised by the conduct of a party to a case.

Russell v Stewart

In *Russell v Stewart* an information was sworn 17 days before the expiry of the 12-month limitation period under the Social Security Act 1964.

The summons at no stage was served on the defendant and the matter was enlarged several times before one final enlargement was granted. When the prosecution again applied for a further enlargement, some three years and nine months after the offence was alleged to have commenced, District Court Judge Guest dismissed the information for delay.

On appeal by way of case stated to the High Court Wylie J after a thorough and extensive review of the authorities and principles held (at 31) that:

1 A District Court Judge in New Zealand does have inherent power to control the Court's process to prevent abuse.
2 That power extends to the power to dismiss or permanently stay a prosecution properly brought initially.
3 Excessive delay may constitute an abuse. Whether it does will depend on the circumstances which will include the respective contributions of the parties to that delay.
4 The period of delay to be considered in assessing the probability of prejudice or unfairness may include the period before filing of an information within the prescribed time limit as well as delay thereafter. It is the cumulative effect which is material, and this is not lessened by compliance with a statutory limitation period.
5 Even in the absence of proved fault or contribution to delay by either party, if the delay is so excessive as to raise a presumption of prejudice or unfairness (and whether such presumption will arise may depend on the nature of the case) then there is an abuse and the Court must act to prevent it.

Had the District Court Judge granted a further adjournment of the case Wylie J considered that because of the delay, unfairness would inevitably have resulted. It would have been greater still were the prosecution reinstated. He considered that cases of non-service were even worse than those where excessive delay had occurred in the bringing of the matter to hearing after service. At least in those cases the defendant knew what they had been charged with and could take steps to secure witnesses and documents.

In this case there was no evidence that the respondent had ever been informed of the charge against her or of any intention to lay any charge. The nature of the charge was such that its outcome would depend on the recollection of conversations which may have taken place with unidentifiable or untraceable persons over four years before. In which case he said (at 34) that "the presumption of prejudice is in my view overwhelming".

The District Court Judge had ample grounds for dismissing the information for delay thus he did not commit an error in point of law though he was incorrect to hold that he had an inherent jurisdiction as opposed to an inherent power to do so.

Watson v Clarke

In *Watson v Clarke* two cases were heard together the second of the two being *Watson v Lawlor* AP 54/88. Clarke was alleged to have committed an offence under the Fisheries Act 1983 in that he fished in a stream with a net longer than legally permitted. The information was sworn 13 months after the event though within the two year expiry period but at no stage had a summons been served on him.

His co-offender, a Mr Leigh had been served. Despite the fact that he had failed to appear at the hearing held two months later, the case against him was dismissed under s 19 of the Criminal Justice Act 1985 as there was no satisfactory explanation for the delay. As to the Clarke case, an enlargement was refused by District Court Judge Willy as in the absence of any explanation, the delay "constituted an abuse of the processes of the Court".

On an appeal by way of case stated Robertson J, after an exhaustive review of the case law, held (at 28) that though he would not be prepared to find that a 15-month delay necessarily constituted abuse, the District Court Judge was entitled, as a matter of law to reach that decision in the circumstances and in the light of the manner in which he had dealt with the co-offender. By so doing the District Court Judge did not commit an error in point of law.

Mr Lawlor was alleged to have discharged sheep dip into a stream. The information was sworn ten months later after the alleged offence took place. The hearing was held one month later but the summons was only served on the defendant eight days beforehand. Counsel for the defendant asked for an adjournment but the District Court Judge, rather than grant it, called on the prosecution to explain why it had taken so long to bring the proceedings.

The District Court Judge, not being satisfied with the explanation, departed from the long established practice of not requiring informants to present evidence on the first call, by having the defendant plead and then requiring the prosecution to proceed with their case. Since the informant was in no position to do so, the information was then dismissed.

On an appeal by way of case stated, Robertson J held (at 32) that the law did not allow cases to be dismissed without hearing evidence. It would generally be contrary to the principles of natural justice to allow such a case to go unheard:[4]

> There must be some evidence of actual or presumed prejudice to the defendant arising in the circumstances of the case, before the Court is justified in refusing an application by either the prosecution or the defendant for an adjournment.
>
> Delay alone in bringing a defendant to trial is insufficient to warrant the very serious step of intervention by the Court. The defendant does not have a right to be protected against any delay but against delays which could reasonably be avoided.

He held that there had not been an abuse of process nor would any injustice have occurred had an adjournment been granted. However, since remitting the matter back to the District Court would only have given rise to further delay which might itself be described as "presumptively prejudicial" to use the phrase of Powell J in the United States Supreme Court decision of *Barker v Wingo* 407 US 514, 530 (1972), Robertson J accordingly was

not prepared to remit the matter for further hearing.

Delay as an abuse of process

In *R v Robins* (1844) 1 Cox CC 114 Alderson B directed a jury to acquit a person because he considered it "monstrous" that a charge was not preferred within a year of the alleged offence. In *R v Lawrence* [1982] AC 510; [1981] 1 All ER 974 Lord Hailsham of St Marylebone LC, in the House of Lords, in dismissing an appeal, criticised a delay of 11 months from the time of the alleged crime to the trial stating (at 517; 975):

> My Lords, it is a truism to say that justice delayed is justice denied . . . Where there is delay the whole quality of justice deteriorates. Our system depends on recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims, and juries who are correctly directed not to convict unless they are assured of the reliability of the evidence for the prosecution, necessarily tend to acquit as this becomes less precise and sometimes less reliable. This may also affect defence witnesses on the opposite side.

In *Bell v Director of Public Prosecutions for Jamaica* [1985] AC 937; [1985] 2 All ER 585 it was held by the Privy Council[5] that the Courts have an inherent power to dismiss a charge for want of prosecution if there had been unreasonable delay and could treat any renewal of the charge as an abuse of process.

The case concerned the fundamental right to a "fair hearing within a reasonable time" provided by s 20(1) of the Jamaican Constitution. To the submission that the common law did not provide a right to a trial within a reasonable time, Lord Templeman, delivering the judgment of the Board (at 950; 589) said:

> Their Lordships do not in any event accept the submissions that prior to the Constitution, the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the Courts of Jamaica would and could have insisted on setting down a date for trial and then, if necessary, dismissing the charges for want of prosecution.

Their Lordships took guidance from a decision of the Supreme Court of the United States: *Barker v Wingo* 407 US 514 (1972); 33 L Ed 2d 101, decided under the Sixth Amendment to their Constitution, itself based on chapter 40 of the Magna Carta of 1215. They acknowledged the relevance and importance of four factors identified by Powell J (at 530-532) which in his view the Court should assess in determining whether a defendant had been deprived of the right to a trial without delay namely: (1) the length of delay; (2) the reasons given by the prosecution to justify the delay; (3) the responsibility of the accused for asserting their rights; and (4) prejudice to the accused. (See also the judgment of Lamer J in *Mills v The Queen* [1986] 1 SCR 863, 924-925 in the Supreme Court of Canada who expressed a preference for a different test.)

As to the length of delay, once there was an acknowledged delay Powell J considered that there was a inference of prejudice which he called "presumptively prejudicial" (at 530-531). As to the prejudice to the accused he said (at 532):

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last . . . If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker v Wingo was adopted and applied in Australia in *Watson v Attorney-General for New South Wales* (1987) 8 NSWLR 685 and *Aboud v Attorney-General for New South Wales* (1987) 10 NSWLR 671 by the New South Wales Court of Appeal and in Canada in *R v Cameron* [1982] 6 WWR 270 and *Mills v The Queen* [1986] 1 SCR 863. (See also *Carter v The Queen* [1986] 1 SCR 981 and *Rahey v The Queen* [1987] 1 SCR 588.)

As Frankel J said in *United States v Mann* 291 F Supp 268, 271 (1968) prejudice in any event may

> fairly be presumed simply because everyone knows that memories fade . . . and the burden of anxiety upon any criminal defendant increases with the passing of months and years.

Other factors which have often been considered of equal importance are (1) the seriousness of the crime: for example the Courts have traditionally been less likely to dismiss a case of murder for delay than they have been with public regulatory offences; and where (2) the complexity of the case requires a greater degree of investigation and preparation such as cases of commercial fraud.

Until the decisions in *Russell* and *Watson* no New Zealand Court had held that delay could constitute an abuse of process in a criminal trial. Wylie J in *Russell* (at 22-28) extensively reviewed the English decisions on delay: *R v Fairford Justices, Ex parte Brewster* [1976] QB 600; [1975] 2 All ER 757; [1975] 3 WLR 59; *R v Newcastle-upon-Tyne Justices, Ex parte John Bryce (Contractors) Ltd* [1976] 1 WLR 517; [1976] 2 All ER 611; *R v Brentford Justices, Ex parte Wong* [1981] 1 QB 445; [1981] 1 All ER 884; [1981] Crim LR 339; *R v Oxford City Justices, Ex parte Smith* [1982] RTR 201; (1982) 75 Cr App R 200; *R v Watford Justices, Ex parte Outrim* [1983] RTR 26; [1982] Crim LR 593; *R v West London Stipendiary Magistrate, Ex parte Anderson* (1984) Cr App R 143; *R v Derby Crown Court, Ex parte Brooks* (1984) 80 Cr App R 164; [1984] Crim LR 754; and *R v Chief*

Constable of the Merseyside Police, Ex parte Calveley [1986] 1 All ER 257; [1986] 2 WLR 144.[6]

These cases extended the meaning of an abuse of process from the notion of mala fides on the part of the prosecution to one where mere delay, not due to any misconduct, if prejudicial to the fair trial of a defendant, was sufficient.

Two cases held that delay in service of the summons, despite the informations being sworn within the statutory time period, constituted an abuse of process: *R v Gateshead Justices, Ex parte Smith* (1985) 149 JPR 681; *The Times*, July 2 1985; and *R v Clerk to the Medway Justices, Ex parte Department of Health and Social Security* (1986) 150 JPR 401; [1986] Crim LR 686; *The Times*, June 14 1986. It may be said that the New Zealand approach now accords with that of England.

The right to a speedy trial

It is often forgotten that chapter 40 of the Magna Carta of 1215 guarantees the right to a trial without delay. This right was given statutory force by 25 Edward I (1297) c29 (among many other Acts). When translated from the Latin "nulli vendemus, nulli negabimus aut defermus rectum aut justiciam", the relevant passage from chapter 29 provides:

> To none will we sell, to none will we delay or deny right or justice.

It is from this provision that the principle "justice delayed is justice denied" derives. The right to a speedy trial was recognised for the first time in New Zealand by Robertson J in *Watson v Clarke* (at 13-14). It is a statutory right as (at 14):

> By virtue of s 2 of the English Laws Act 1908, 25 Edward I (1297) c29 is a part of the Laws of New Zealand and the Imperial Laws Application Act 1988 (assented to on 22 July 1988 and coming into force on 1 January 1989) specifically preserves this section: s 3(1) and the First Schedule.

Throughout its history the common law has long recognised the importance of the right to a speedy trial and as Lord Templeman in the Privy Council confirmed in *Bell v Director of Public Prosections* [1985] AC 937, 950; [1985] 2 All ER 585, 589 the common law was not powerless to provide a remedy against unreasonable delay.

Sir Edward Coke declared that Magna Carta was a confirmation or restitution of the common law. *1 Coke Upon Littleton* (18 ed) L2 C4 Section 108 at 81a, describes Magna Carta as being so called

> not for the length or largenesse of it (for it is but short. . .) but it is called the great charter in respect of the great weightinesse and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme.[7]

Thus in Australia, the right to a speedy trial is considered a common law right. As Rogers J put it in *Kintominas v Attorney-General for the State of New South Wales* (1987) 24 A Crim R 456, 459 it is:

> a fundamental, constitutional right, deeply-embedded in the administration of criminal justice. The statement in Magna Carta is merely an affirmation of this entitlement, not its origin.

The importance of a speedy trial can be evidenced by the fact that at an even earlier time, s 4 and s 6 of the Assize of Clarendon 1166, required the sherriff to bring accused persons such as robbers, murderers and thieves before Justices "immediately and without delay".

Magna Carta and its common law principles are the source of the United States Constitution's Sixth Amendment right to a speedy trial: see *Klopfer v North Carolina* 386 US 213 (1967). It is also the source of Article 9(3) of the International Covenant on Civil and Political Rights to which New Zealand is a signatory. It states:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other official authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release . . .

The principle has been asserted on many occasions including *R v Commissioners of Inland Revenue; Re Nathan* (1884) 12 QBD 461 in which Bowen LJ said (at 478) "by Magna Carta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice".

In *R v Secretary of State for Home Department, Ex parte Phansopkar* [1976] KB 606, 621 Lord Denning MR after referring to Magna Carta said that it was "implicit in this legislation" that a person was entitled to have their application examined "fairly and in a reasonable time" and Lawton LJ (at 624) said that the duty imposed by Magna Carta was not to "delay unreasonably".[8]

By way of remedy chapter 37 of Magna Carta (1297) provided that "if anything be procured by any person contrary to the premises, it shall be of no force or effect". This provision was incorporated into the complementary statute: 42 Edward III (1368) c 3 as:

> It is assented and accorded, for the good governance of the commons, that none be put to answer without presentment before Justices or matter of record or by due process and writ original according to the old law of the land. And if anything from henceforth be done to the contrary, it shall be void in law, and holden for error.

42 Edward III (1368) c 3 is specifically preserved by the Imperial Laws Application Act 1988. Both trial by jury and the writ of Habeas Corpus trace their descent from chapters 38 to 40 of the Magna Carta of 1215. (Holdsworth, *A History of English Law*, 3 ed, p 215)

Robertson J in *Watson* (at 16-22) referred to a series of Australian decisions from the highest Courts in the states of New South Wales, South Australia and Victoria which have held that delay in the prosecution of a criminal case may be a breach of the constitutional right existing at common law to a speedy trial, the denial of which constitutes an abuse of process: *R v McConnell* (1985) 2 NSWLR 269; *R v Climo* (1986) 7 NSWLR 579; *Moore v Jack Brabham Holdings Pty Ltd* (1986) 7 NSWLR 470; *Herron v McGregor* (1986) 6 NSWLR 246; (1986) 28 A Crim R

79; *Herron v Attorney-General for the State of New South Wales* (1987) 28 A Crim R 353; *Whitbread v Cooke (No 2)* (1987) 5 ACLC 305; *Kintominas v Attorney-General for the State of New South Wales* (1987) 24 A Crim R 456; *Joel v Mealey* (1987) 27 A Crim R 280; *R v Clarkson* (1987) 25 A Crim R 277; *Watson v Attorney-General for New South Wales* (1987) 8 NSWLR 685; (1987) 28 A Crim R 332; *Clayton v Ralphs & Manos* (1987) 45 SASR 347; *Carver v Attorney-General for the State of New South Wales* (1987) 29 A Crim R 24; and *Aboud v Attorney-General for New South Wales* (1987) 10 NSWLR 671.[9] Wylie J in *Russell* (at 28-33) referred to several of these decisions in the context of delay as an abuse of process.

Generally Judges have refrained from nominating a time period beyond which the delay is unreasonable and an abuse of process. As Kirby P said in *Aboud v Attorney-General for New South Wales* 10 NSWLR 671, 689 "the Court must anchor its approach in reality, avoiding arbitrary standards or formulas" but McHugh JA stated (at 696):

> Speaking generally, I think that, in a case where the trial will take only a matter of days, a delay of more than twelve months between the charge and trial is prima facie a breach of the accused's speedy trial right unless the delay has been caused or consented to by the accused.

This accords with the views of Alderson B in *R v Robins* (1844) 1 Cox CC 114 (one year) and Lord Hailsham in *R v Lawrence* [1982] AC 510, 517; [1981] 1 All ER 974, 975 (eleven months).[10]

Conclusions

Russell v Stewart and *Watson v Clarke* are two very important decisions in the history of the criminal law in New Zealand for they hold or confirm, often for the first time that:

1 Every Court has a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court.

2 A District Court Judge has an inherent power to control the Court's process to prevent abuse of its own process.

3 That power extends to dismiss or permanently stay a prosecution properly brought initially.

4 The categories of abuse of process are never closed.

5 Excessive delay may constitute an abuse. Whether it does will depend on the circumstances of the case.

6 The inherent power to prevent abuse of process applies to both the instituting and the continuing of proceedings against a defendant. The whole period of delay from the time of the commission of the offence is to be considered in assessing the probability of prejudice or unfairness. It may include the period before the filing of an information as well as delay thereafter. It may include delay in service of a summons where not due to evasion by the defendant. It is the cumulative effect which is material and this is not lessened by compliance with a statutory limitation period.

7 Even in the absence of proved fault or contribution to delay by either party, if the delay is so excessive as to raise a presumption of prejudice or unfairness (and whether such presumption will arise may depend on the nature of the case) then there is an abuse and the Court must act to prevent it. This "presumptive prejudice" arises where there is deterioration in the quality of the evidence through: (1) loss of memory; (2) loss of witnesses by death or disappearance; (3) loss of relevant evidence; (4) difficulty in gathering evidence; and (5) a general risk that a fair trial is no longer possible.

8 The factors to be taken into account are: (1) the entire length of the delay from the time the event arose through to the date of the trial; (2) the reasons given by the prosecution to justify the delay; (3) whether the delay is due in part to the accused or is consented to by them; (4) actual and presumptive prejudice to the accused; (5) the effect of the delay on the accused's personal and private life; (6) the seriousness of the charge; (7) the complexity of the case; and (8) any institutional resources that gave rise to the delay.

9 The test is whether on the balance of probability, the defendant has been, or will be prejudiced in the preparation or conduct of their defence by unjustifiable delay on the part of the prosecution.

10 When given for an abuse of process, it is a substitute for an acquittal.

11 In New Zealand there is a statutory right to a speedy trial traceable to the Magna Carta, breach of which may constitute an abuse of process. In Australia this is considered a common law right.

12 There is an obligation on the prosecutor to conduct criminal investigations and prosecutions as expeditiously as reasonably possible. Offences should be charged and tried soon after their commission so that (1) the recollections of witnesses may still be reasonably clear; (2) so as to avoid any unnecessary anxiety to the public and private life of the defendant; and (3) so as to avoid unnecessary pre-trial incarceration.

13 The right to a speedy trial is not a right to be protected against any delay but against delay which could reasonably be avoided. Lack of availability of resources including congested Court lists is not of itself a justification if avoidable. The Court must first decide whether there has been a breach and then decide what effect the breach has had before considering a remedy.

14 Only where the delay has substantially prejudiced or is likely to prejudice the fair trial of a person or has become oppressive, is it necessary to take the very serious step of staying the action for abuse of process. □

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1 *R v Brentford Justices, Ex parte Wong* [1981] 1 QB 445; [1981] 1 All ER 884; [1981] Crim LR 339; *R v Oxford City Justices, Ex parte Smith* [1982] RTR 201; (1982) 75 Cr App R 200; *R v Watford*

Justices, Ex parte Outrim [1983] RTR 26; [1982] Crim LR 593; *R v Grays Justices, Ex parte Graham* [1982] QB 1239; [1982] 3 All ER 653; [1982] 3 WLR 596; [1982] Crim LR 594; *R v West London Stipendiary Magistrate, Ex parte Anderson* (1984) 80 Cr App R 143 and *R v Derby Crown Court, Ex parte Brooks* (1984) 80 Cr App R 164; [1984] Crim LR 754.

2 *Miller v Ryan* [1980] 1 NSWLR 93, 109; *Herron v McGregor* (1980) 6 NSWLR 246, 250; (1986) 28 A Crim R 79, 82; *Watson v Attorney-General for New South Wales* (1987) 8 NSWLR 685; (1987) 28 A Crim R 332; *Aboud v Attorney-General for New South Wales* (1987) 10 NSWLR 671; *R v Clarkson* (1987) 25 A Crim R 277 and *Clayton v Ralphs & Manos* (1987) 45 SASR 347.

3 The Court of Appeal has on several other occasions referred to the inherent jurisdiction of the Courts to prevent abuse of process in the interests of fairness and justice, so as to prevent oppression and prejudice to a party. These include: *R v Moore* [1974] 1 NZLR 417; *Taylor v Attorney-General* [1975] 2 NZLR 675; *R v Hartley* [1978] 2 NZLR 199; *Kumar v Immigration Department* [1978] 2 NZLR 553; *Police v Lavalle* [1979] 1 NZLR 45; *R v Davis* [1982] 1 NZLR 584; *Daly v Ministry of Transport* [1983] NZLR 736; *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8; *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84; *Gregoriadis v Commissioner of Inland Revenue* [1986] 1 NZLR 110; *Tamworth Industries Ltd v Attorney-General* CA 181/86 26 June 1987 and *Amery v Solicitor-General* [1987] 2 NZLR 292.

4 Wylie J in *Russell v Stewart* makes the same point (at 10) but compare the decision of Quilliam J in *Whetton v Auckland City Council* (High Court, Wellington, A 34/80 20 October 1980 (at 6)).

5 See the earlier Privy Council decision of *Grant v Director of Public Prosecutions of Jamaica* [1982] AC 190 and also *Atkinson v The United States of America* [1971] AC 197, 232; [1969] 3 All ER 1317, 1322 per Lord Reid.

6 Other English decisions not cited but worthy of consideration are: *R v Manchester City Stipendiary Magistrate, Ex parte Snelson* [1977] 1 WLR 911; [1978] 2 All ER 62; *R v Horsham Justices, Ex parte Reeves* (1980) 75 Cr App R 236; *R v Grays Justices, Ex parte Graham* [1982] QB 1239; [1982] 3 All ER 653; [1982] 3 WLR 596; [1982] Crim LR 594; *R v Magnaload and Greenham Premises* [1984] CLY 572; *R v Canterbury and St Augustine's Justices, Ex parte Turner* (1983) 147 JPR 193; [1983] Crim LR 478; (1984) JP 467n; *R v Newcastle-upon-Tyne Justices, Ex parte Hindle; Hindle v Thynne* [1984] 1 All ER 770; *R v Ashton-under-Lyne Justices, Ex parte Potts, The Times,* March 29 1984; (1984) 148 JP 467n and *R v Bow Street Magistrates' Court, Ex parte Van Der Holst* (1985) 83 Cr App R 114. See also Pattenden, "The Power of the Courts to Stay a Criminal Prosecution" [1985] Crim LR 175.

7 See also Thomson, *An Historical Essay on the Magna Charta of King John* (1829) 229 and Samuels, "Magna Carta as Living Law" (1969) 20 NILQ 49.

8 See also *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245; [1968] 1 All ER 543, 546 per Lord Denning MR but compare *Chester v Bateson* [1920] 1 KB 829, 832 per Darling J.

9 The authorities are usefully reviewed in an article by Byrne, "The Right to a Speedy Trial" (1988) 10 NSWLR 671. See also: Schneider, "The Right to a Speedy Trial" (1968) 20 Stanford L Rev 476; Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975) 27 Stanford L Rev 525; Uviller, "Barker v Wingo: Speedy Trial Gets a Fast Shuffle" (1972) Columbia L Rev 1376.

10 See the United States Federal Speedy Trial Act 1974 as amended in 1979 which generally requires Courts to bring cases from arrest to trial within 100 days or 90 days where defendants are remanded in custody. See also: Misner, "Legislatively Mandated Speedy Trials" (1984) 8 Crim LJ 17; Vennard, "Court Delay and Speedy Trial Provisions" [1985] Crim LR 73 and Byrne, "The Right to a Speedy Trial" (1988) 62 ALJ 160, 162-163.

Directing the jury

A paper by Judge Jack B Weinstein, Chief Judge of the United States District Court, Eastern District of New York, which he gave in October 1987 has recently been read by the Editor. The paper is a very substantial one and reviews the power and duty of Federal Judges in the American legal system when summing up, or as the American phrase has it, charging juries. The paper is mainly concerned with American tradition and procedures. The Judge points out some of the dangers and emphasises, among other things, that the Judge should not confuse the jury on where the burden of proof lies. He quotes what was said by a Judge which was in effect that it was the civic duty of the jury to find the defendant guilty. Among other things, the Judge said to the jury:

> I don't say he's guilty of any of [the crimes charged] because that's not my job. That's your job. And that's why you're here. . . . I sat here, just like you did. I listened, just as you did. If you think for one moment I don't know what's going on, I'd have to be an idiot or a moron not to know. Yet, it's not my job. This is why you are here. So I say to you, when you arrive at a verdict, ask yourselves the question, "Can I go home tonight and say to my wife or my children or, in your case, to a husband, I'm proud of the verdict I rendered. I was a juror in the highest trial court in the State of New York and I'm proud of the verdict I rendered." If you can say that, you can hold your head high. You can look anyone straight in the eye and justly be proud. If you can't, all I say is, remember the oath that you took. . . . The law requires me to tell the jury about all of the general rules of criminal law that apply in every criminal case across the land. . . . And I would . . . avoid using up the energy to discuss them, but the law says that I must and so I will. Every defendant, not only this defendant, but every defendant in the country, no matter what he's charged with, arson, rape, murder, the law says he's presumed to be innocent. Now, what does that mean? It means he's presumed to be innocent until the evidence in the case that comes from the lips of witnesses convinces the trial jury to the contrary. And when that happens, the presumption of innocence goes right out the window. It doesn't exist if the weight of the evidence convinces the jury beyond a reasonable doubt that the defendant participated in the commission of the crime. So much for that.

Another occasion Judge Weinstein referred to concerned an issue of identity. The defence depended in part upon testimony given by his family that he never wore a hat which had been worn by the person who committed the crime. The Judge remarked to the jury at the close of the trial:

> Now members of the jury, there was testimony that the defendant never wears a hat, or may, or may never wear a hat except when he is going out to rob a bank or never wears a hat unless he is going ice skating, or never wears a hat unless he is going out to commit some crime, or whatever. So what significance that has, I don't know. You must say. □