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Lawyer's guide

As will become clear the title for this editorial is purposely ambiguous. The reference is to Robert Ludbrook's recently published *You and Your Lawyer* (published by Bateman 1989, $24.95) for which the subtitle is A Client Survival Guide for New Zealanders. The question remains whether it is either, or both, a guide to lawyers or a guide for lawyers.

This is a good book. It largely succeeds in what it sets out to do. It is aimed at lay people, and in his introduction Mr Ludbrook says he hopes that the book will help the reader find a good lawyer and establish a good working partnership based on trust and mutual respect. It sets out to be "user friendly" in current day jargon, and to express in simple terms answers to the sorts of practical questions that might be in the minds of a lot of people when they are first going to approach a lawyer. Mr Ludbrook has undertaken a much more difficult task than it might seem to be on the surface, and the criticisms that can be levelled at the book are in no way a denial of its very considerable merits and usefulness.

The book is only just over 100 pages in length and is set out in short sections with clear and appropriate headings. There are some ten chapters with up to a dozen or more subheadings of sometimes just two or three paragraphs each. A list of the chapter titles will indicate the extent and approach of the book.

The ten chapters are titled:

1 Introduction
2 Do you really need a lawyer?
3 Finding a lawyer who is right for you
4 The first meeting
5 What you can expect from your lawyer
6 What your lawyer can expect from you
7 Keeping your lawyer up to the mark
8 Unhappy with your lawyer?
9 What do lawyers actually do?
10 Money, money, money.

As for the headings within the chapters, those for chapter 3 on "Finding a lawyer who is right for you", will give a fair indication of how sensible and practical the approach is. The chapter is divided into some 13 sections which are headed up as follows (with the page reference given to indicate the length of the sections):

How not to choose a lawyer (p 30)
Personal recommendation (p 30)
Questions to put to a lawyer before deciding (p 31)
Lawyers' advertising (p 31)
Personal style (p 32)
Mini-practice or mega-practice? (p 33)
Modern technology (p 33)
City, suburb or town? (p 33)
Lawyers and friends (p 33)
Dressing up (p 34)
Keep one eye on the clock (p 34)
Personal matters (p 35)
Some areas of legal specialisation (p 35)

Throughout the book there are interlarded quotations from such people as Samuel Johnson, Voltaire, Janet Frame, Lord Rutherford, Francis Bacon, Keith Holyoake and so on. My favourite of the quotations given is that of the American novelist Saul Bellow:

> I got a lawyer and she got one too, and both of them talk and send me bills.

As has been noted already the book is full of good advice. It is advice that is good from the point of view of the client and in many cases even better from the point of view of the lawyer. An example is the section headed "Babies and children" which reads:

> You know your baby, your child. If their presence is likely to prove a distraction it is best to make other arrangements. Do not assume that your lawyer's secretary will have the skills or inclination to look after your baby or toddler while your see the lawyer.

And talking about secretaries, there is a nice grace note to the section on page 54 where he suggests that lawyers would appreciate a word of thanks or a gesture of appreciation and then adds "And don't forget the secretary, who can be a real help in times of trouble."

Inevitably of course the book has a few oddities. On page 96 for instance it raises the question of what is a reasonable fee and gives an answer that might have pleased Gertrude Stein, but is likely to make the lay reader think that it is a perfect example of legalese. Robert Ludbrook

explains that "the Law Society will tell you that a reasonable fee is a fee that is reasonable. . ." and he then goes on to say taking into account a variety of things. He does explain the matter more reasonably by saying that for the client a reasonable fee is the lowest possible fee that the client can negotiate. Another odd thing for a lawyer to say is at the very beginning of the book. When explaining the sources of law Mr Ludbrook says that statutory regulations "are issued by government departments. . ." This may be a fair description of where they originate, but in fact they are of course issued by the Executive Council and are administered by the departments. A small but rather odd way of expressing what is after all a very basic constitutional point. This is one of the difficulties of course in trying to write a simple text for laymen.

The piece I liked best was the reference on page 29 to buying a will from a stationery shop and filling it in yourself. He comments with, I am sure, an unconscious sense of humour "not only can a homemade will cost you money later on. . .". I thought it was one of the great truisms about money that you can't take it with you! And then, in what might be thought of as a commercial grouch, there are three periodicals referred to as useful sources of information. They do not include *The New Zealand Law Journal*, but do refer to *New Zealand Recent Law* which it is said is published monthly, but of course that is no longer so.

At the end of the book there is a very useful section which is described as a Glossary. The difficulty with that of course is that anyone who knows what a glossary is, is unlikely to have need for a book like this. The matter is not improved by the sub-heading "Lawspeak" which is as ugly a neologism as its echo a few pages on by a list of useful addresses under the heading "Lawplaces". Leaving that aside however, the glossary does have some clear, simple and straight-forward explanation of terms. They are written at times with a certain element of tongue-in-cheek, as for example, in the delightful explanation of cross-examination as

> the lawyer's opportunity to test and challenge the witness by asking certain questions. It may make you cross – but keep your cool.

In general terms this is a book that ought to have a wide readership. It is helpful in many ways for clients – and also for practitioners, and in particular young practitioners. An example of the helpfulness of the book is the discussion of the question about being *Unhappy with your lawyer.* The opening section reads:

> If you feel angry with your lawyer or feel disappointed with the lawyer's performance the first thing to do is to go and talk to your lawyer. Do it at once. Phone and make an appointment to see the lawyer. Say that you want to talk about your matter.
>
> When you have made the appointment sit down and put in writing the grounds for your complaint or the reasons for your concern. Avoid emotional attacks – "you just don't care about me or my case". Don't descend to personal or professional abuse – "all lawyers are crooks and you are no different". Don't talk in generalisations – "I thought you would be able to help me but you have turned out to be completely useless".
>
> Be specific about your complaints or concerns. Go back to your personal file and back up your complaint by referring to correspondence or notes of earlier interviews.

That is good advice – but there is a catch to it. Anyone who is organised, sensible and careful enough to keep his or her own file is *not* likely to need this book. On second thoughts, perhaps they are the only kind of people who will buy this book because that is the sort of person they are, organised, sensible and careful. The question remains who is this book intended for? It is more than a pamphlet or a brochure, it does not have that simplistic toothpaste "ring of sincerity" that salesmanship relies on to carry a message. But it is less than an explanation of what the law is in itself or of what the profession is, except in a passing way. It is more like a map or a guide book for tourists so may be of use to middle-aged, middle-class pakehas – and those Maoris who now fall into the first two categories.

My own view of who should really read this book is that it is most appropriate for the newly qualified practitioner. It says what clients are entitled to expect and therefore what some will expect. It spells out the responsibilities of a lawyer in a much more direct and practical way than reading the Code of Ethics will do. It says things about the solicitor-client relationship that lawyers need to be very conscious of and aware of. It is straightforward in terms of emphasising that lawyers are human and therefore not only liable to error but also to suffer from all of the personality quirks that go with being human. In a very real sense therefore the book can be seen as a guide to lawyers and consequently a guide for lawyers.

But the book troubles me. It sets out to demythologise the law and in doing so, in my view, denigrates the legal profession. I hasten to add that I accept that that was not the intention of the author. The trouble is however that in demythologising the law as so often happens in other areas, there is a tendency for the matter to be overdone.

What this book emphasises is that the law is a means by which a lawyer earns his living – like a plumber or a carpenter in their trades. But the book fails to make the point that it is also more than this – much more. What is disturbing is that too many lawyers themselves have lost the concept of the law as a profession. They no longer see it as a vocation for themselves, and also as an essential aspect of community living with a guarantee of social security (pacta sunt servanda) and individual liberty (all people are equal under the law). The law is not just a job, a tricky trade, an intellectual charade.

Presumably without intending to do so, this book puts the emphasis on demythologising to the point where it not only fails to explain the nature of the law, and the role, function and professional purpose of the lawyer, but gives a false impression. Perhaps this is only to say that the book is all too accurate in describing what too many of us are and not sufficiently accurate in describing what all of us should be (and happily a large number of the profession are). To the extent that lawyers lose pride in their profession – as a profession – and fail to emphasise it to others, to that same degree will we lose respect from the community and the community lose respect for the law.

Examples of what I mean abound throughout the book. On page 13 for instance there is a definition of lawyers as being "problem solvers". To which the answer is yes, but more than that. To leave it at that is to avoid

understanding an essential element of the relationship between a lawyer and his client. Throughout the book the emphasis is placed on the idea of the client being the boss. At page 55 this is explicitly stated in the following way "Your lawyer is acting for you. You make the decisions. You are the boss. This needs to be established at the first interview." And at page 44 there occurs the passage "Always be assertive in your dealings with your lawyer. State your needs and insist that the power to make decisions about your life and your affairs remains securely in your hands."

Now there is undoubtedly a considerable degree of truth in these statements. The book as written however gives the impression that this is the essential truth, the last word.

On the other hand there are passing references throughout the book to the Code of Ethics and to the lawyer having certain obligations. On page 48 there is a paragraph that reads as follows:

> The requirement of truthfulness applies not only to the lawyer's relationship with the client but also the lawyer's dealings with others. You cannot expect a lawyer to tell lies on your behalf. The lawyer is entitled to accept the information you give at face value and is not obliged to double check. But no lawyer must make statements to a Court or to any third party knowing that the statements are untrue.

The whole point of this paragraph, and the passing references to standards that occur in the book, is really that the lawyer's over-riding obligation and responsibility is to the law and to the legal system; and it is only because of this, and as an essential element of it that there is any obligation or responsibility to the client. This is what the Code of Ethics is all about. In some ways this is a hard message and many people will not want to hear it. It is however an essential fact which is the whole basis of the law as a profession. Unless lawyers themselves acknowledge and accept this they will not be able to preach it to others; and unless they preach it to others no one will understand it.

It is accordingly unfortunate that in the glossary there is a definition of the Law Society as a "trade union or professional association". The fact that these two definitions are a contradiction in terms is simply ignored. This sort of comment is to sink to the level of a politician in parliamentary debate. This is said despite the quotation in support on page 65 from Sir Patrick Hastings, which would no doubt need to be seen in its context if it was to be understood properly. But to identify the practice of the law in terms of a trade union is to denigrate the profession and to totally misunderstand the nature and function of a trade union. It is a sorry sight to see this in a book written by a barrister for the information of the general public.

P J Downey

Case and Comment

Interim orders under the Matrimonial Property Act 1976 and R 333 of the High Court Rules

Murray v Murray (Court of Appeal, CA 35/89, 6 April 1989)

Rule 333 of the High Court Rules provides that where in a proceeding concerning property it appears to the Court that the property is more than sufficient to answer the claims on the property for which provision ought to be made in the proceeding, the Court may allow any part of the property to be conveyed, transferred or delivered to any person having an interest in the property.

This Rule was invoked unsuccessfully by counsel for the appellant wife in *Murray v Murray* (Court of Appeal; CA 35/89; 6 April 1989; Richardson, McMullin and Casey JJ). The parties separated early in 1988 after a 24-year marriage. After their separation, the former matrimonial home was sold and the net proceeds, which amounted to some $173,600, were lodged in a solicitor's trust account. Some matrimonial property matters were settled between the parties, but not the important matter of the husband's superannuation entitlement. Had he retired about the time of the parties' separation he would have been entitled to a lump sum of $428,705. His intention, however, was to continue in his employment, if at all possible, until his compulsory retiring age of 55 on 27 July 1991.

The family chattels had been divided by agreement between the parties and the wife had retained, or received, matrimonial assets totalling some $23,000.

The wife began substantive matrimonial property proceedings in the High Court at Christchurch. Because it would be some time before the various matters arising in them could be resolved and because each spouse, while living in rented accommodation, wished to purchase a property, there were successive applications before Hardie Boys J to be permitted to use the proceeds of sale of the former home to fund the purchase of housing.

The wife was the first to apply for an order, viz that she should receive the net proceeds of sale of the home on account of her interest in the

matrimonial property. The basis of this application was that the amount of her entitlement – and however the superannuation rights were to be valued – would far exceed the full sale proceeds and the assets which she had retained. The husband was in a stronger position as regards income, having about $100,000 per annum as against the wife's $40,000 or so. On the other hand, he had little accumulated savings and would not be in a position to purchase a property without the benefit of his share of the sale proceeds of the former home. Hardie Boys J concluded that the justice of the case called for the parties to share the sale proceeds of the home equally and that the wife's application must thus be dismissed.

The next step was taken by the husband. He applied for an order that the sale proceeds be paid out to the parties in equal shares. The wife opposed the application, primarily upon the basis that a decision to allow immediate payment of the money would pre-empt the Court's adjudication on the substantive proceedings, making it for all practical purposes impossible for the Judge then to take the view that the husband having chosen to retain his superannuation rights rather than retire, the wife should have in the meantime a greater cash sum than half of what was available. Hardie Boys J took the view, as he had on the wife's earlier application, viz, that the proceeds of sale should be divided now. To protect the wife's position, however, he ordered that the moneys held in the trust account should be paid to the parties in equal shares but subject to a prior undertaking from the husband that, in the event that he did receive a lump sum payment on his superannuation prior to the substantive hearing, he would forthwith pay to the wife a sum equivalent to half of the net sale proceeds of the former home so that she would thus receive the full amount of those proceeds.

The wife appealed against this later order. Her counsel argued that the decision had been wrong in that it gave insufficient weight to the need to preserve to the trial Judge at the final hearing the option of vesting the whole of the net proceeds of sale of the former home in the wife. Counsel considered that the order which should have been made was one which preserved the fund until the final determination of the matrimonial property proceedings.

As Richardson J stated in delivering the judgment of the Court of Appeal, the jurisdiction to make orders for interim distribution of matrimonial property prior to final determination of the proceedings arises under ss 25 and 33 of the Matrimonial Property Act 1976. Section 25(3) states that the Court may, at any time, subject to the provisions of the Act, make such declaration or order relating to the vesting of any specific property as it considers just. Questions of possible prejudice arising from the making of a proposed order under that subsection would doubtless be taken into account in appropriate cases, continued Richardson J, in deciding where the interests of justice lay. Nevertheless, the Court was satisfied that

> It would be wrong in principle to qualify or gloss the breadth of the discretion conferred under the statutory provision by reference to R 333. This is an appeal from the exercise of a discretion reposed in the High Court Judge and it is well settled that in order to succeed an appellant must show that the Judge acted on a wrong principle or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that his decision was plainly wrong.

It was then observed that there was no suggestion that, on retirement, the husband might elect for a pension rather than a lump sum and that the case had been argued on the basis that he would receive a lump sum on his actual retirement – which would probably not take place until July 1991. The case for the wife had been advanced on the basis that, on determination of the substantive proceedings at the hearing expected before the end of the year (sc 1989), the High Court might wish to award the wife a cash sum exceeding half the $173,000, which might not, in practical terms, be able to be given effect if the husband had invested a share in a home or unit, until such time as he received the lump sum entitlement. That, in turn, might involve an effective delay of some 18 months to two years between the hearing around the end of 1989 and an actual retirement, at the latest, in July 1991.

Richardson J noted further that the wife might be disadvantaged to some extent if she had to wait until July 1991 for receipt of the balance of her share of the matrimonial property, and in that regard it might be argued for her at the substantive hearing that the husband could be expected to borrow to pay a substantial sum on account at that time. But in any event it was a matter of balancing, in the overall assessment of where the interests of justice lay, any prejudice to the wife of making the order against the prejudice to the husband of not making one, viz, his inability otherwise to buy a house or unit for his own use and to do so in the same market in which the former home was sold. All relevant considerations had been taken into account by Hardie Boys J and their Honours felt quite unable to say that he had erred in reaching his decision. The appeal was accordingly dismissed with costs to the respondent husband in the sum of $750 and certain disbursements.

It is to be noted that this was not a case of a sale of the former home being sought in advance of the substantive proceedings. It is thus not comparable with *Jolley v Jolley* (1977) 1 MPC 115 or *Elley v Elley* (1979) 3 MPC 46 (CA). It is, however, suitably comparable with *Galantai v Galantai (No 1)* and *Galantai v Galantai (No 2)*, reported respectively in (1980) 4 MPC 71 and (1981) 4 MPC 72. There Chilwell J, having made findings as to the spouses' respective shares in the matrimonial home, ordered the husband to make interim cash payments to the wife pending final orders being made. These "advance payments" – for that is what they really were – could well be afforded by the husband.

P R H Webb
University of Auckland

Involuntary hospitalisation and treatment of the mentally ill

By Marion Hetherington BA LLB (Hons) (Auck) LLM (Columbia), Barrister and Solicitor of Auckland

The author states that her paper is written from a legal viewpoint, and it is informed by practical exposure to the field under consideration. The writer is not equipped by training or experience to evaluate medical information, and has accordingly relied on secondary source materials and discussions with and comments of those who are appropriately qualified. The writer thanks the library and word processing departments of Bell Gully Buddle Weir for their assistance, and the firm for its indulgence.

Mental Health and Guardianship legislation currently under consideration or recently enacted in New Zealand, some Australian States and the United Kingdom reflects proper concern with civil liberties and implements community based health care. In so far as it produces a varied regime for the management of severe mental illness the writer expresses two reservations. The first is that the *substance* of the law delineating the preconditions for involuntary hospitalisation and treatment unduly restricts medical intervention, and that the reality of this will become increasingly apparent as the re-fashioned procedures ensure that the law is observed. The second is that the *procedures* of the law may well be so cumbersome as to render expeditious and effective treatment needlessly difficult or even impossible.

Reasons

The reasons for this opinion are set out below.

Many (if not most) people suffering from severe psychotic illnesses (of one sort or another) can be effectively restored to health by a short period (usually about 3-4 weeks) of involuntary hospitalisation with involuntary treatment (usually including medication and sometimes ECT), but will not lawfully be so admitted and treated because of the legal tests set down in the existing or proposed mental health legislation as generally drafted in New Zealand, some Australian States and the United Kingdom[1].

One reason for this is that the legislation requires the presence of *both* mental illness *and* some other factor or factors (usually dangerousness to self or others and/or incapacity to look after oneself[2]), of which it is often difficult and frequently impossible to provide satisfactory evidence sufficiently indicative of the high level of dangerousness and/or incapacity which the Courts, as the guardians of liberty, will require as a matter of interpretation[3].

Psychiatric symptoms

Now that the statutes are tending to define "mental illness" or "mental disorder" in terms of known psychiatric symptoms[4], the situation may be more difficult, in that the Courts may now require specific evidence as to the existence of symptoms, such as, for example, delusions, hallucinations and disorders of mood, whereas hitherto they have tended to accept medical conclusions as to the presence or absence of mental illness[5].

Proof of the presence of the "other factor(s)" of dangerousness and/or incapacity to care for oneself, calls for predictions of future behaviour, for which endeavour psychiatrists are not significantly better equipped than anybody else. (*The Mason Report* (1988) 209) Predictions are thus based on evidence of past acts indicative of likely future acts. The medical personnel will rarely have been present at the time of the past acts, and are therefore obliged to ask for anecdotal evidence to be given by family and friends in support of a case for compulsory hospitalisation or retention of a patient already in hospital.

That family and friends will be the likeliest sources of relevant evidence is a matter of self-evident reality, and the writer has seen this occur in practice. The evidence will frequently include such things as a family member's account of what a police officer, a friend, another relative, or some other person has told the family member about the patient's behaviour. As it would not be practically or economically feasible (and possibly not therapeutically advisable) to have all people who have observed the behaviour in Court as witnesses, this evidence, however unsatisfactory, must be given.

Briefing witnesses

As a result, hospital psychiatrists find themselves effectively "briefing" witnesses and explaining to them what evidence they will need to give to satisfy the Court.

The writer's experience in NSW is that this can involve an interview of an hour or two in which a hospital psychiatrist alerts the family to the requirements of the law, the patient's past behaviour is discussed, and the psychiatrist indicates which aspects of it should be brought to the attention of the Court as likely to influence a decision in favour of the order sought; the psychiatrist also points out that the family evidence is critical, evidence of medical personnel involved not being sufficient. The writer imagines that such interviews assist the psychiatrist by providing medically relevant information. It nevertheless seems extraordinary that the legal system should force doctors into adopting what is a lawyer-like role.

The writer's experience in New Zealand suggests that the psychiatrists can as yet still obtain orders solely on the basis of medical evidence. It can surely only be a

matter of time before legal requirements dictate the tendering of more extensive evidence. (See Delahunty: "The Civil Committal Process" in Dawson et al, *Mental Health: A Case for Reform* (1986) at 70.)

Even so, it is very difficult to obtain orders, *inter alia* because by the time the patient is presented to the Court, he or she will frequently have been sufficiently stabilised by medication and the caring and regulated environment of the hospital to present well, but not sufficiently to cope if discharged. The likelihood at this stage is that the medical personnel will have been able to do little more than reach a tentative diagnosis and prepare the Court case. There will not have been time or opportunity to devise a sensible plan for treatment or rehabilitation and long term care if that is necessary.

Anecdotal evidence

The inevitably high level of curial dependence on anecdotal evidence of family and friends as to the "other factor(s)" of dangerousness and incapacity to look after oneself is unsatisfactory, especially as family and friends are obviously less likely to speak from an objective viewpoint than the health professionals involved.

Many (if not most) patients successfully treated by the methods referred to above (ie, involuntary hospitalisation with involuntary treatment – medication and/or ECT), when sufficiently recovered are thankful for the treatment they have received. Many become voluntary patients until they are well enough to leave hospital. Their families are delighted and relieved to see their loved ones returned from madness to sanity. (See Sainsbury, fn 1, below and Dawson, fn 2, below, Ch 7.)

Coercive intervention cannot be justified in all cases where mental illness is present.[6] From this it follows that *some* additional criteria are necessary. There is a question, however, as to whether the criteria thus far selected are the appropriate ones, or if they are, whether their statutory expression accurately captures the meaning intended.

Dangerousness of itself has no particular relevance to mental illness or the successful treatment thereof. (See *The Mason Report* Appendix 2, "Dangerousness", p 207ff.) Capacity to look after oneself may have been artificially maintained by family efforts, which will not be sustainable in the long term, and in any event does not bear specifically on mental illness or its treatment or outcome. (See *In the Matter of an Alleged Incapable Person* (1959) 76 WN (NSW) 477; *In a Matter of an Enquiry under the Mental Health Act 1969* (1984) 2 DCR 303.)

Need to ensure treatment

It seems that the existing and proposed preconditions for involuntary hospitalisation and treatment do not squarely address the purpose for which they are intended, ie the need to ensure treatment or hospitalised treatment for people whose illness prevents them from recognising the need for and value of it. More appropriate preconditions might be:

(a) mental illness or mental disorder (meaning madness or insanity as generally understood);
(b) requiring care or treatment;
(c) which can best be provided in a hospital (relevant only in cases where hospitalisation is sought).

Criteria of this general character would, it is suggested, have several advantages. First, they would separate ascertainment of mental illness from the satisfaction of the additional criteria, and at the same time remove the pernicious circularity in existing legislation.[7] Secondly, the additional criteria would elevate the relief of needless suffering to the high priority which it should be accorded in legislation whose overall objective is mental health.

Such additional criteria would invite reasoned consideration of the likely consequences of intervention and non-intervention. These would include the expected response to treatment, and the expected suffering, social, financial, physical and emotional that might occur in the absence of intervention. In some cases consideration would necessarily involve questions of dangerousness and capacity to look after oneself, without derogating from the therapeutic focus of the test.

Thirdly, the misguided association of dangerousness with mental illness with its unfortunate consequences would be severed, and separate provision could then be made for the detention of mentally ill people considered too dangerous to be in the community, but whose likely response to treatment would not be sufficiently favourable to bring them within the suggested criteria.

Enjoyment of civil liberties

Nobody who has had exposure to these matters would seriously entertain the belief that legislation so drafted would infringe civil liberties. Civil liberties are not of much value to people who are so incapacitated by mental illness that they cannot usefully enjoy them. It is the more frustrating to state this in the knowledge that so many psychiatric conditions are treatable such that the ill person can be made well and able to fully enjoy his or her civil liberties again.

Many (if not most) families with mentally ill members, are only too anxious to work for the cure, improvement or rehabilitation of the "patient", but their efforts are frequently futile if they are unable to marshal professional assistance at critical times in severe psychiatric illnesses. Far too frequently it is the case that the family will have gone through a year or two or more of unsuccessful attempts to get help, and it is only when the "patient" becomes manifestly insane and has additionally engaged in "criminal" activity that help can lawfully be rendered. By that time the illness has progressed to considerable severity, and because of the failure to achieve early intervention, the task of helping the "patient" to put his or her life together will be more difficult. Meanwhile, the family's capacity to assist in or undertake the necessary rehabilitation will have been diminished by the depletion of emotional, physical and material resources, and by damage to the fabric of their own lives.

There seems to be an erroneous belief entertained by some that people in the condition under consideration are "happy" to stay that way and that this is why they refuse help. In fact, they are often severely distressed, and it is their illness which prevents them from perceiving the need for or the possible benefit of professional help. (See submissions appended to

the 1988 NSW Report, fn 1, below.) Indeed, many cope with their distress at all only through immense efforts exerted by those around them, which efforts cannot be indefinitely sustained in the absence of professional help.

Judicial hearings

The judicial hearings conducted in the hospitals, as observed by the writer in New South Wales and New Zealand, cause distress to patients, potential damage to therapeutic and family relationships, and interrupt the orderly management of medical conditions.

The writer's experience is that in every case where the patient has sufficient awareness to appreciate that it is a judicial hearing, distress is apparent before, during or after the hearing, sometimes at all stages, sometimes for days in advance and afterwards. The legal and medical personnel approach the matter with great sensitivity, and it is usually explained to the patient by all at different times that the purpose of the proceeding is to protect his or her rights. Nevertheless, patients almost invariably see themselves as on trial for some wrongdoing or as being subjected to yet another form of coercion. Some make valiant attempts to explain away or deny the behaviour or symptoms relied upon to justify their detention or treatment, some complain of not having a fair hearing, some become depressed or agitated, some overtly manifest symptoms of mental illness which had previously abated. Doctors and relatives are obliged to make statements about the condition and behaviour of the patient that they would prefer not to make in this relatively public and formal situation. The lawyer's position is difficult also. The patient's perception of his or her best interests will frequently be erroneous, but the lawyer is bound to put it to the Court, and indeed there can be little point in having present a legal mind additional to that of the Judge or magistrate unless this is done.

In such circumstances, patients often display confusion as they try to grapple with the conflict that arises between relying on the lawyer who is advocating their position in what appears as a specific crisis, and the doctors and relatives on whom they depend in the longer term. This is surely the kind of conflict that a mentally ill person can well do without. The difficulty for the patient is compounded by the fact that cases are frequently adjourned, and as a result preparing for the next hearing immediately becomes an issue.

Equally worrying are some of the cases where the patient expresses himself or herself as willing to stay in hospital, but for rather different reasons from those advanced by the doctors and accepted by the legal and judicial personnel. The patient may, for example, believe he is safer in hospital, because he is likely to be murdered by his enemies if discharged. The doctors believe the patient is safer in hospital because he is ill, in need of treatment and likely to put himself at risk if discharged. The case is disposed of by everybody agreeing that the patient is safer in hospital, but there is an uncomfortable feeling that the patient has been deceived for everyone's convenience, and that the erroneous beliefs that are symptomatic of his illness have been officially reinforced.

Community treatment orders

In line with good psychiatric practice, it is now considered desirable, wherever possible, to treat those who are chronically mentally ill as outpatients so that they can be maximally integrated into mainstream community life. To this end, community treatment orders are increasingly authorised by legislation. However the legislative provisions do not permit coercive enforcement of orders requiring patients to accept medication in order to maintain their mental health. As a result, it is necessary to wait until mental health has deteriorated to the point where in-hospital care is necessary before medication can be compulsorily administered. (See *R v Hallstrom* fn 2, below, cl 26 Mental Health Bill 1987 (NZ) and recommendations and discussions in the 1988 NSW Report fn 1, below)

In the interests of patients and their treatment, it is suggested that the legal formalities associated with authorising detention or treatment be simplified, so that, for example, in cases where community treatment orders are made emergency intervention can occur to maintain mental health, and in cases where patients are hospitalised, judicial or magisterial enquiries should normally be held only where the hospital wishes to detain the patient for a substantial period.[8]

It seems ironical that as psychiatric treatment progresses[9] the reform of the law increasingly inhibits its availability to those most in need and most amenable to treatment — many of the people who are the most ill, and have the least insight into their problems, and are thus the most resistant to treatment, because of the state of the law, seem the least likely to receive it. Even for those who fall within the substantive legal tests for involuntary admission or treatment or both, the procedures associated with their continued detention or treatment, tend to interrupt rather than to support orderly medical management. If law or practice so inhibited the delivery of modern medical services in other fields one suspects that it would rightly be regarded as a public scandal.

There is no novelty in noticing that the law has not kept up with psychiatry. In 1942 Starke observed:

> It is only to be expected that modern psychiatry would outpace the law, and in fact has outpaced it. (1942) 16 ALJ 227.

What seems remarkable in the present context is that the law makers seem wantonly to disregard not only advancement in psychiatric techniques but also the practical realities of psychiatric practice in shaping laws which rather than increasing access to the improved services inevitably thwart it.

Evidence of psychiatrists

Perhaps more surprising, however, is the fact that psychiatrists frequently make most of the points made in this paper,[10] and little account seems to be taken of their comments. In the writer's experience, many of them feel considerable despondency about the workability of a system in which their evidence carries so little weight, and which frustrates the expeditious and effective treatment of treatable conditions. Notable responses to this situation include

(a) attempts to circumvent the law by detaining patients on the pretext of a lawful purpose when the true purpose is otherwise;

(b) giving up on the hard cases on the basis that it is better to spend time helping people they can help rather than devoting enormous amounts of time to preparing and probably losing Court cases decided in terms of legislation which is not geared to the therapetutic needs of their patients;

(c) exaggerating the patient's abnormal behaviour to impress the Court with the seriousness of the situation. (See *R v Hallstrom* fn 2, below; Dobson at 20, Hall at 17-18, Finnigan 30, in Dawson and Abbott, fn 3 below; Durham, fn 6 below.)

Lack of regard for the comments of the psychiatric profession on these matters seems to be premised on the beliefs that

(a) the psychiatrists do not have any beneficial or curative treatments to offer; and

(b) the psychiatrists have messed up mental health care in the past and should not be allowed the power to run it in the future; and

(c) the psychiatric profession in general lacks good faith or competence or both. (See Doutney, fn 1, below.)

As to (a) and (c) the writer can state the opposite opinion only on the basis of personal observation of the efficacy of psychiatric treatment, not being equipped by training or experience to evaluate the scientific data. But the following observation may be justified. There is no obvious reason why the community should expect higher levels of successful treatment from psychiatry than it expects from other branches of medicine or from other professions, except perhaps that advanced by the *Mason Report*:

> An offer of effective treatment must be the quid pro quo for society's right to confine mentally disordered persons. . . (at 223)

As to (b) the writer can see no reason why the psychiatric profession should be asked to carry such a large measure of the responsibility for general community neglect of the needs of the mentally disabled or for the now discredited belief that disabled people fared better if institutionalised. Indeed, it is apparent that advances in psychiatry contributed significantly to making deinstitutionalisation possible, and that generalised community neglect would in any event have rendered the successful practice of psychiatry in any broad community sense well-nigh impossible.

And it may still because of inadequate resources. The story of the Mason Report is surely that of the failure of both institutionalised and community based mental health services, in spite of enlightened and humane psychiatric practice, because of generalised neglect and paucity of resources.

We may ultimately be faced with a situation in which the psychiatric profession "gives up" because the law will not support it, and the families "give up" because the law will not allow the profession to support them. The predictable result would be increasing numbers of readily treatable mentally ill people wandering the streets with worsening conditions, and prey to all kinds of dangers, including the attention of the criminal justice system. (See Errington, fn 2, below at 191.)

Conclusion

The object of the writer is not to condemn the "Community Care" model or to suggest that the legal machinery set up under the Mental Health and Guardianship legislation both to implement "Community Care" and to protect the liberties of the mentally ill is inherently unsuitable. It is to argue that, in its provision for the involuntary hospitalisation and treatment of the mentally ill, the legislation is too cumbersome in its procedures and too restrictive in its substance. Put simply, the law is not geared to the therapeutic needs of the mentally ill, because these have been afforded too low a priority by the lawmakers.

The predictable response to the writer's argument is that the law is as it is because it should authorise only "minimal intervention". To that the writer says "minimal intervention" to what end? If the answer is (as it surely must be) "minimal intervention" to meet the needs of the mentally ill, the reply is that the law's provision for intervention is below the minimum necessary. □

1 Snowdon, "A Review of Compulsory Admissions to a Psychiatric Unit in Sydney", (1981) 15 *Australian and New Zealand Journal of Psychiatry* 307-310; Doutney, "Mental Health Law Reform: Advancement Towards Enlightenment or Denial of Reality?", (1986) 20 *Australian and New Zealand Journal of Psychiatry*, 266-275; "Report to the Minister for Health on the Mental Health Act" (1988) (NSW), Submissions of Durham at 212 ff, Sainsbury, 203-205, Andrews, 220-224 Shea, 226.

2 See cl 26, Mental Health Bill 1987 (NZ) and the 1988 NSW Report supra 9-11, 111 ff. For accounts of the legislative formulae in the Australian States see Errington, " 'Mental Illness' in Australian Legislation" (1987) 61 ALJ 182 and Dix, Errington, Nicholson, Pow, "*Law for the Medical Profession*", (1988) 124-130. For an account of the legislative formula in New Zealand see Dawson, *The Process of Committal* (1987) 10. For consideration of the legislative formula in the United Kingdom see *W v L* [1974] 1 QB 711; *R v Hallstrom and another, ex parte W (No 2), R v Gardner and another, ex parte L* [1986] 2 All ER 306.

3 *R v Hallstrom* supra; *In the Matter of an Enquiry under the Mental Health Act 1969* (1984) 2 DCR 303; Finnigan, "A Judge's View of the Civil Committal Process" in Dawson & Abbott, *The Future of Mental Health Services in New Zealand: Mental Health Law* (1985) 27.

4 See Mental Health Bill (1987) (NZ) cl 2; "Report to the Minister for Health on the Mental Health Act 1983" (1988) (NSW), recommended definitions for s 5 at 100-101.

5 *W v L* [1974] 1 QB 711; *Re MEF* (1921) 38 WN (NSW) 113, see Briscoe, "The Meaning of 'Mentally Ill Person' in the Mental Health Act, 1958-1965 of New South Wales" (1968) 42 ALJ 207.

6 See Durham, "The Gravely Inadequate Definition of a Mentally Ill Person" in the Mental Health Act (New South Wales) 1983", (1988) 22 *Australia and New Zealand Journal of Psychiatry*, 43. The writer is indebted to Professor Durham for comments made on an earlier version of this aspect of paper, but remains responsible for surviving defects.

7 Durham. fn 6, above, convincingly argues the case for separate ascertainment of mental illness and additional criteria and for the removal of definitional circularity.

8 Snowdon, fn 1, above, at 310, suggests that hearings should normally be held where detention after the fourth week is considered necessary.

9 The *Mason Report* coments at 101 on the impact of electro-convulsive therapy and major tranquillisers on the character of psychiatric hospitals and at 136 on the dramatically shortened stays in hospital. On the duration on hospitalisation see Snowdon, fn 1, above, Wanck, "Two Decades of Involuntary Hospitalisation Legislation" (1984) 141 *Am J Psychiatry*, 33; Fama, "Legislation and Practice in Compulsory Admission to a Psychiatric Hospital", *NZ Medical Journal* (1983) 130.

10 See eg, Durham, Doutney, Snowdon *supra* and the submissions referred to in the Mason Report and the 1988 NSW Report supra. Finnigan 30, in Dawson and Abbott supra; Durham, loc cit.

Extrinsic aids to statutory interpretation

By D G McGee, Clerk of the House of Representatives

This article was given as an address to the Law Librarians' Seminar at the University of Canterbury on 17 February 1989. The essential question considered is the purpose of a statute. It is Mr McGee's opinion on the question of the use of extrinsic evidence for purposes of statutory interpretation that it is inimical to justice, likely to lead to more litigation rather than less and would effectively result in the undermining of Parliament as a central institution of our constitutional system.

The growth in the use of extrinsic materials by Courts in the interpretation of statutes is a particularly significant development for you as Law Librarians. Quite obviously it renders more important to lawyers the aid and assistance which you can give in the assembling of the materials which will influence the establishment of legal principles. From your point of view this growth cannot fail to enhance your role and hence your status within the legal profession.

I therefore want to apologise in advance for the fact that I intend to say some things which are designed to dampen enthusiasm for this growth. I want to suggest that the introduction of a wider range of materials into legal argument for a wider range of purposes than has been the case hitherto is not pure gain for the law or for society. I realise that from a narrow point of view such a thesis is antithetical to your own professional interests and that I thereby run the risk of making myself an unwelcome visitor to your counsels. As consolation to you I can, however, say that my views do not represent today's conventional wisdom on this subject and I am under no illusions that the doors which are currently being opened in this country to the greater admission of extrinsic materials in Court are likely to close. On the contrary, we stand on the brink of an explosion in the admission of such materials, much to the enhancement of your positions.

Extrinsic materials

"Extrinsic materials" are any reports, statements or documents that are not themselves part of the Act of Parliament which is being construed. Extrinsic materials have always been used in the interpretation of statutes. The *Law Reports* contain reports of cases in which a word or a phrase under consideration has been previously considered by a Court. It would be absurd for anyone to contend that the *Law Reports* cannot be referred to as an aid to interpretation merely because they are not part of the Act.

The *Law Reports* are the most obvious extrinsic materials that Courts use in statutory interpretation, but other types of documents have also been put to use – principally Royal Commission and other types of reports commenting on or making proposals for amendment to, the law. I do not think that any objection could or should be taken to the use of extrinsic materials on the ground of their source whatever that source may be. If they have probative value and can assist the Court thereby, the identity of their source should not be a barrier to their production in Court. I wish principally today to deal with those extrinsic materials which emanate from Parliament, but I want to make it quite clear that I see no objection to the production in Court of parliamentary materials merely because they are parliamentary. The important issue, as I see it, in deciding whether particular extrinsic materials should be produced is not their source, but the purpose to which they are to be put, before the Court.

In Australia legislation enacted in 1984 has specifically recognised the Courts' right to look at parliamentary materials for certain purposes in interpreting legislation. We are told by the Secretary of the Australian Attorney-General's department that

> Lawmakers are conscious that what is said in Parliament may influence the interpretation of legislation, and members of Parliament were among the most enthusiastic supporters of [the amendment]. (Patrick Brazil: The Australian Approach (Address to Law Commission Seminar on Legislation and Interpretation, March 1988))

I can well believe that Members of Parliament were enthusiastic supporters of legislation that gave the Courts a broad hint that they should listen to the individual views expressed by members in Parliament, but that does not impress me at all as a good reason for the change. Our own Attorney-General has recently expressed fairly similar views when he stated categorically that the Courts can examine what is said in Parliament as an aid to interpretation and urged Members to be aware that what they said in the debate then in progress might influence the way the legislation was interpreted. (*Hansard*, 1988, Vol 493, p 7207) Interestingly that legislation very soon afterwards was challenged in the Court of Appeal but the Court did not find it necessary to refer to the *Parliamentary Debates* to assist it. (*R v Cann*, [1988] BCL 2089)

Traditionally, extrinsic materials have been referred to by the Courts for very limited purposes, such as establishing what the law was thought to be before it was changed

by the Act under consideration. This is now changing in a number of ways.

The Courts are more often referring to the individual views of Members of Parliament (usually Ministers) as to what they thought the particular provision of the Bill before the House meant. This may be done for the purpose of resolving an ambiguous provision, filling in a perceived gap, or advancing what the Court sees as the "purpose" of the legislation, but for whatever reason, there are in my opinion certain inherent dangers in and objections to this development.

Ambiguity leading to litigation

The first is that the multiplying of extrinsic material may itself serve to import ambiguity into a provision which in its pristine state is free of it. The Court of Appeal itself is aware of this danger. (*Attorney-General v Whangarei City Council* [1987] BCL 1587) While the highest Court may well be able to handle the tendency to throw any parliamentary authority that seems to give the least support to one's side into the equation, the opening of this source on a wide scale has cascading effects throughout the legal system. One should never underestimate counsel's ability to formulate an argument raising a doubt where one would not have thought a doubt could exist. For example, for anyone working in the parliamentary environment it is self-evident that a section of an Act which has an upper case letter or letters following its number is a wholly separate section from the section which precedes it. The section with the upper case letter happens to be inserted between two existing sections, hence the need to distinguish it by a letter, but it is drafted as a separate clause in its own right and is dealt with in the parliamentary process as a new and separate section. Nevertheless, counsel before the Planning Tribunal recently argued that such a section was not a separate section from the preceding section but was an offshoot or associate of the preceding section and had to be read as part of it. Fortunately the Judge rejected the argument and so forestalled throwing the Statute book into a state of total confusion (*Elders Resources NZFP Ltd v Waikato Catchment Board* [1988] BCL 1803), but the incident illustrates starkly for me that an advocate can fashion an argument on virtually any point. How much easier it will be to fashion a plausible argument if the materials on which one may be based are allowed to proliferate. The more tools an advocate has, the more byways he or she may find to lead the Court away from the plain words of the statute.

And this only refers to those cases that reach the Court for decision. Lawyers advising clients on the effect of statutes will also have to take account of the different light in which a statute might be read if extrinsic materials are used in interpreting it. In practical terms the greatest consequence for lawyers and their clients of the increased use of extrinsic material may well be at this level.

By permitting the importation into a case of a wide range of materials for a wide range of purposes, the Courts risk enlarging the area of ambiguity of statutes.

Furthermore, in such cases, much will depend on the energy or endurance of counsel or, I may say, counsel's Law Librarian. The temptation to continue dredging up material of little relevance in the hope that one will strike gold in the form of a blindingly clear parliamentary statement of intended meaning will be greatly increased. Should our interpretation of the law depend on the varying levels of ability and research of counsel and those who assist them? I for myself would prefer to think that there are more absolute standards to law than that. As Mr Justice Gallen has said extra-judicially

> . . . there must be at least some tendency towards preferring a result which is not dependent upon unpredictable industry. ("A Judge's View", Address to Law Commission Seminar on Legislation and its Interpretation, March 1988.)

Accessibility of legal materials

This brings me to another point.

There is a tendency to look at the question of statutory interpretation in an abstract sense as the application of certain rules to a text to produce a reading of the law. But questions of statutory interpretation arise because two parties who are affected or potentially affected by a statute, have asked a Judge or consulted a lawyer in an endeavour to resolve the dilemma. Statutes are passed for the common wealth, not for the delectation of lawyers.

The pressure for plain English drafting of statutes is, I take it, a recognition that as the law affects us all, it should be reasonably accessible to us all.

In this connection Mr Justice Gallen has made some very important points about the basic obligation and role of a Judge as a resolver of disputes, He contends that the traditional rules as to the limited admission of extrinsic materials provided a framework which was

> intended to allow those subject to the statute to gather for themselves what it means with some degree of certainty. (ibid)

As he went on to point out, it could be said that Parliament and the drafters of the law had this framework in mind when preparing the statutory material.

I am personally sceptical about imputing knowledge to a body such as "Parliament" for I believe that such an imputation about a body that is a collection of individuals must be fictitious, but I think Mr Justice Gallen's point about statutes having been prepared according to certain understandings or expectations about the way they would be handled by the Courts is perfectly valid. If so, the bulk of our statute law is now to be interpreted by the Courts according to techniques that were never anticipated when it was being passed. Parliament may now have caught up with the Courts, as the Attorney-General's statement last year implies, but that will only affect the preparation of new legislation. The new interpretation techniques being put to work in respect of the extant statute law were not foreseen by anyone involved in its passing at the time.

The tendency to admit extrinsic materials has another effect on persons who wish to ascertain how statutes apply to them. It lays traps.

The Public Statute Law of New Zealand is contained in some 70 volumes. These volumes are fairly widely available in public libraries throughout New Zealand. But how

many people using them realise that behind those 70 volumes there are 500 volumes of *Hansard* and countless other volumes of Journals and Appendices containing Royal Commission and Law Reform Committee reports, any one of which may contain something which could be taken to put a new complexion on an innocent and apparently straightforward phrase in the statute? For instance, it must seem strange to the lay person (it certainly seems strange to me) that he or she will have to check the copy of the Bill, a document which one might think one can discard when the Act is passed, so as to see what the parliamentary counsel or departmental official who drafted it said in the Explanatory Note that it meant at the time it was introduced, rather than being able to rely exclusively on the final Act of Parliament which has been bound in the volume of statutes.

The proliferation of source material in this way drives us further and further away from the unadorned text of what Parliament has enacted and thus renders it less likely that anyone will be able to use the statute book with confidence.

Parliamentary "mistakes"

One of the factors which seems to tempt Courts into resort to extrinsic materials is the desire to avoid a result that seems absurd or that the Court feels Parliament did not intend. The demonstration that Parliament did not intend the result may be made by referring to a statement made during debate on the Bill. Usually the statement is made by the Minister in charge of the Bill.

Well, there are two sides to every question. In such cases as these my sympathies go out to the litigant who has put his or her faith in the words of the statute, only to find that their legitimate expectation is frustrated by the Court's desire to read the Act in a way that Parliament is supposed to have intended. It is no part of the Court's function to rewrite statutes even if support for the rewriting can be found in minsterial statements in Parliament or in the Bill's Explanatory Note. Quite simply, Parliament should have got it right, and if it did not succeed in enacting what it intended to enact, it should try again in amending legislation. It is not insuperably difficult to pass legislation in New Zealand. Many would say that it is far too easy to do so. The Courts are therefore not performing any essential function in correcting or covering-up parliamentary mistakes (if indeed they are mistakes in the first place). Instead what the Courts are in danger of doing is an injustice to the party who is misled as to the meaning of a statute which is apparently in their favour.

This is not by any means intended as a universal criticism of the judiciary. Courts do from time to time acknowledge their limited role in correcting what Parliament has enacted; but the temptation, especially when given support in the parliamentary record, is always there. In my opinion it is best resisted.

The purpose of a statute

The development of interpreting statutes according to their purpose has naturally been a great impulse to admitting extrinsic materials, for how else, it might be said, can the purpose be divined. Well the purposive approach to interpretation is now well-established and may be a more desirable technique than a slavish literal adherence to the words of an Act, but establishing a statute's purpose does not inevitably drive a Court outside the terms of the Act – as recent cases have demonstrated where the Courts have confined their examination to the Act itself in order to deduce its purpose. (For example *Northern Milk Ltd v Northland Milk Vendors* (1988) 7 NZAR 229 and *IRC v Mobil North Sea Ltd* [1987] 1 WLR 1065.)

What the Courts should be engaged on is a search for the meaning of the statutory provision in issue before them. That meaning will be one that, given the language that Parliament has employed in the provision, fairly advances the purpose of the statute. But the statute should not be the starting point for a voyage of discovery through the volumes of *Hansard* and the Journals. The statute is the universe within which its meaning must be deduced.

You may recall the reference in Dickens to the hearsay rule – what the soldier said was not evidence. We must beware of admitting parliamentary hearsay as a gloss on the words of the statute. The important thing during the parliamentary process is the attention that is lavished on the drafting of the provisions of the Bill, not on the drafting of the terms of the Explanatory Note, for instance.

Last year on the Dentists Bill the Legislation Advisory Committee found a discrepancy between the intentions of the Bill as set out in the Explanatory Note and the clauses of the Bill as drafted. The committee was alerted to a defect in the Bill by this discrepancy and made submissions to Parliament pointing this out. As a result, amendments to the Bill were made to cure the error before the Bill as passed. That was an excellent use of the Explanatory Note during the parliamentary process. Exactly what, if I may say so, the Explanatory Note exists for. But if the Bill had passed without the discrepancy being noticed it would have caused much confusion and injustice if the Courts had permitted the Explanatory Note to be introduced as an argument for reading down the words of the statute. In deciding on the meaning of what Parliament has enacted, what has gone before should be excluded and attention focused exclusively on the golden words of the statute.

Jim Farmer, QC, in an address has said

> My own view is that when the statute is poorly or inelegantly drafted or even when the statute used is ambiguous, it is far safer to restrict the search for statutory meaning and objective to the statute itself than to embark on a speculative search through a forest of disparate extrinsic material.

Lest my own views on excluding extrinsic material seem extreme, I would point out that Mr Farmer advocates legislation prohibiting the Court of Appeal or any other Court from having access to parliamentary material at all.

Using social and economic materials in interpretation

Some Judges are, of course, more active than others in having resort to extrinsic materials and in exhorting counsel to do likewise. A

Judge of the Court of Appeal has called on counsel to delve into social and legal history and to use a much wider range of materials in presenting cases to the Court than has been the custom hitherto.

American law has made this practice a part of its jurisdprudence at least since the beginning of this century. A recent writer, commenting on the use of congressional materials in American jurisdictions has said:

> In the current era legislative history truly abounds, with library specialists compiling vast tomes designed to aid lawyers and judges in divining the meaning of statutory law. (Kenneth W Starr: "Observations about the Use of Legislative History." *Duke Law Journal*, 1987, No. 3: 371)

The seminal event in the development of the use of extrinsic materials in the Courts of the United States was the acceptance by the Supreme Court in 1908 of the famous Brandeis Brief. This was the written legal argument presented to the Court by the counsel for one of the parties, Louis D Brandeis, who was later himself to become a most distinguished Justice of the Supreme Court. I mention the Brandeis Brief because it seems to me to be the best example of counsel delving into social history and presenting to the Court a range of materials quite outside the norm as far as legal argument is concerned. In the United States the use of such materials appears now to have become the norm, largely as a result of Mr Brandeis's initiative.

The case in which Louis Brandeis was involved (*Muller v Oregon*, 208 US 412) concerned the constitutionality of a statute which restricted the hours of work for women to ten hours a day. Brandeis appeared for those supporting the statute as constitutional. His brief comprised two pages of legal argument in the traditional form and over a hundred pages of citations and extracts from materials drawn from reports of committees, commissions and inspectors, and from statistical surveys. These materials — these fruits of scientific delving — all went to prove, as a matter of *fact*, that long hours were dangerous to women's health, safety, and morals, and that short hours for women would result in social and economic benefits.

The critical question was whether the Supreme Court would accept such materials being cited to it at all. Well, of course, it did admit them and the rest you might say, is history. Basing itself on the materials presented to it the Court upheld the Ten-Hour Law, finding in the process that these materials were

> significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. (*Muller v Oregon*, supra)

Great leap forward that this decision appeared to be in 1908, it does not look so good to us today. Yet the decision was supported by what was up to that time at any rate the greatest amount of delving by a lawyer into social and economic materials that had ever been undertaken.

I do not want to be unfair to the Brandeis Brief. If it seems naive to us today that is only because the original research materials out of which it was compiled seem naive. I have no doubt that in 80 years' time much of contemporary social and economic analysis will also seem naive to those who come after us.

But what is significant to me is that while the one hundred pages of the Brief containing social and economic analysis has dated drastically, the two pages of legal argument which Brandeis presented have not. There is a timeless quality about the form of legal argument. Some might say it has not dated because, being presented in a traditional form, legal argument has not developed along the lines that it should do to meet the needs of a rapidly changing society. It is probably such a belief as that which impels certain Judges and others to advocate lawyers resorting to a wider range of materials a la Louis Brandeis.

I for one do not accept that view. I prefer to believe that there are some universal principles attaching to the law and its practice and that it is not a heterogeneous collection of maxims drawn from those other disciplines which legal practitioners, with the aid of Law Librarians, have been able to collect a smattering of knowledge about. Furthermore, I believe that there should be a consistency about the law, until it has been changed in accordance with accepted legal doctrines, and that it does not just represent today's latest economic theory, today's sociological explanations, or today's political prejudices. All of which are likely to look as absurd tomorrow as most of the Brandeis Brief material does now.

If the Courts feel that they need to be appraised of a much wider range of material than that normally adduced in legal argument, one wonders what it is that will specially fit a lawyer to do the delving and presenting of the material? If it is historical material why not use an historian, if economic an economist, if sociological, a sociologist? What is it about law which fits or entitles its practitioners to handle the multi-disciplinary aspects of problems that some members of the judiciary now seem to expect to be tackled in legal argument?

The answers to these questions, if there are any, obviously have enormous implications for what we perceive law to be, and how the members of the legal profession should be trained and selected. I shall not attempt to essay any answers to them here.

The supremacy of Parliament

Finally I want to refer briefly to some wider implications for Parliament and the Courts of the developments in respect of admitting parliamentary materials to assist in the interpretation of statutes.

It might be thought on its face that such a development would raise the prestige of Parliament by giving its proceedings weight in the interpretation given to its legislative output.

I have expressed my view elsewhere that such a development is a reflection of the trend for the mutual respect between Parliament and the Courts to break down, with neither any longer fully respecting the exclusive role of the other in its proper sphere.

I specifically do not accept that

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A reform that almost wasn't: or when to correct a Parliamentary gaffe

By Roderick Munday, Fellow of Peterhouse, Cambridge. Visiting Lecturer in Law, Victoria University of Wellington (June-December 1988)

In this article the author refers to a most unlikely discrepancy he discovered between the final printed Act of a statute and the copy signed by the Governor-General. The discrepancy was obviously because of a drafting oversight referring to a wrong Schedule, but the legal, indeed constitutional question that arises is an interesting one that could be very significant in particular cases. The author concludes with some comments on the more general question of statutory interpretation.

The object of the Protection of Personal and Property Rights Act 1988 was to safeguard and promote the personal and property rights of persons not fully able to manage their own affairs. During the Bill's passage through Parliament it was decided, on the recommendation of the Parliamentary Select Committee, to emulate the example of other Commonwealth jurisdictions and to make provision for enduring powers of attorney – that is, powers of attorney that do not determine upon their donors' supervening mental incapacity. Accordingly, enduring powers were inserted as Part IX of the Bill, eventually requiring the introduction into the body of the legislation of 15 clauses and one Schedule. Section 116 of the Bill, as delivered to the Governor-General for signature read

> The enactments specified in the Third Schedule to this Act are hereby repealed.

Fortunately, however, the final printed copy of the Act amended that section, which now refers to "the Fourth Schedule". Parliament, in s 116, undoubtedly intended to refer to the Fourth Schedule, which contains the customary list of enactments to be repealed.

It is, to say the least, unusual to uncover a discrepancy between the published text of an Act and the version of the Bill signed on behalf of the Monarch by the Governor-General. Moreover, it is widely assumed that it is wrong to alter the text to which the Governor-General's signature has been apposed. The purpose of this paper, therefore, will be twofold. First, as this aspect of the legislative process is not particularly well understood, it will be suggested why it is legitimate in New Zealand to alter the wording of an Act in this manner even after it has been signed

continued from p 344

the Courts' fitful use of parliamentary material enhances or is intended to enhance the role of Parliament or of members of Parliament.

I was therefore interested in a recent article in the *New Zealand Law Journal* by Mr B V Harris of Otago University in which he instances the Courts' greater willingness to look at parliamentary materials for guidance as evidence of the way the Courts are contributing to an environment which can accommodate a changed perception of Parliament in our legal system.[2] Specifically that changed perception is one in which Parliament is no longer legally sovereign. If this is the case, the Courts' apparently greater regard for parliamentary proceedings may be undermining Parliament's legal position, as I believe it is. Parliament may in fact be exchanging its legal sovereignty for a bit part in the legal game. There may be good reasons why Parliament should do so, but such reasons need to be examined out in the open where they can be addressed and debated. This should not happen incidentally at the initiative of the Courts or of some Judges. I am afraid, however, that this is just what is happening.

Summary

As I indicated at the outset of this address, I do not believe that my view on the use of extrinsic materials, and specifically parliamentary materials, represents the prevailing state of opinion in the legal profession on this subject. Increasing use has and will continue to be made of such aids. To summarise I believe that such a development will encourage:

1 More litigation.
2 Less accessibility to the full range of legal materials which will be needed.
3 Injustice.
4 The use of parliamentary hearsay.
5 Reliance on superficial arguments drawn from other disciplines.
6 The undermining of Parliament.

Quite a catalogue of woes. But there is one consolation, there will be more work for lawyers and Law Librarians. □

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1 For example, *R v Bolton; Ex parte Beane* (1987) 70 ALR 225, 228. "It is always possible that through oversight or inadvertence the clear intention of Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

2 B V Harris: "A changing perception of the law-making powers of Parliament." [1988] NZLJ 394.

by the Governor-General. Secondly, the paper will speculate upon how narrowly misfortune may have been averted, since it is not absolutely clear how Courts would have responded to this legislation had parliamentary counsel not amended the Act just before it was entrusted to the Government Printer for final publication.

Last-minute amendment of the legislative text

There is almost certainly a widespread misconception that once the Governor-General has signed a Bill submitted to him for royal assent, the text of that Act can no longer be altered. Such a view of the legislative process is encouraged by the fact that the two copies signed by the Governor-General and retained by the Clerk to Parliament and the Clerk to the High Court respectively, are acknowledged to contain the authentic text of the legislation which one is at liberty to verify if, for example, the accuracy of the final printed version is doubted. In New Zealand, such checks are very rarely made: indeed, apart from this writer's researches, only one other instance of such inquiry having been made has come to light — and that was said not to have revealed any discrepancy. However, even after Royal Assent, certain corrections may still be made to an Act of Parliament.

To err is human. As anyone who has proofread will acknowledge, no matter how vigilant one may be, mistakes can still elude discovery or only be spotted at the eleventh hour. Before submission of a Bill to the Governor-General, Standing Orders provide that

> amendments of a . . . formal nature may be made, and clerical or typographical errors may be corrected *in any part of the Bill* by the Chairman of Committees (SO 237).

This clearly can only refer to corrections made prior to submission of the Bill for the Royal Assent. Once the two fair prints of the Bill, authenticated by the Clerk of the House, have been signed by the Governor-General, then according to internal instructions of the Clerk of the House,

> any printing or typographical errors that may have come to attention after the Bill was printed for assent are corrected at this stage.

Otherwise, as one would expect, no further changes are permitted.

This internal instruction invites two questions. First, what exactly is meant by "printing or typographical errors"? Secondly, what is the foundation for the Clerk's authority to correct any such errors? In answer to the first question, clearly spelling mistakes and manifest printing slips are covered. But the expression "printing or typographical errors" also wears a more technical meaning and probably connotes the same cases as "printing corrections" made informally by the Clerk of Public Bills in the English Parliament. In England it is well-established practice for the Clerk to make a variety of alterations to Bills *both before and after* the Royal Assent in order to settle the final form of the published text.[1] Such alterations must not of course amount to substantive amendments to the legislative text — although, as will be seen, they may almost appear so. Essentially, they constitute a last tidying-up of the text, the intention being to give full effect to the will of Parliament. The Clerk, for instance, has a discretion as to where new clauses or schedules are to be inserted. Where the text of the Bill obviously contains a misprint, this may be corrected. Similarly, if alterations in the numbering of sections becomes necessary owing to the addition or deletion of material from the Bill, again the Clerk may make the required alterations. If, as is likely, the English practice provides the model for New Zealand, the amendment of the words "Third Schedule" to read "Fourth Schedule" in s 116 of the Protection of Personal and Property Rights Act 1988 was entirely legitimate. Nor could it now be argued that the incorrect text, signed by the Governor-General and stored for posterity in the archives of Parliament and the High Court, should prevail over the later printed version. In short, in the case of "printing corrections", as understood in this broad sense, the granting of the Royal Assent does not operate to preclude a final polishing of the text.

Although such changes may in practice be made by parliamentary counsel, if the analogy with England holds, printing corrections are actually effected under the authority of the Clerk of the House. (Bennion, *Statutory Interpretation* pp 119-20) This officer, like the English Clerk of the Parliaments, is a Crown appointee and only through the Clerk can the Crown accomplish its constitutional duty of finalising and procuring the publication by the Government Printer of the legislative text. To the extent that the Crown today, anomalously, still retains nominal responsibility for making legislation, it can be said that the Clerk of the House in New Zealand, like his English counterpart, is under a positive duty not only to make the conventional changes to the printed Bill necessitated by the Royal Assent (for example, to insert the date of assent on the published Act) but also to give effect to Parliament's will and correct errors such as the one under consideration when they come to light.

The interpretation of defective legislative texts

The error in s 116 was only detected at the last moment. It may be instructive to consider what might have happened had alert parliamentary counsel not picked up the error and the Act had been published uncorrected. In this event, the Act's fate might have been somewhat inglorious. For whilst the Clerk of the House may owe a constitutional duty to the Crown to give effect to Parliament's will and to ensure that an accurate version of the Act be promulgated, Her Majesty's Judges may not necessarily feel bound by an analogous duty when it comes to the interpretation of a defective legislative text. Indeed, there may be some reason — admittedly, slim reason in this instance — to suggest that the error in s 116 of the Protection of Personal and Property Rights Act 1988 could have proved particularly awkward.

How would a Court have responded to the mistake in s 116? At first blush, the prompt answer is that it would unhesitatingly have interpolated "Fourth" for "Third", thereby rectifying a manifest printing error. However, even if such an outcome would have been highly likely, given the common law's

schizophrenic attitude to statutory interpretation an alternative plot can be imagined. Indeed, there have been not wildly dissimilar cases where Courts have proved most reluctant to correct printing errors.

The first question is whether legislation, as enacted, makes sense. Whilst Courts are often said to interpret legislation so as to avoid an anomalous or illogical result, they are not impervious to the argument that some quirks and illogicalities are actually intended by the legislature. As Lord Sumner observed of the Married Women's Property Act in *Edwards v Porter*, "I fully recognise that the Act of 1882 is illogical, as reforms often are." [1925] ACI 46. Moreover, Courts will not inevitably be deflected from giving a provision a literal reading by the fact that this will produce wholly illogical results. In *A-G v Prince Ernest Augustus of Hanover*[2] the House of Lords, without pronounced misgivings, unanimously held that by the terms of a statute of 1705 virtually all members of European royalty were British subjects — a curious conclusion, by any standards!

The Fourth Schedule of the 1988 Act, to which in the normal course of events s 116 would have referred, contains a list of provisions in the customary form under the title "Enactments Repealed". However, fate decreed that the Third Schedule also should make mention of certain "enactments". " 'Enactments', as Ridley J explained in *Wakefield & District Light Rly Co v Wakefield Corporation*, "does not mean the same thing as 'Act'. . . . a section or part of a section in an Act may be an enactment". [1906] 2 KB 140, 145-6. The Third Schedule sets out the prescribed forms for enduring powers of attorney. In the body of one of these forms there is a reference to Part IX of the Protection of Personal and Property Rights Act 1988. In short, bizarre though it may sound, the version of s 116 actually passed by the Legislature and signed by the Governor-General *did* have a certain substantive meaning. Bearing the seeds of its own destruction within it, the 1988 Act simply provided for its own partial repeal. The expedient is novel, even aberrant — but it is arguable that there is a substantive statutory meaning revealed in the original reference made by s 116 to the Third Schedule.[3]

In any case, is s 116 strictly necessary in order for the repeals listed in the Fourth Schedule to take effect? Section 5(*h*) of the Acts Interpretation Act 1924 states that "Every Schedule . . . to an Act shall be deemed to be part of such Act". Similarly, headings are also deemed to be part of the Act, although by s 5 (*f*) they "shall not affect the interpretation of the Act". Given that s 5(*j*) lays down that every provision in a statute is deemed to be remedial, the enactments listed for repeal in the Fourth Schedule were almost certainly abrogated by implication by the provisions of the Protection of Personal and Property Rights Act itself. When the terms of a later Act are plainly inconsistent with those of an earlier enactment, the later Act should prevail. (eg, *Duke of Argyll v IRC* (1913) 109 LT 893.) If, for example, one imagined that, by an even graver oversight, Parliament had completely omitted to include section 116 in the Bill, but had included the Fourth Schedule listing the "enactments repealed", without falling foul of section 5(*f*) of the Acts Interpretation Act 1924 it is suggested that a Court might legitimately have construed the Act to mean that the enactments listed in the Schedule were repealed by the later statute. In other words, if actually implicit in the terms of the repealing Act, the traditional list of statutes repealed, that customarily concludes the modern statute, in practical terms might operate merely as a manifestation of an orderly legislative design, it being intended to avoid any argument as to which statutes and provisions are in force at any one time, and therefore not necessarily requiring a further dispositive provision in the body of the repealing Act.

Moreover, whilst it is admittedly the case that in the majority of instances statutes repealed are both listed in a Schedule and referred to in a repealing section in the body of the Act, this practice is not invariably observed. Section 48 of the Credit Contracts Act 1981, for example, repeals a number of provisions simply by a section built into the body of the statute. At the other end of the scale, the Accident Compensation Act 1972 contains no repealing provision whatever. Therefore, there is not absolute uniformity in these matters. A Schedule of listed repeals, dangling in mid-air, as it were, might appear eccentric. But it might also simply indicate another break with the traditional statutory format. Or it might indeed reveal some deeper purpose still — perhaps the intention that there be a period during which the new provisions and the old should both be in force together, it being left to the Courts to determine which of the old are impliedly repealed, and which can be reconciled with the new. Such exercises are a regular incident of judicial life. In *re R* [1942] NZLR 531, for example, the Court was required to decide whether a provision in the Aged and Infirm Persons Protection Act 1912, enabling the Court to appoint a manager of a mental defective's estate, overrode the provision in the Mental Defectives Act 1911 providing for custody and administration of the estate to be placed in the hands of the Public Trustee. Northcroft J had little hestiation in ruling that the latter provision impliedly overruled the former. In other cases, where in the words of Viscount Dunedin the two statutes can live together, (see *re Silver Bros Ltd* [1932] AC 514, 523) the Courts have been able to reconcile the apparently conflicting provisions of the two pieces of legislation — as, for instance, in *Waimairi C C v Hogan* [1978] 2 NZLR 587, a case concerning two statutes that, just to add to the general confusion; both received the Royal Assent on the same day.

In conclusion, it is just arguable that the copy of the Bill assented to on behalf of Her Majesty the Queen had a meaning.[4] As will be seen, a statute may have only to make very slight sense for the Courts to refuse to perform the most minor linguistic surgery on the legislative text.

Judicial emendation of the text

When will Courts be prepared to intervene to correct an error made by Parliament? The answer to this question is rather unclear and on several occasions has generated pronounced judicial disagreement. Thus in *McLauchlan v Marlborough C C* [1930] NZLR 746, whilst Myers C J was willing to ignore a subsection the draftsman had accidentally left in a statute, Ostler J in the same case felt unable to follow this course and included

the redundant provision in his analysis of the law. What is certain is that only in the very clearest cases have the Courts been prepared to amend Parliament's handiwork. *R v Clark* (1906) 25 NZLR 991, where obtaining "property on credit" was mistakenly printed as "property or credit", was such a case; as was the English decision, *R v Wilcock* (1845) 7 QB 317, where the legislature very obviously referred to the wrong year of a statute it wished to repeal. But in the majority of cases, one senses the Courts most hesitant to interfere and correct the wording of a statute.

In *Gualter, Dykes & Co v Begg* (1910) 30 NZLR 99 for example, where, in the words of Edwards J, (at p 108) Parliament had blundered and referred to s 137 instead of s 133 of the Act, the majority agreed with Chapman J who cautiously ventured:

> The Courts have always been very chary of omitting a word, and still more so of substituting another, but such an omission must sometimes be made, where, as here, the reference in the text is really meaningless (at p 117).

But it is notable that Stout C J dissented on this point, despite both the fact that the index and marginal note showed that an error had been committed and the fact that it was a consolidating statute:

> There can be no doubt, through a slip in the correcting of the proof of the draft statute, section "137" has been substituted for section "133". I have doubts, however, if the Court can read section "137" as "133". (at p 107)

In view of such considerations and particularly the fact that the majority in the *Gualter* case insisted that the text had to be "really meaningless", it is just permitted to wonder whether a Court would necessarily interpret "the Third Schedule" in the Protection of Personal and Property Rights Act 1988 to refer to "the Fourth Schedule."[5]

In much the same way, in this context Courts have not always responded to the apparent invitation in s 5(*j*) of the Acts Interpretation Act 1924 to treat all provisions as remedial and therefore to give them a liberal interpretation. Nor have they traditionally displayed any eagerness to fill obvious lacunae left by the legislature. As Turner J remarked in *Wasey v W Auckland Committee for Promotion of Licensing Trust Control*:

> The submission of *casus omissus* is always a difficult argument to counter. If the Legislature has truly left a gap in the statute, untouched by its provisions, it is always dangerous, and frequently impossible, for the Judiciary to attempt to fill the hiatus by what would amount to judicial legislation. [1971] NZLR 765, 777.

The Courts are not generally prepared to assume that Parliament has made a mistake. (*Apted v Beswick* [1950] NZLR 689, 690 per Fair J) Moreover, if a text is capable of a single, unambiguous meaning, they will be slow to tamper with it. As Turner J observed of a provision in a statute in *Williams v Hutt Valley & Bays Fire Board*.

> In my opinion, fatally, the text of the section in its unamended version cannot be said to be incapable of conveying a plain meaning, and it is not ambiguous. It is merely assailable as leading in certain circumstances (of which this case may be one illustration) to a palpably unjust result. Such a state of affairs will not generally support violence being done to the text of a statute. [1967] NZLR 123, 134.

Even if one were very confident of the error, the preferred course remains:

> Where the text as it stands is reasonably capable of two meanings, the Court has no doubt the duty of selecting one, in which case a comparison of the results of each construction is permissible, and may be helpful, or even decisive. But it is not the function of the Courts to sit in judgment on the wisdom of the Legislature in passing the provisions of statutes into law, where the words are plain. If something has been overlooked, if justice is found not to have been done, by some provision, there will no doubt be a case for statutory amendment. But it is not for the Courts to guess what the Legislature would have proposed, had the matter been more thoroughly examined.[6]

As the passages quoted demonstrate, judicial reluctance to intervene is founded upon high constitutional considerations.

In this climate one can perceive why *Craies* emphasises the role of Parliament in the correction of legislative errors. (*Statute Law*, 1971, 7 ed, by Edgar, p 522) When an error is detected, Parliament can intervene speedily to repeal or amend the relevant statute. Thus, when it was realised that the English Artisans and Labourers Dwellings Act 1879 referred to a Third Schedule to that Act which did not exist, a further statute was passed under the snappy title of the Artisans and Labourers Dwellings Act (1868) Amendment Act (1879) Amendment Act (1880) expressly to correct this mistake. But such interventions are not always necessary. *Craies'* suggestion, that it is only for the Courts or Parliament to correct drafting slips, is at variance with the practice of the English Clerk of the Parliaments who, upon discovering an error in the printed copy of the statute, may authorise Her Majesty's Stationery Office to issue a corrigendum slip – and this, sometimes, even if the error is contained in the authoritative vellum copies. (Bennion p 121.) This would seem to accord also with New Zealand practice. Section 3(4) of the Bylaws Act 1910 provides an apposite illustration. That subsection, where a consequential amendment to a Bill was inadvertently omitted, mistakenly referred to a period of "twelve months", whereas Parliament intended to refer to a period of "three years". In the 1958 Reprint of the Statutes there is a note explaining how the error occurred. The note reads:

> Twelve months in subs (4) should have been enacted as three years to correspond with subs (2). An examination of parliamentary records discloses that the period originally fixed was twelve months and was altered to three

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Interim payment orders in civil litigation

By Grant Illingworth, barrister of Auckland

The pace of civil litigation, traditionally sluggish, has picked up noticeably since the advent of the summary judgment procedure and, in Auckland, the introduction of the Commercial List. Both reforms illustrate the point that a modern system of civil procedure should be able to produce results without undue delay. The purpose of this article is to suggest a further amendment to the High Court Rules with the same objective. The writer proposes the adaptation of English provisions which allow a Judge to order one party to make an interim payment to another party pending the final determination of a claim.

As Lord Scarman observed in *Castanho v Brown & Root* [1981] AC 557, 571 interim payment rules were first authorised in England by the Administration of Justice Act 1969 and promulgated in 1970 by RSC, Order 29, rules 12 to 17. The relevant rules, since amended, are now rules 9 to 18. An interim payment is defined to mean a payment on account of any damages, debt or other sum, excluding costs, which a defendant may be held liable to pay to or for the benefit of the plaintiff. A plaintiff, at any time after service of the writ and after the time for acknowledgement of service has expired, may apply to the Court for an order requiring the defendant to make such a payment. The application must be supported by an affidavit which should verify the quantum figure and the grounds of the application. The affidavit must also exhibit any documentary evidence relied on by the plaintiff in support of the application.

Relevant qualifications

If the Court is satisfied that the case qualifies it may order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the amount which in the opinion of the Court is likely to be recovered by the plaintiff. The Court must take into account any relevant contributory negligence and any relevant set-off, cross-claim or counterclaim. The kinds of case which qualify include proceedings in which:

(a) The defendant has admitted liability for the plaintiff's damages;
(b) The plaintiff has obtained judgment against the defendant for damages to be assessed;
(c) If the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the relevant defendant;
(d) The plaintiff has obtained an order for an account to be taken;
(e) The plaintiff's action includes a claim for possession of land, and if the action proceeded to trial the defendant would be held liable to pay the plaintiff a sum of money in respect of the defendant's use and occupation of the land during pendency of the action, even if a final judgment or order were given or made in favour of the defendant;
(f) If the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money other than damages or costs.

The rules include machinery provisions dealing with the manner of payment, applications for directions as to the further conduct of the action after an interim payment order has been made, non-disclosure of the interim payment to the trial Court and adjustment of final judgments or orders to take into account the interim payment. There is also a provision that interim payments may be ordered on a counterclaim or in proceedings commenced other than by writ. Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

As originally drafted, the rules did not take into account the fact that a plaintiff could discontinue an action as of right. This led to some unseemly judicial acrobatics in the case mentioned above, *Castanho v Brown & Root*. (See Lord Scarman's speech at p 571 — plaintiff's notice of discontinuance struck out as an abuse of process!) This difficulty has since been removed.

New Zealand situation

Under Rule 136(1) of the New Zealand High Court Rules, it is open for the plaintiff to seek summary judgment in respect of "a claim in the statement of claim or to a particular part of any such claim". It may be thought that this provision eliminates the need for a separate rule to cover interim payments. The "*Fuohsan Maru*" [1978] 1 Lloyds Rep 24 provides authority to the contrary. Although it was plain that the plaintiff shipowners were entitled to heavy damages for breach of contract, the whole claim for damages was in

issue and it was impossible to identify or quantify any particular part of the claim in respect of which there was no defence or which was indisputably due, so summary judgment could not be granted.

There are certain circumstances in which it is undoubtedly possible already for a plaintiff to obtain interim payments under our existing High Court Rules. Rule 333 provides that in a proceeding concerning property the Court may allow any part of the property to be given to any person having an interest therein. The Court must be satisfied that the property is more than sufficient to answer the claims on the property for which provision ought to be made in the proceeding. Rule 334 provides that in a proceeding concerning property which produces income the Court may allow the income or part of it to be paid to any person having an interest therein if satisfied that the whole or any part of the income is not required to answer the claims on the property. It will be obvious that these two Rules apply in very limited circumstances only and that there will be cases in which interim payments are fully justified yet which are covered neither by the summary judgment procedure nor by Rules 333 or 334. Where it is plain that a litigant will succeed in obtaining a minimum level of damages or other monetary relief, do not common sense and basic justice demand that the Court should have the power to order a defendant to pay the sum in question to the plaintiff? Why should a plaintiff be required to wait for months or even years before obtaining and enjoying the use of money which the defendant clearly owes?

English powers broad

The breadth of the power created by the English interim payment rules is illustrated by *British and Commonwealth Holdings PLC v Quadrex Holdings Inc (No 2)* (*The Times*, 13 March 1989). In that case Hirst J made an order for an interim payment by the defendants to the plaintiffs in the sum of £75,000,000 on account of the damages they were likely to be held liable to pay at trial. The order was stayed temporarily to allow the defendant to appeal. The Court of Appeal (*The Times*, 8 December 1988) in effect upheld the decision to make an interim payment order but reduced the amount to a mere £5,000,000.

A recent example of an unsuccessful attempt to invoke the English interim payment provisions is to be found in *Barry-Crest Limited v Denemor Limited*, an unreported decision of the Court of Appeal heard in August 1988. The defendants were proprietors of leasehold premises situated in Oxford Street, London. The plaintiffs wanted to convert the basement of the premises into a retail market. The contract between the parties provided that the plaintiffs should incur the cost of renovating the basement, amounting to £18,000 plus VAT. The plaintiffs were to be reimbursed for their expenditure out of the rental income when the conversion was completed. Thereafter, the rent was to be split between the parties 40% to the plaintiffs and 60% to the defendants. When the conversion was almost complete and after licensees for the market had been found and had paid substantial sums by way of deposit, the parties fell out. Each alleged that the other had repudiated the contract. The plaintiffs sought damages under the contract but as an alternative alleged that if they were in repudiation of the contract, they were entitled to recover in a quantum meruit. The Judge at first instance concluded that the plaintiffs must succeed on one or other of their alternative bases of claim and therefore ordered the defendant to make a substantial interim payment.

On appeal, the Court examined the nature of the contract between the parties and concluded that there was no certainty that the plaintiffs would be entitled to a quantum meruit if they were wrong on repudiation. That left the question whether the plaintiffs could show that they were so likely to succeed on the repudiation issue that they ought to have an interim payment on that ground alone. The judgment of the Court was delivered by Lloyd LJ who said:

> Now it may be that the plaintiffs are more likely than not to succeed on the question of repudiation. That is evidently what the judge thought. But the question of repudiation depends on what was said and done by Mr Mamon acting on behalf of the defendants, and Mr Zamir Hyder acting on behalf of the plaintiffs at the critical period in October 1986. That is eminently a question which ought to be determined at a trial. . . . On the whole the case falls short of the high standard of proof necessary for an interim payment under Order 29, rule 11. In that respect I would refer to the decision of this Court in *Breeze v McKennon* 32 Build LR 4, where Lord Justice Croom-Johnson said at page 49:
>
> > the onus of proof to "satisfy" the court on liability under [RSC Order 29] rule 11(1)(c) is high. It is equivalent to being sure that the plaintiffs will recover. A mere prima facie case is not enough.
>
> The plaintiffs in my view failed to reach the high standard of proof required in order that the court can be satisfied that they will recover judgment at the trial.

Lloyd LJ went on to refer to the discretionary nature of the remedy and observed that it would not have been a proper case for the exercise of the discretion in any event.

Standard of proof

In *Gibbons and Another v Wall* (*The Times*, February 24 1988) the Court of Appeal held that the standard of proof to be applied by the Court when determining whether a interim payment order should be made was the civil standard. The Court needed to be satisfied that if the action proceeded to trial the plaintiff would obtain judgment for substantial damages. It was not necessary for the Court to be satisfied beyond reasonable doubt. The Court of Appeal held that Croom-Johnson LJ in *Breeze v McKennon* had not meant, by his use of the word "sure", that anything but the civil standard applied. It was noted, however, that the civil standard was flexible, and in the context of an application for an interim payment, the standard to be applied was at the high end of

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Cannabis: Proving its presence

By D M Wilson, Barrister, Hamilton

This article looks at the issue of the proof required of the presence of the illegal drug cannabis in relation to charges of cultivation and possession for supply. Mr Wilson concludes that attacking the admissibility of the analysis certificate will prove to be a less fruitful and successful defence in future because of recent decisions in the Court of Appeal. In every case it will be a question of fact and circumstantial evidence may be sufficient.

In two new decisions *R v Cruse* [1989] BCL 850 and *R v Devcich* [1989] BCL 851, the Court of Appeal has settled uncertainty concerning the proof of the presence of the illegal drug cannabis in relation to charges of cultivation of cannabis and possession of cannabis for supply. Particularly in the *Cruse* case the Court refused to act on a narrow view of the facts and took the opportunity of stating a principle which may cause some surprise to criminal lawyers, whether prosecution or defence.

The definition of cannabis in the Misuse of Drugs Act 1975 reads:

> Cannabis plant (whether fresh, dried, or otherwise), that is any part of any plant of the genus *cannabis* except a part from which all the resin has been extracted.

Is scientific opinion evidence necessary?

The issue is how can it be proved that the vegetable material relied on in a particular case still had its resin present? Is direct evidence necessary? May the presence of resin be inferred? The usual answer is provided by the certificate available under s 31 of the Act. If the certificate is not admissible prosecutors call the Analyst to identify the material. Even this step was not always successful. See for instance *Police v Drury and Others* [1974] 2 NZLR 493.

It seems apparent that a requirement to call scientific evidence on such charges was accepted at senior Crown level. In *Scott* (CA 169/84, 19 June 1985) the Court of Appeal noted:

> Mr Squire (who appeared for the Crown in the Appeal) pointed out that identification of cannabis for the purposes of cultivation charges, *unlike its identification on possession for supply charges* does not require chemical analysis, simply visual identification. (*emphasis added*)

The position in England seemed to be rather similar. See *R v Goodchild* No 2 [1977] 1 WLR 1213, [1978] 1 All ER 649, a decision of the Criminal Division of the Court of Appeal. Goodchild appealed against conviction on a count of possession of a cannabinol derivative, arguing mere possession of the separated leaves and stalk would not do: that some processing was required and at p 653 of the *All England Report* at letter e, the Court said:

> There can be no question that in this type of case the court does require expert evidence to understand the structure of the plant, the nature of the plant, and indeed to understand the language which is peculiar to the expertise of the particular expert subject.

Opinion evidence

The Courts have traditionally restricted the giving of opinion evidence, particularly where that

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the range. Similar conclusions were reached in *Shearson Lehman Brothers Inc v Maclaine, Watson & Co Limited* [1987] 1 WLR 480 and *Shanning International Limited v George Wimpey International Limited* [1988] 3 All ER 475.

These cases emphasise the fact that the English interim payment rules have built-in safeguards. They do not authorise Judges to make orders on flimsy evidence. Neither do they justify a Judge in making an interim payment in circumstances where there are real and serious doubts about the plaintiff's ability to repay the defendant if the plaintiff fails at trial. The rules provide an important adjunct to the ordinary powers of the Court to achieve overall justice between the parties in civil litigation. There is a strong case for the amendment of the New Zealand High Court Rules by the inclusion of provisions similar to the English interim payment rules but tailored to fit our existing system. This reform would add a valuable weapon to the judicial armoury and would assist our Judges to dispense practical justice to litigants in civil proceedings. In particular, it would help to remove the unfair strategic advantage presently enjoyed by the defendant who, while lacking a meritorious case, is able to force the plaintiff into an unfavourable settlement, or even into giving up altogether, by employing delaying tactics which drain the plaintiff's financial and emotional resources. □

opinion is in respect of the very matter which the Court has to decide and only suitably qualified experts have been allowed to advance opinion evidence at all. See for instance *Blackie v Police* [1966] NZLR 910. In that case the issue was whether the appellant had been proved to have been incapable of having proper control of a motor vehicle. A majority of the Court of Appeal held that only Police and traffic officers who properly qualify themselves should be allowed to give such opinion. Association with the prosecution affected weight only not admissibility.

What if there is no surviving exhibit?

In a number of cases, typically involving charges of the use or possession of small quantities of illegal drugs no exhibits were recovered and therefore there could be no chemical analysis. A typical case was *Driscoll v Police* (High Court Wellington, 1 August 1985, M 328/88). At a Dire Straits Rock Concert, a detective saw two people handing a cigarette back and forth. The detective said that he could quite clearly smell cannabis being smoked. He approached the appellant who, seeing the police, flicked the cigarette into the crowd and it could not be recovered. Jeffries J had "little hesitation in rejecting Detective Joynes as an expert as to the drug cannabis. He is a Police Constable and possesses no special knowledge, skill, experience and training as would qualify him to give such evidence in a Court of law".

He could not, in the view of the Judge, rank alongside a scientist from the DSIR "who the Court can take judicial notice, is the accepted expert in analysis of drugs".

That decision was followed by Mr Justice Chilwell in *Free v Police* (1986) 2 CRNZ 298. Free had been convicted of possession of cannabis leaf. On appeal it was discovered that the DSIR certificate was inadmissible. Evidence of the smell of cannabis by a constable who did not qualify himself as an expert was held to be insufficient to sustain the conviction. The case proceeded on a central issue whether objection to admissibility of the certificate could be taken for the first time on appeal.

Mr Justice Gallen in a reserved decision, [1988] BCL 1838; *Richmond v Police* forthcoming [1989] NZLR, in the Hamilton High Court, allowed an appeal against conviction for using cannabis in similar circumstances to *Driscoll* and *Free* holding:

> I do not think that the inference should be drawn in the absence of analysis that the specific substance contemplated by the Act was involved .... In the absence of any material to analyse I do not think a prosecution could have succeeded.

There was also a line of cases on confessional hearsay. These cases in a way meet the requirements for opinion evidence in that they proceed on the basis that the accused himself may make an effective admission identifying a drug on the basis of his own experience.

Confessional hearsay

In *Police v Coward* [1976] 2 NZLR 86 Mr Justice Roper dismissed an appeal from conviction on separate charges of using and being unlawfully in possession of the narcotic cocaine, under the Narcotics Act 1965. Evidence on the "using" charge was confined to the appellant's admission to a witness that he had used cocaine on previous occasions by "snorting". When police called, Coward was in the toilet. A detective retrieved a capsule from the toilet bowl which had not been flushed. Coward said that the capsule contained cocaine, although Police thought it contained heroin. Analysis showed Coward to be correct. It was safe to act on his admission.

In *Hawkins v Police* (M 231/84, judgment, 21 December 1984) Mr Justice Quilliam in the Rotorua High Court upheld a conviction on a charge of supplying cannabis plant in a confessional hearsay case where there was no certificate. His Honour said that "a chemical analysis will normally be the most convincing kind of evidence". Section 31 was described as "permissive and procedural only in its scope". The Judge commented "No-one who smokes tobacco needs to be told by chemical analysis what he is smoking" and accordingly an *inference* could be drawn as to the presence of resin from the experience undergone by the user in smoking the drug.

In *Porter v Police*, (M 258/85, judgment, 1 August 1985 in the Wellington High Court) Mr Justice Savage dismissed an appeal against conviction on a charge of possession of cannabis plant. The facts were these:

(a) The appellant acted suspiciously in throwing away a cigarette when a uniformed policeman approached him.
(b) The appellant smelt of cannabis, his voice was slurred and his pupils were dilated.
(c) He admitted that what he had possessed and smoked was cannabis.
(d) There was no exhibit to be found and therefore no analysis.

Savage J held there was no other reasonable hypothesis inconsistent with the offences and further "a person could give evidence that he had recognised the smell, for example, of whisky without having to produce evidence of some technical or scientific qualification as a chemist.

In the *Scott* appeal the Court of Appeal were considering evidence from a detective at trial who had recovered the plants and said they were cannabis and that the mode of protection of the different cultivation was in accordance with the practice of cannabis growers. At the trial, the identification of the cannabis had *not* been in issue. The Court of Appeal accepted in the circumstances of that case that the visual identification of the cannabis was sufficient to establish cultivation charges. The fact that the identification issue had not been raised before the appeal was a significant influence in their reaching that decision.

It was against this background that the *Cruse* and *Devcich* appeals came before the Court of Appeal on 10 May 1989.

In *Cruse*:

(i) No cannabis was recovered at all.
(ii) As a result no evidence from any expert, whether from the DSIR or the Police, identifying any material as cannabis.

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A 19th-century Thatcherite?

By Anthony Hartley

This article is reprinted with permission from the English review Encounter *for April 1989, page 76. It is published as an interesting piece of English legal history and also on the relevance of what Sir James Fitzjames Stephen wrote over 100 years ago.*

It is a curious feature of the present debate on what is happening to British society that so much of it should take the form of the establishment of a sort of moral league-table, on which trades and professions are ranked by the degree of "goodness" to which they can lay claim. The activities of clergymen, social workers, health service employees, school and university teachers are often described as "good" or "caring"; those of bankers, lawyers, stockbrokers and doctors working in private medicine as "selfish" or "money-grabbing". Selling themselves to the Mammon of unrighteousness, these unfortunates suffer the penalties of moral disapproval on the part of enlightened intellectuals. Even within the Civil Service there is a dividing line. The Security Services and the Ministry of Defence are given over to the deeds of darkness. The Ministries of Health and Social Services encounter none of this suspicion. Their soundness of heart is sufficiently proved by flow of documents, leaked by dribs and drabs for the benefit of the critics of government.

This form of modern dualism is much practised by intellectuals. If Ormazd and Ahriman are to fight their battles in British society, it must be comforting to feel that one is on the side of light.

Such reflections have their relevance to the state of mind of Professor Bernard Williams who, from the prosperous shores of San Francisco Bay, has recently denounced the Minister for Higher Education, Robert Jackson, as a "traitor" (to the country? To All Souls?). For, naturally, a conviction that someone is engaged in "doing good" must be accompanied by a feeling that those who deny the unlimited funds necessary for these purposes are, in some sense, evil or corrupt. Mr Jackson is trying to do his best with a situation from which Professor Williams has fled. But that makes no difference. "*Ecrasez l'infame*" is a good enough device for a professor of philosophy, and stoutly he goes to it in his Californian retreat. As for Mr Jackson, he must strive to make the best of his fallen state, along with the rest of us, whose occupations, while appearing modestly useful to ourselves (for we are all in need of a "life-lie"), cannot provide that strong assurance of being about the Lord's business felt by so many Pharisees.

It is strange that those who adopt this dualistic approach to the components of society often also call for a renewed "sense of community" in Britain today. A "sense of community" is the great panacea or social pain-killer of our time, but it is hard to reconcile with the relegation of most working people to the ranks of the "selfish" or "money-grabbing".

Oddly enough, the best refutation of such attitudes is to be found in an essay on "Doing Good" which was published anonymously in 1862 in a book called *Essays by a Barrister*. This sets out to answer the accusations made by those who claim to belong to the "caring professions" against everyone else. It is worth some quotation. What is the meaning behind the phrase "doing good"?

> It insinuates that the mainspring of professional zeal is personal ambition; that commerce and agriculture are mere embodiments of avarice; and that, in a word, selfishness is the vital principle of almost every part of society.

Such a point of view is injurious in that "it has a strong practical tendency to discredit the common occupations of life . . ." and "does so on the false ground that pursuits which benefit the person who follows them up are selfish". On the contrary:

> A stockbroker who passes the whole day in buying and selling shares, or a publican who is constantly occupied in serving his customers, passes his time in doing good just as much as the most zealous clergyman or sister of mercy.

Human society is a complex organic whole, but "if the object ultimately produced by the combined efforts of all is in itself a good one, it cannot be denied that whatever is essential to its production is good also".

Finally , the writer gives his own version of the do-gooder's" characteristics, sketching a picture which, even today, is far from unrecognisable:

> He is more exposed than almost any other person to the danger of becoming pedantic and petty, and of trying to realize his own conceptions of what people ought to be and to do, instead of learning how slight and narrow those conceptions are. Benevolence is constantly cultivated by philanthropists at the expense of modesty, truthfulness, and consideration for the rights and feelings of others; for by the very fact that a man devotes himself to conscious efforts to make people happier and better than they are, he asserts that he knows better than they what are the necessary constituent elements of happiness and goodness. In other words he sets himself up as their guide and superior.

The argument is obvious enough – apart from the fact that nobody recently has cared to make it in so trenchant a form – but the style has a flavour of its own. It is the style of an advocate – tart, cutting and rational.

In fact, the author of *Essays by a Barrister* was Sir James Fitzjames Stephen, the uncle of Virginia Woolf, a distinguished barrister and judge, the historian of English criminal law and legal member of the Viceroy's Council in India. His main political work was *Liberty, Equality, Fraternity* (1873), a reply to John Stuart Mill's *On Liberty*. It is hard to find a copy of *Essays by a Barrister* since, to my knowledge, it has never been reprinted. This is a pity, since it contains much wisdom and originality. There is about Stephen's approach to the subjects of the day a downright and even brutal common sense, which enables him to brush aside fashionable cant and disinter the facts of a case from the layers of sentimentality with which they are surrounded. What is disclosed is often disagreeable and unwelcome to those accustomed to view human nature through a rosy mist. Stephen is adept at exposing the flaws in individual behaviour, the consequences of the use of power in society and the need for crime to be followed by punishment.

"I do not think", he wrote in *Liberty, Equality, Fraternity*, "the State ought to stand bandying compliments with pimps." Liberty for him – and this was the centre of his answer to Mill – was determined by power: ". . . it is only under the protection of a powerful, well-organised, and intelligent government that any liberty can exist at all." Nor was religion exempt from his condition of social existence: ". . . if Christianity had had not threats and used no intimidation, there would have been no metropolitan deans. Religions are not founded on mildness and benevolence."

Stephen was a utilitarian who believed in the need for a strong state. He also possessed a puritanical temperament. It is recorded that "he once smoked a cigar and found it so delicious that he never smoked again". He was a believer in the supreme importance of individual exertion and self-control. "A life made up of danger, vicissitude, and exposure is the sort of life which produces originality and resource." His view of the state was very much that of Hobbes: its task was primarily to ensure defence against foreign enemies and civil order at home. The state as a purveyor of welfare and the source of public benevolence he might have regarded as a dangerously enervating institution. He valued hard work, independence of mind, a virile and energetic grappling with life. If the human condition was difficult and men potentially wicked, then all the more courage and effort were required from the individual. Stephen was very conscious of the dangerous side of political activity and of the irrationality inseparable from it. "Disguise it how you will, it is force in one shape or another which determines the relations between human beings", was his chilly verdict.

He was a Puritan, but it would be hard to say he was religious. His view of the Churches was of organisations intended to aid the State in its task of social control. But he was conscious of the power represented by religion. "Millions upon millions of men, women, and children", he wrote in *Liberty, Equality, Fraternity*, "believe in Mohammed to the point of regulating their whole life by his law. How many people have understood Adam Smith? Did anybody . . . ever feel any enthusiasm about him?"

It was Stephen's predilection for practical activity which made him impatient of those whose business it was to preach to others. It was ordinary life that attracted him, and he found high sentiments, whether in church or lecture-hall, hard to bear. His essay "Juniores Priores", on the relationship between teacher and student, shows how difficult he found it to be fair to those who claimed to make disciples of the young:

> There is no one thing which it is more important for persons connected with education to remember than the truth that education is only a preparation for life, and that the life which lies beyond it is utterly unlike it, is very partially known to anyone, and is, in general, particularly little known to themselves.

There is in this a hit at John Henry Newman, whose often sentimental romanticism he found antipathetic. In his essay on what he called "Gamaliels" (and we would now call "gurus") he expressed the view that "it is unwise for a man who cares for the investigation of the truth to address himself to the young. . . ." Here he is in agreement with Benjamin Jowett who remarked of Newman's conversion, "It was very unfair to those young men". Jowett himself was more an informal civil service commissioner than a Gamaliel. At any rate, he escaped Stephen's condemnation.

The relevance of what Stephen has to say to the present day is unquestionable. For we appear to be living in the age of the militant professor. A spate of advice, admonition and rebuke pours from the universities towards Whitehall. Yet much of it – the gallons of ink that have been wasted on proportional representation, for instance – betrays an apparent unworldliness, a distance from real affairs which gives substance to Stephen's criticism.

Yet it is not only this which makes his writing seem modern. Much has been written about Mrs Thatcher and Victorian values. But the moment the names Arnold, Carlyle, Mill, Newman are pronounced, it is hard to perceive much sympathy or identity of opinion. Fitzjames Stephen, on the other hand, is far closer to the present Prime Minister's habit of mind than any other Victorian intellectual. His puritan utilitarianism, his cult of personal effort, his austere respect for achievement through hard work make of him a 19th-century Thatcherite – perhaps the only one.

The 1860s and 1870s were a time when the Victorians were beginning to lose something of the initial toughness which had carried them into empire and industrial expansion. Under the influence of Carlyle and Arnold what might be called a philanthropic consensus had arisen, which played no small part in making England a less harsh and more humane place, but which may have brought with it a certain slackening of energies. Fitzjames Stephen reacted against this trend, much of which appeared to him as cant, by reasserting the vital

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Mistaken Mistakes

By Elisabeth Garrett, Lecturer, Department of Commercial Law, University of Auckland

This paper considers the objective and subjective quality of the concept of intent and the definition of mistake in criminal law.

The New Zealand Court of Appeal in *Millar v MOT* [1986] 1 NZLR 660 suggests that *R v Strawbridge* [1970] NZLR 909

> can be seen as a troublesome anomaly best done away with or severely confined as confirmed by the elaborate discussion forced upon the High Court of Australia in *He Kaw Teh* [1985] 157 CLR 523!

The purposes of this paper is to demonstrate the significance of *Strawbridge* to the jurisprudence of the criminal law.[2] The focus of the paper is an analysis of *Millar*. In that case Cooke P stated:

> It is no exaggeration to say that respectable, even high, judicial authority can be invoked for placing driving while disqualified in every one of the seven classes [in *Millar*]. The state of affairs is no credit either to legislatures or Courts.

This paper distinguishes the purely subjective quality of intent (*Morgan* [1976] AC 182) from the objective quality of a defence. The focus of the distinction is the definition of mistake. It is submitted that the failure properly to define mistake is responsible for the seven *loci* rendered possible by the Court of Appeal's classification of offences vis à vis s 35 of the Transport Act 1962.

Millar v MOT [1986] 1 NZLR 660

The facts of *Millar* can be briefly stated. The defendant had a history of District Court convictions for excess breath and blood alcohol offences and driving while disqualified.

Applying Lord Reid's principle from *Sweet v Parsley* [1970] AC 132, 147 the Court of Appeal opined that mens rea was an ingredient of the offence created pursuant to s 36 of the Transport Act 1962. *There being evidence that the defendant did not know* of the disqualification, the prosecution was required to prove knowledge beyond reasonable doubt. His Honour listed seven categories of criminal offence:

(i) Simple mens rea;

(ii) The assumption of the presence of mens rea where the onus of proof in the event of evidence to the contrary is on the prosecution;

(iii) *Strawbridge*;

(iv) Honest and reasonable mistake with the persuasive burden on the defendant;

(v) Total absence of fault;

(vi) Honest ignorance;

(vii) Absolute liability.

The President noted that if *Millar* came within the first category, the offence would be "driving while disqualified, knowing of the disqualification". Acknowledging the complexity of the seven categories, he observed that if there were a distinction between the first two categories it was "so narrow as not to be worth preserving". (ibid, 667.)

Class II would then become "*Strawbridge* without reasonable grounds". Cooke P added:

> But once that complication is dropped the offence can be described simply as one where *guilty knowledge is an ingredient of the offence. That indeed is exactly how the House of Lords resolved the common law about rape* in *Morgan* [1976] AC 182. The crime was redefined as having sexual intercourse without consent knowing she was not consenting. [Emphasis added].

The President continued:

> The approach of the House of Lords in *Woolmington* [1935] AC 462, 481 to the so-called defence of provocation is parallel. If a reasonable doubt remains as to whether the killing was provoked, the prosecution has not proved the malicious intention or in other words, the mens rea, required as an ingredient in murder.

He elaborated:

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qualities which he saw as essential to the national existence. Of course, any comparison between him and Mrs Thatcher is absurd. He was a speculative thinker of great power and she is a practical politician, adept in the adjustments which politics requires. None the less, to read his works is to come across the best arguments for her struggle against a liberal consensus. Such unexpected meetings are only one of the benefits to be gained from a knowledge of the past. □

> Seen in this way absence of guilty knowledge is like the defence of provocation, automatism, self defence and compulsion. There must be some evidence or material either from the prosecution case or called by the defence to raise the issue.

Critique

While a merging of the categories is possible, the merging advocated by the President is not justified by the case law. The first two categories will be discussed in the context of the relevant cases. A discussion of the remaining categories follows.

***DPP v Morgan* [1976] AC 182**

With respect, Cooke P's definition of the offence rape, is *not* as the House of Lords in *Morgan* defined it. The House of Lords defined it in terms of intent. The intention to have sexual intercourse recklessly, not caring whether the victim consented, was deemed equivalent to the intention to do the prohibited act without the victim's consent. According to Lord Hailsham:

> . . . the prohibited act in rape is non-consensual intercourse and [that] the guilty state of mind is an intention to commit it.

The merging of categories I and II advocated by the President is with respect, tantamount to a denial that mens rea encompasses intention as well as knowledge.

Where mens rea as intention is an element of the offence (an essential ingredient), the onus is on the prosecution to prove it. If the Crown fails to prove intention there is no offence. If the defendant is proven to have acted intentionally the onus is then on the Crown to negate any defence raised. Lord Hailsham applies this distinction to *Morgan*:

> The primary "defence" was consent. *I use the word "defence" in inverted commas*, because, of course, in establishing rape the prosecution must exclude *consent in order to establish the essential ingredient of the crime.* [Emphases added].

In discussing the varied meanings of mens rea, Lord Hailsham elaborates:

> Sometimes it forms part of the essential ingredients of the crime without proof of which the prosecution as it were withers on the bough. Sometimes it is a matter of which though the probative burden may be on the Crown, normally the evidential burden may usually (though not always) rest on the defence, eg self defence and provocation in murder.

His Lordship concludes:

> Once one has accepted what seems to me abundantly clear, that the prohibited act in rape is *non-consensual intercourse* and the guilty state of mind is *an intention to commit it*, it seems to *follow as a matter of inexorable logic that there is no room for a defence of honest belief or mistake* or of a *defence* of honest and reasonable belief. Either *the prosecution proves that the accused had the requisite intent, or it does not.* In the former case, it succeeds and in the latter it fails. [Emphases added].

***R v Strawbridge* [1970] NZLR 909**

There is no dispute that *Strawbridge* is a truly criminal offence: *CAD v MacKenzie* [1983] 1 NZLR 79. There is an evidentiary burden on the defence to adduce or point to evidence of honest belief on reasonable grounds that her act was innocent. An acquittal follows unless the Court is satisfied beyond reasonable doubt that this is not so.

It is submitted that *Strawbridge* is a case of mistake. George Fletcher, *Rethinking Criminal Law* (1978) distinguishes accident and mistake.

> If I shoot at a *tree stump* and the bullet ricochets and hits a *man* standing nearby, my hitting him is an accident; but if I shoot at what I take to be a *tree stump* and it turns out to be a *man*, my hitting him is the consequence of a mistake. [Emphases added].

Fletcher, (op cit), elaborates:

> Accidents occur in the realm of causation. When expected forces go awry, the result is an accident. Mistakes occur in the realm of perception. At the moment of shooting at the tree stump, the question whether an accident will occur is yet undetermined. But as at the moment of acting the mistake has either been made or not.[3]

It follows that a mistake is an error of perception as between objects. Mistake differs from ignorance. The latter implies a *lack* of knowledge or belief; mistake, knowledge or belief based on an incorrect distinction between *different* objects. Given the dangerousness and deliberation inherent in mistake, the requirement of reasonableness is acceptable.

The *Morgan* and *Strawbridge* categories follow the *MacKenzie* (supra) categorisation.[4] The *Strawbridge* category also includes "possessory" offences (and *Millar* (supra) if it is not a regulatory offence which, it is submitted, is the proper classification, post). In "possessory" offences, guilty knowledge is assumed but negated by ignorance. An absence of knowledge that an object is in one's possession precludes the qualification, reasonable. Further dealing in any manner with an object, the existence of which one is ignorant, is not possible.

Absence of fault

The considerations influencing Richardson J to determine that the relevant legislation in *MacKenzie* (supra) created a regulatory rather than absolute offence was the legislative intent to control a dangerous activity. While social utility warranted the activity, public welfare required its regulation. The emphasis on the act rather than the actor, the offence was not truly criminal. It is submitted that these considerations would place the offence, driving while disqualified, within this category.

Factors weighing in favour of absence of fault (rather than mens rea) with the persuasive burden on the defendant were as follows. The section was aimed at protecting public safety. The penalty was $2,000.00 and/or twelve months' imprisonment. The remaining factor is not relevant to *Millar* (supra). Pursuant to s 30(1) of the Transport Act 1962, second or subsequent offences of driving while disqualified were punished by a term of imprisonment not exceeding five years and/or a fine not

exceeding $4,000.00. The severity of the penalties appeared to favour some form of mens rea. If, however, after *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, 17, the test for absolute liability was effectiveness in promoting public safety, *Gammon* would apply.

The President of the Court of Appeal in *Millar* (supra) found no consistent line of authority. The original reason for the creation of the offence was public safety; the current reason, *the enforcement of Court orders*. There was insufficient reason for not applying *Sweet v Parsley* (supra). The universal principle was thus stated:

> Mens rea in the sense of guilty knowledge, should be understood as an ingredient of the offence. But on proof that a disqualification order still in force was duly made against the defendant, his knowledge of the disqualification *is naturally to be assumed in the absence of evidence suggesting otherwise.* If there is such evidence, the prosecution must prove knowledge beyond reasonable doubt. [Emphasis added].

In so far as Cooke P stated that the difference between his categories I and II "is not worth preserving" the effect of *Millar* is the alteration *sub silentio* of the burden of proof in criminal offences. *Millar* however, imports the subjective standard of proof rejected in *MacKenzie* supra. This is achieved by the requirement that the *prosecution* prove the defendant's knowledge beyond reasonable doubt.

Millar, Category IV. Honest and reasonable mistake a defence with the burden of proof on the balance of probabilities on the defendant

It is submitted that the category is superfluous. The word mistake is a misnomer. The defence is *ignorance*, and not mistake.[5]

The defendant in *Maher v Musson* (1934) 52 CLR 100, 104-106, was ignorant of his possession of illicit drugs. As Dixon J explains:

> The provision [section 74(4) of the Distillers Act 1901-1931] relates to possession custody or other physical relation to an article. *Its nefarious character is not intrinsic, but arises from antecedent breaches of the law generally by other persons.* The very description "illicit" means that the spirits *have illegally been dealt with.* It seems then natural to treat *ignorance* upon reasonable grounds of their unlawful history as an exculpation. [Emphases added].

It is submitted that this category should be eliminated for concepts of ignorance are embraced by the absence of fault category. Nor does there appear any good reason, given the absence of fault category for *Millar*, category vi, honest ignorance. Indeed, Cooke P himself favours the merging of his categories iv, v, and vi.

Richardson J in *MacKenzie*, supra, considers

> concepts such as impossibility, inevitability, necessity, involuntariness, reasonable mistake of fact, the act of a stranger, and absence of negligence are different routes to that social goal of excluding liability for conduct which is non-culpable in that regard.

The words "in that regard" relate to the means of alleviating the harshness of absolute liability which would otherwise be the case.

The words "reasonable mistake of fact"

It is submitted that the words "reasonable mistake of fact" are a term of art for the defence "ignorance". None of the cases refer to the word "mistake" unqualified. *Morgan* refers to a defence of "honest belief *or* mistake", supra; *He Kaw Teh*, "honest and reasonable mistake (of fact)" supra, 533 and 535. While Dixon J in *Maher v Musson*, supra, referred to "ignorance" alone, Hoare J in *R v Gardiner* [1981] QdR 394 used the alternative, "ignorance *or* mistake of fact". Whether the words "reasonable mistake of fact" are used to mean ignorance, or ignorance is used unqualified, there is a degree of symmetry in the categorisation of offences delineated here.

(i) Where the necessary mens rea is stated, the onus is on the prosecution to prove it beyond reasonable doubt;

(ii) Where the necessary mens rea is not stated in truly criminal offences, there is an evidentiary burden on the defendant to raise some evidence of the defence relied on; in "possessory" offences, mens rea is assumed. In the event of evidence to the contrary, the burden of proof is on the prosecution.

(iii) In regulatory offences, the persuasive burden is on the defendant to prove an absence of fault. According to *MacKenzie*, supra, the defences in both regulatory and truly criminal offences are the same.

(iv) Absolute liability (the defendant is at fault).

Conclusion

MacKenzie was seen to be contrary to principle in so far as it reversed the burden of proof in regulatory offences (but not in truly criminal offences). Furthermore, there was said to be nothing in *MacKenzie* to define a regulatory offence. The potential of *Millar*, it is submitted, is the obliteration of the regulatory offence category as well as the *Morgan* category. Two categories remain: the absolute and the presumption of guilt categories. The alleviating factor, this time, is that in the event of the presumption being overcome, the Crown will bear the overall burden of proof.

Strawbridge plays a crucial role in the jurisprudence of the criminal law. The appreciation of its significance, however, mandates comprehension of the distinction between mistake and ignorance. □

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1 The judgment of Cooke P and Richardson J was read by Cooke P.

2 Gibbs CJ, with whom Mason J agreed, endorsed *Strawbridge* in *He Kaw Teh*, [1988] 15L CLR at 535.

3 Fletcher here paraphrases Austin, "A Plea for Excuses" (1956-1957) 57 Proc Aristotelian Soc 1.

4 *MacKenzie* includes in its first category offences where knowledge or recklessness need be proved. *Strawbridge* is *not* classified as an example.

5 *MOT v Strong* [1987] 2 NZLR 295 states that involuntariness is only a defence to crimes where intention must be proven. In so far as Sinclair J relied for this proposition on *Hill v Baxter* [1958] 1 QB 277 an *absolute offence*, it is submitted that such a restriction is incorrect.

Other Men's Flowers

By J N Matson, practitioner of Christchurch

The title is taken from an anthology of poetry compiled by Field-Marshal Wavell. This paper looks at some of the literary quotations and allusions which from time to time have graced the judgments of the Courts, particularly English Courts.

Lord Wavell was no ordinary soldier; a writer as well as an anthologist, C-in-C Middle East, later Viceroy of India, and finally a Field-Marshal and Peer of the Realm. But he was a product of that classical education which produced so many English Judges, at least until the advent of legal aid. He was obviously conscious, when choosing the title for his poetry anthology, of the meaning of *anthos*, the Greek for flower.

New Zealand Judges are the products of a different culture. It is many years since Latin was a pre-requisite for a law degree, and Greek, when offered, has attracted few students. We are a long way in the time and space from Mansfield CJ's objection in 1788 to the appointment of Kenyon CJ as his successor, on the ground that he "did not know the characters of the Greek language and of Latin knew only some scraps to be misquoted". Despite the amount of Latin still embedded in legal language many lawyers (Judges included) stumble over such expressions as *functus officio* and *scilicet*, and the difference between *stratum* and *strata*, *dictum* and *dicta*, *datum* and *data* and so on. But new uses for old words are part of a general trend, transforming the meaning and number (singular/plural) of many Greek and Latin words, such as *criterion* and *criteria*, *medium* and *media*. There is much to be said for using generally known English words in place of legal Latin. In England Lord Diplock has said:

> I think it would be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of criminal offences today, if we were to avoid bad Latin and instead to think and speak . . . about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of *actus reus* and *mens rea*. (*R v Miller*, [1983] 1 All ER 978, 980.)

The reference to "bad" Latin however assumes that legal Latin should be classical Latin, which it never has been.

> For five centuries two languages, each called Latin, existed side by side in the Roman Empire. While the language of the ear kept on the move, the language of the eye remained static over a period as long as that which separates the Anglo-American of Faraday or Mencken from the English of Chaucer and Langland. (F Bodmer, *The Loom of Language*, London, 1987, p 310)

Legal Latin was not wholly the language of the ear but was very far from the language Cicero wrote.

A year or two before *R v Miller* was decided, Vinelott J, in *Re Berkeley Securities (Property) Ltd*, [1980] 3 All ER 513, 528, was faced with circumstances which a New Zealand Judge might well have described as a catch-22 situation. The expression has been well understood in the English-speaking world since Joseph Heller's novel *Catch-22* was published in New York in 1961, and has for long been part of the linguistic culture of New Zealand. But what Vinelott J said was: "The question appears to present a paradox worthy of Epimenides" (who, the experts tell us, was a Cretan poet and prophet living, if at all, in the sixth century BC. "Many fabulous stories are told of him, and even his existence is doubted".) Similarly in *Bunge Corporation v Tradax SA*, [1981] 2 All ER 513, Lord Scarman called in aid "the idiom of . . . Demosthenes (Oratt: Attici: Reiske 867.11) . . ." But in fact the noble Lord was only having a dig at Diplock LJ, who despite criticism that he was being too clever was persisting in using the Greek-based French-mediated word "synallagmatic" to describe a bilateral contract. The word will not be found in any dictionary smaller than the two-volume *Shorter Oxford*.

Speaking of pressure on Judges in the common law world, Justice Kirby, President of the Court of Appeal of New South Wales, recently said:

> More time might mean better judgments — including judgments which are simpler, more conceptual in expression and more persuasive as literature. (1987 3 Cant LR 193)

That pressure is exerted on both English and New Zealand Judges, but without venturing on an assessment of literary merit it may be said there are clear differences of character between the judgments of the Courts of the two countries. New Zealand Judges are more matter of fact, and very seldom step outside a straightforward statement of the facts, issues, law and decision. This does not of course prevent their judgments being good literature, or being adorned with literary allusions. Very occasionally for instance the decisions of Mahon J were expressed with the same sardonic humour as appeared in his *Dear Sam*, and were a pleasure to read for that reason if for no other. English judgments on the other hand give the impression of being more leisurely and discursive, and often find time and place for literary

quotations and allusions which are absent from the decisions of New Zealand Courts. (It is notable in both countries that judgments tend to be much longer than they were before the days of stenographers and tape-recorders, though doubtless matters for decision are more complicated now.)

Literary quotations in English judgments encompass a wide range of sources, from Shakespeare's plays, through Persian and English poetry, children's stories, seventeenth century memoirs and nineteenth century novels, to detective fiction and obscure essays. But the literary work which is most often alluded to, both in England and in New Zealand (no doubt because the particular passage deals directly with legal matters), is that concerning the Chancellor's foot as a measure of equity. Even oblique references will carry the meaning; indeed it seems to be assumed the passage is too well known ever to be actually quoted. Thus in *Regis Property Co Ltd v Lewis Peat Ltd*, [1970] 3 All ER 227, 228, a case about fixing the rent on renewal, the Judge's remark that "The rent will in the end be fixed by the length of the Judge's foot" would not have been lost on the counsel involved. The metaphor comes of course from John Selden's *Table Talk*, a gathering of miscellaneous paragraphs collected by his secretary, arranged under headings in alphabetical order, and published in 1689, thirty-five years after Selden's death. Under the heading "Equity" we find:

> Equity is a Roguish thing, for Law we have a measure, know what to trust to, Equity is according to Conscience of him that is Chancellor, and as that is longer or narrower so is Equity. 'Tis all one as if they should make the Standard for the measure, we call a Chancellor's Foot, what an uncertain measure would this be. One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellor's Conscience.

Under the heading "Marriage" it is said

> Marriage is a desparate thing, the Frogs in Aesop were extream wise, they had a great mind to some water, but they would not leap into the well, because they could not get out again —

which is reminiscent of Mr Punch's advice to those about to get married. "Don't".

Selden was an extraordinary polymath, one of the brighter stars in the intellectual firmament of the time. Barrister, statesman, historian, jurist, expert on heraldry, orientalist, he wrote numerous works (mostly of course in Latin) on Syrian religion, Jewish marriage law, the reception of Roman law, the international law of the sea, English baronage, the Jewish calendar, Jewish succession law, natural law, the history of tithes, and other topics.

Shakespeare and Selden and Oliver Cromwell (quoted below), and also Coke CJ, were all contemporaries, their lives straddling the divide between the sixteenth and seventeenth centuries. Their sayings and writings provide a wealth of apt quotations — less so however in the case of Selden and Coke, the two lawyers, than in the case of the others. Partly this is because their writings tend to be of a more serious style, but partly also because so much of them were not in English. Latin was the learned language of the day; most of what Selden wrote was in that tongue. Coke in addition wrote in law French when his writing was directed at a legal audience. His first report of Shelley's case, in which he made his name, was dedicated to Lord Buckhurst and written in English; but when he published it eighteen years later with reports of other cases he translated it into French. The note books for his own professional use were in law French. But other writings, including those directed at students, were in English; and he several times expressed his views on style and vocabulary. In the preface to 10 Co Rep for instance he wrote:

> Certainly the fair outsides of enamel'd words and sentences, do sometimes so bedazzle the eye of the reader's mind with their glittering shew, as they cause them not to see or not pierce into the inside of; and he that busily hunteth after affected words and followeth the strong scent of great swelling phrases, is many times (in winding of them in, to show a little verbal pride) at a dead loss of the matter itself. To speak effectually, plainly and shortly, it becometh the gravity of this profession. Truth takes small delight with varnish of words and garnish of flowers.

Nevertheless, in *IRC v Duke of Wellington*, [1935] AC 1, 19, Lord Tomlin plucked one of the better-known flowers of Coke's diction to garnish his argument. Speaking of the contention that in tax cases one looks at the "substance" of documents, not at their strict legal effect, he said "the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for 'the golden and streight metwand of the law'." These were the words used by Coke in persuading James I not to sit personally as Judge in 1607. (*The Case of Prohibitions del Roy*, 12 Co Rep 63; 77 ER 1342)

In *Bass Holdings Ltd v Morton Music Ltd*, [1987] 2 All ER 1001, 1007, Kerr LJ drew inspiration from Fitzgerald's *Rubaiyat*. Speaking of the irremedial breach of a negative covenant he said: "It cannot be undone, any more than Omar Khayyam's 'Moving Finger ... having writ' or an indelible stain on the tenant's escutcheon."

> (The Moving Finger writes; and having writ,
> Moves on: nor all thy Piety nor Wit
> Shall lure it back to cancel half a line
> Nor all thy Tears wash out a word of it.)

Referring (on the same page) to an earlier case he said:

> Although of great importance for present purposes, it was a remarkably unattractive case which occupied the courts repeatedly between July 1848 and August 1853. *Bleak House* was published in instalments between March 1852 and September 1853, and *Jarndyce v Jarndyce* must have appeared familiar to the parties.

One may guess that the parties would, like Omar-Fitzgerald, have preferred

> A Book of Verses underneath the Bough,

> A Jug of Wine, a loaf of Bread, and Thou
> Beside me singing in the Wilderness.

Of the poets Tennyson has appealed to other Judges. "The law", said Nugee QC, sitting in *Re Basham* [1987] 1 All ER 405, 411, "in Tennyson's words, 'slowly broadens down from precedent to precedent', and in few areas is this more clear than that with which I am concerned." But it was not directly the law which Tennyson said broadened down, and he took a rather more jaundiced view of case law than the Judge's words might suggest. In *You Ask Me Why* he wrote of

> A land of settled government
> A land of just and old renown
> Where Freedom slowly broadens down
> From precedent to precedent.

Of case law however he spoke in *Aylmer's Field* of

> the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances.

It is understandable perhaps that no Judge seems to have quoted either these lines or Jeremy Bentham's view of case law:

> Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait until he does it and then beat him. This is the way you make laws for your dog, and this is the way Judges make laws for you and me. (*Works* V 231)

(It was Bentham also who invented the word for what he advocated and Tennyson seems to have preferred: codification.)

In *Bank of Baroda v Panessar* [1986] 3 All ER 751, 753, Walton J was more concerned with getting at the truth than with large constitutional issues, and it is perhaps natural that his mind turned to detective fiction. "So far as the husbands are concerned," he said "none of them struck me as being a particularly good witness. In particular, there is the astonishing case, of which Mr Sherlock Holmes would doubtless have desired to have been seised, of the invisible brokers' men."

Scrutton LJ had to deal with causation in *Clan Line Steamers v Board of Trade* [1928] 2 KB 557, 569. He said "There is an old fallacy, post hoc propter hoc – a fallacy illustrated by the question asked by the authors of *The Rejected Addresses* 'Who fills the butchers' shops with large blue flies?' The answer being that they and the other evils enumerated were there owing to the existence of Napoleon. Post hoc propter hoc is generally wrong. Ante hoc propter hoc I suppose is worse. The question here seems to be whether simul hoc propter hoc is a right conclusion, and whether it is correct to say if two things happen at the same time, one must be the consequence of the other." Even at that date *The Rejected Addresses* must have been a fairly recondite work. When the Drury Lane Theatre was rebuilt in 1812 the committee advertised for addresses to be delivered at the opening. Eminent writers submitted compositions but they were all rejected as unsatisfactory. James and Horace Smith then published a collection of parodies of the addresses found wanting, entitled *The Rejected Addresses*. "The remarkable appositeness and humour of the parodies made them extremely popular."

Judgments on the construction of statutes (a subject which has produced enough memorable dicta almost to justify an anthology of its own), particularly dissenting judgments, tend to quote Lewis Carroll in support of their views. In *Liversidge v Anderson*, [1942] AC 462, 481, for instance Lord Atkin said:

> I know of only one authority which might justify the suggested method of construction. "When I use a word," Humpty Dumpty said in rather a scornful tone "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean different things." "The question is," said Humpty Dumpty, "which is to be master – that's all." (*Alice Through the Looking Glass*, c vii.) After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has". I am of opinion that they cannot, and that the case should be decided accordingly.

(English Judges (even more than New Zealand Judges) normally go out of their way, at least in public, to be polite, even excessively polite, when disagreeing with their colleagues.)[1] These fairly forthright remarks of Lord Atkin resulted in his being cut in an exhibition of petulance by some of the other Law Lords, and Lord Maugham actually wrote a letter of complaint to the editor of *The Times*. Lord Simon LC had suggested that he tone down his remarks –

> I am all in favour of enlivening judgments with literary allusion, but I would venture (greatly daring I know) to ask you whether the paragraph should be retained –

but he did not do so. (G Lewis, *Lord Atkin* London, 1983, pp 132 ff)

The judgment of Scrutton LJ in *Place v Searle* (1932), 48 TLR 428, led to an even more acrimonious and public dispute, turning partly on a misplaced analogy between the facts of the case and the story of the *Iliad*. It was a dispute about a doctor who ran off with the wife of a grocer. In circumstances where New Zealand counsel might fleetingly have called to mind Hinemoa and Tutanekai or some closer analogy, before McCardie J counsel turned to Homer. In the Court of Appeal however Scrutton LJ is reported by *The Times* (but not by any of the other four reports) as saying that

> it was a squalid not very interesting case which had somehow been elevated by the newspapers into a case which afforded good copy, apparently because some ingenious counsel had considered there was some likeness between this case and the Trojan war.

Anything less like the godlike Hector and Achilles and "the face that launched a thousand ships" he found it difficult to conceive, but the case had apparently attained great notoriety . . . Dealing with the fight between the defendant and the

plaintiff, Lord Justice Scrutton, in his review of the evidence, said:

> The fight is the only connection one can see with the Trojan War, but what characters in the Trojan war are the two parties supposed to represent? I have no idea.

What really incensed McCardie J however, apart from some disparaging remarks about another part of his judgment, was Scrutton LJ's saying:

> If there is to be a discussion of the relationship of husbands and wives, I think it would come better from judges who have more than theoretical knowledge of husbands and wives. I am [a] little surprised that a gentleman who has never been married should, as he has done in another case, proceed to explain the proper underclothing that ladies should wear.[2]

It would be surprising if no judgments on the interpretation of statutes or other documents contained any reference to Shylock and his pound of flesh, and in *Sydall v Castings Limited* [1967] 1 QB 302, 311, Russell LJ cited the Venetian precedent in support of his argument, quoting Bassanio's plea to the Court to "wrest once the law to your authority; to do a great right do a little wrong", and Portia's retort that

> It must not be; there is no power in Venice can alter a decree established, 'twill be recorded for a precedent, and many others, by the same example, will rush into the state: it cannot be.

His Lordship said "I am a Portia man".

A legally less apposite but linguistically more interesting passage is that from *Macbeth* which Lord Russell quoted in *Sudbrook Trading Estate Limited v Eggleton* [1982] 3 All ER 1, 12.

> I can only exclaim with Macduff: "What, all my pretty chickens and their dam, at one fell swoop?"

Macduff, it will be recalled, was told that in his absence his enemies (whom he likened to a hawk swooping on a hen and chickens) had attacked his home and killed his wife and children. When we hear something said we may unconsciously rearrange or fill out what we hear before it ceases to be a mere jumble of meaningless sounds and acquires some structure and consequent significance. To get the meaning we do not need to hear every syllable that is uttered. "Half-listening combined with half-guessing will get us by most of the time" as Dwight Bollinger says. In assessing and completing the structure we may well go beyond filling the gaps. We may reject what we have in fact heard because it does not fit our preconception of what the structure really is. One may recall the parlour game in which a message is whispered from one to another, and what starts as "Send reinforcements, we're going to advance" ends as "Lend me three and fourpence we're going to a dance." The word *fell* in the sense that Macduff used it is archaic, and for many of us is not even in our passive vocabulary (words understood but not used). So when we hear or half-hear "at one fell swoop" we interpret and reproduce it as the current catch phrase "at one foul swoop"; and it is a fair bet that those who use it are not conscious of quoting (or misquoting) Shakespeare.

Bentham and Tennyson and Dickens are far from being the only writers who have had harsh things to say about the machinery of justice, and with justification. On more than one occasion also Oliver Cromwell expressed his opinion in typically forthright fashion. James LJ quoted (or misquoted) a fragment in *Davy Bros v Garrett* (1878) 38 LT 77, 81: "We must not be driven to confess, as Oliver Cromwell did with a sigh, in reference to his ineffectual attempt to reform the law and procedure of this country, that the sons of Zeruiah are too hard for us." Sir R E Megarry has noted Cromwell's Biblical source: 2 Samuel 3, 39 (*Miscellany-at-Law*, London 1955, p 45). The historical source of the quotation is the memoirs of one of Cromwell's generals, Edmund Ludlow.[3] There is nothing to suggest that Cromwell confessed "with a sigh" however; his frustrations more often drove him to anger. Ludlow records him as saying

> that it was his intention to contribute the utmost of his endeavours to make a thorow reformation of the Clergy and the Law: but, said he, "the sons of Zeruiah are vet too strong for us"; and he cannot mention the reformation of the law but they presently cry out, we design to destroy propriety [property]: whereas the law, as it is now constituted, serves only to maintain the lawyers, and to encourage the rich to oppress the poor . . .

Cromwell is also alleged to have described the law of real property as "a tortuous ungodly jumble" sometimes quoted as 'jungle', but that Indian word is not recorded in written English until more than a century after Cromwell died. The only authority for any such allegation seems to be T Cyprian Williams's statement that

> the late Professor Maitland once told the writer that there is a story that Oliver Cromwell pronounced the English Law of Real Property to be 'an ungodly jumble'.[4]

Cromwell had some remarkably sensible and modern ideas about reforming the administration of justice, but he had to contend with vested interests, and his measures in this sphere were swept away with the rest, and the old abuses reinstated, at the Restoration of the Monarchy. Perhaps for this reason law reform in the Commonwealth has not had the attention it deserves, though there has recently been published a biography of *William Sheppard, Cromwell's Law Reformer*, the author of Sheppard's Touchstone.

So much for other men's flowers. There was a time when every Judge of Assize had a nosegay presented to him, supposedly to counteract the smell and contagion of the prisoners arraigned before him. It lent a sweetness to the air and a touch of colour to the scene. The flowers of speech may perform the same office for the utilitarian judgment. □

1 But being overruled is sometimes more than mortal man can bear with a good grace; see Cooke P's public reference to the "juvenile" remarks of the Privy Council in the *Takaro* case, and to the decision in *Lesa v AG* (1987) 3 Cant LR 181, 182).

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Limitation defences in civil proceedings:

The special case of charity?

By C E F Rickett, Senior Lecturer in Law, Victoria University of Wellington

The article discusses whether the general view that actions against trustees of charity are subject to the usual statutory limitation rules, and argues that they should not be. He relies for his argument on the recent decision of Harman J in Attorney-General v Cocke *[1988] 2 WLR 542 on the interpretation of the English equivalent of s 21(2) of the New Zealand Limitation Act 1950.*

The question

Are actions against charitable trustees subject to the relevant statutory limitation rules?

The received wisdom

Leading commentators have assumed that the answer is "Yes". For instance, we find in *Halsbury's Laws of England* (4 ed, vol 5, para 839) the following statement:

> In proceedings against charity trustees, whether express or constructive, the rule is that, except in cases of fraud, retention of the trust property, or conversion by the trustee to his own use, the right of a beneficiary to recover trust property, whether real or personal, or to sue in respect of any breach of trust, is barred after the expiration of six years.

In respect of this statement, the New Zealand *Commentary* (at C 839) cites the following section of the Limitation Act 1950:

> **s 21(1)** No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –
>
> (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> **(2)** Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued: . . .

For completeness, it should be noted that a footnote in the English edition of *Halsbury* comments: "quaere whether an action by the Attorney-General, representing the Crown as parens patriae, is aptly described as 'an action by a beneficiary under a trust' . . ." (at para 839, fn 2)

The leading modern English text on charity law, Picarda's *The Law and Practice Relating to Charities*, echoes *Halsbury*. (London, 1977, at p 381) Picarda also picks up on the "beneficiary" point, asserting (with the relevant New Zealand provisions substituted) that "no-one doubts that section 21 of the Limitation Act 1950 does apply to such an action."

The received wisdom shot to pieces

A recent decision of Harman J in *Attorney-General v Cocke* [1988] 2 WLR 542 has reversed the received tradition. It now appears that the answer to our question, at least in England, is "No". The Attorney-General issued a writ against the trustees of the will of a testator who had died in 1950. The testator had an art collection, over which had been declared various charitable trusts. The Attorney-General obtained an ex parte injunction restraining the disposition of any of the assets of the trusts, followed later by perpetual undertakings from the trustees. New trustees were also appointed. The Attorney-General now sought an account against the original trustees (there was no allegation of breach of trust, nor was this an attempt to recover money or property from the trustees). The Master ordered an account, and from this the trustees appealed.

The trustees' argument on appeal was that s 21(3) of the Limitation Act 1980 barred the claim of the Attorney-General. Section 21(3) is, for all material purposes, equivalent to New Zealand's s 21(2). With some devastating simplicity, Harman J held that the section could not be applied, since this was not an action by a beneficiary. He accepted the submissions of counsel for the Attorney-General. The action was being brought by the Attorney-General, who was not personally a beneficiary of the trust. Harman J said (at 547):

> He [counsel] asks rhetorically "who then are the beneficiaries of it?" The only answer can be "the public at large". In my judgment there can be no other answer, if the word "beneficiaries" has any proper meaning. But that would mean that I, as a member of the public, am an interested beneficiary and plainly ought not to adjudicate upon the claim.
>
> To state the matter in that way to my mind shows up as a reductio ad absurdum the nonsense of alleging that there is

> any beneficiary in any meaningful sense of that word under a public charitable trust of this nature. It seems probable to me that in almost all charitable trusts there are no individual beneficiaries.

Harman J accepted further a contextual argument in support of this construction. The final sentence of s 21(3) (in New Zealand, also in effect the final sentence of s 21(2)) referred to the accrual to a beneficiary of the right of action which does not happen until the interest vests in possession. Such a concept was, according to Harman J, appropriate only to instances of beneficiaries with property rights under a trust. Harman J stated (at 548):

> No "right" properly so-called ever vests in any member of the public individually under a charitable trust. Equally plainly, nobody has a property right under a public charitable trust and nothing can be said to vest in them at any date, present or future.

In a note on the decision, Jean Warburton points out several other factors which support Harman J's construction of s 21(3). These will not be rehearsed here. (See [1988] Conv (NS) 292, 293-4.)

Cocke appears to be the first time the form of words found in s 21(3) (in New Zealand s 21(2)) has been examined by the Courts in the context of charitable trusts. The hesitancy expressed by commentators about actions by trust "beneficiaries" has been shown to be well-founded.

Actions for an account — a little twist

Harman J also examined arguments based on s 23 of the 1980 Act, which states:

> An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.

Counsel for the trustees suggested that the basis of a duty to account was some breach of trust, or impropriety by the trustee, and that therefore an action for account was also statute barred, the referential period of limitation being that under s 21(3). Harman J, however, preferred the argument of counsel for the Attorney-General, that the basis for a duty to account was the existence of a fiduciary relationship, here between the trustees and the person entitled to enforce the trust, the Attorney-General on behalf of the Crown as parens patriae. Therefore, Harman J concluded:

> . . . . section 23 has nothing to do with the case because there is no basis of the duty which is otherwise dealt with in the Limitation Act 1980 itself. (*Attorney-General v Cocke*, at 549)

Now for the twist. This debate about the basis of an action for an account would, it is clear, be entirely academic in respect of the New Zealand limitation statute. Section 4(2) states:

> An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

Applying a combination of *Cocke* and the statutory rules, the position in New Zealand appears to be that the Attorney-General will find himself liable to be statute-barred in an action for account against charitable trustees (see ss 4(2) and 32), but that in relation to any other actions against charitable trustees there are no statutory limitation rules (s 21 as interpreted by Harman J). The only potential "limitation" defences for charitable trustees in actions other than account are equitable acquiescence or laches. It appears that these were pleaded as an alternative in *Cocke* (at 543), although not mentioned in the reports of counsels' arguments, nor in the judgment (see some discussion by Warburton, supra, at 295). We shall return to an assessment of the New Zealand position, after an examination of the proposals of the Law Commission in their *Report No 6: Limitation Defences in Civil Proceedings* (Wellington, 1988).

Towards a simpler future?

The position regarding actions against charitable trustees appears not to have been given any separate attention by the Law Commission. In its proposed Limitation Defences Act the Commission includes (as cl 4) "a standard limitation defence which may be raised to defeat a claim served more than three years after the date of the act or omission on which the claim is based". (supra at 152) There is also a long stop defence "which, in most cases, may be raised to defeat a claim when 15 years have passed between an act or omission and the service of a resulting claim". (at 152) The basic three-year period can be extended if the claimant proves an inability to bring a claim, particularly, for our discussion, on the basis of lack of knowledge.

The only reference in the proposed Act to "trusts" occurs in cl 5(2)(c) and (d), dealing with a long stop defence in cases of *either* a fraudulent breach of trust *or* a breach of trust or conversion in relation to trust property. In such cases the limitation period is three years *after* the date on which the claimant gains knowledge of the relevant basis of the claim (as further defined in clause 6). Since the words used in cl 5(2)(c) and (d) refer to "a claim by a beneficiary against a trustee", it appears that claims by the Attorney-General against charitable trustees are not covered (on the reasoning in *Cocke*), and that such a case therefore falls to be decided on an application to the standard defence, or on an application of clause 5(2)(a) when applicable:

> (a) 3 years after the date the claimant gains knowledge of any fact described in section 6(1) *that was deliberately concealed by the defendant;* . . . . (emphasis added)

It appears that in this simpler future *all* civil actions by the Attorney-General (see cl 3(3): "This Act binds the Crown") against charitable trustees will be subject to the relevant statutory limitation rules. The latter will be:

> a a standard period of 3 years; or
> b a long stop period of 15 years; or

c a long stop period of 3 years after the Attorney-General gains knowledge of any fact (defined in clause 6(1)) that was deliberately concealed by the defendant(s).

Some concluding thoughts

One of the scandals of the law of charity is the complete lack of effective supervision of the activities of charitable trustees. The enforceability of and control over such trusts by the Attorney-General, representing the Crown as parens patriae, is essentially a legal fiction with little real practical effect. Even in Britain, with the existence of Charity Commissioners having first-line oversight responsibilities, there is considerable concern.

It might be argued that there ought to be less concern once the fiscal privileges currently enjoyed by charities are removed. This point of view not only assumes something which may not in fact happen, but it also ignores the other "public" aspects of charitable trusts, all of which call for more effective supervision.

Jean Warburton has greeted Harman J's decision in *Cocke* with approval. She writes:

> An examination of the history of the Statutes of Limitations in relation to charities leads one to suppose that the period 1833-1939 [when, it appears, the Attorney-General would have been caught by limitation rules under the wording used in the statutes during that period] was merely a misjudged interruption in an otherwise settled pattern of the Attorney-General's immunity when exercising his powers in relation to charitable trusts. Harman J has merely returned the law to its rightful position.
>
> There has recently been much concern [in the United Kingdom] about the lack of supervision of charities and the failure of charitable trustees to deliver accounts to the Charity Commissioners. Harman J's decision gives power to the Attorney-General to call for an account without limit of time and this strengthens his power of supervision over charities. A case of history being proved right after all? ([1988] Conv (NS) 295)

It is suggested that the proposals of the Law Commission should be reworked before becoming legislation, to allow for an exception from statutory limitation rules in the case of actions by the Attorney-General (or other agency of the Crown) against charitable trustees. In any event, the present s 4(2) ought to be repealed to allow for actions for an account to be brought at any time, as a useful supervisory tool. (Harman J in deciding that s 23 of the United Kingdom Act had nothing to do with the case in *Cocke*, was pressed with the argument by counsel for the trustees that this meant that s 23 had very little application. While refusing to decide hypothetical cases, Harman J said he could "quite see that may be right". (at 548)) Indeed, it is further suggested that, because of their useful supervisory role, actions for an account ought to be available *in all cases of fiduciary relationships*, without limitations other than those imposed under equitable doctrines of acquiescence and laches. This would, of course, also require an amendment to the Law Commission's proposals. Any concerns about the improper use of actions for an account being brought after a delay should be met by such a practice as that described by Harman J:

> It is important to notice that the court, in a case where there is no allegation of any impropriety but merely an allegation of a relationship of a fiduciary and an object of the ficudiary duty, will frequently make a common form order for an account (unless indeed it be oppressive or for some other good reason the Court in its discretion thinks it wrong to make an order) but will not make any order in respect of the costs of that application, reserving those costs until the account has been taken. That is because the duty to account arises, but if the accounting party is innocent and produces a true and good account, it would be quite wrong that the cost of carrying out that duty should be thrown upon the innocent accounting party. (at 548, 549)

The Law Commission (*Report*, p 101-102) faced an interesting argument: that recent changes to the Trustee Act 1956 permitting trustees to invest on a "prudent trustee" basis rather than in accordance with the previous authorised "list" basis might increase the scope for actions for breach of trust. That may or may not be right — whatever, in this age when property management is becoming more and more complex there seems to be no good reason to time limit actions for an account, the availability of which might very well, of itself, act as an encouragement to honest and diligent property dealings by all types of fiduciaries.

To conclude the main thrust of this note:

a *Cocke* has revealed the true understanding of s 21(2) of New Zealand's Limitation Act 1950.

b *Cocke* has also shown up the need to repeal s 4(2).

c *Cocke* has shown up the inadequacy of the Law Commission's proposals vis-a-vis actions against charitable trustees.

d *Cocke* forces us to examine the law of limitations in the charity area in the context of the control and supervision of charities.

e Actions against charitable trustees ought not to be subject to statutory limitation rules; rather, any limitation should be left to the Courts' discretionary application of the equitable principles of acquiescence and laches. □

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2 D Pannick, *Judges* (London 1988) p 22. But McCardie J's knowledge was not confined to theory (ibid p 12). (The offending words were not reported.)

3 *The Memoirs of Edmund Ludlow*, C H Firth, ed, Oxford 1894, Vol I p 246. (This edition is later in date than the report of *Davy Bros v Garrett*.)

4 *The Contract of Sale of Land* (London 1930) p v. The book is dedicated to Maitland and the author's brother, our Joshua Strange Williams, some time Chancellor of the University of Otago, Chairman of the Board of Canterbury College and Judge of the Supreme Court, whose portrait photograph hangs in the High Court library in Chirstchurch and used to hang in the old Council Chamber of the University.

Statistics and the Gaming and Lotteries Act

By R Hugh Morton, MA, PhD, Mathematics and Statistics Department, Massey University, Palmerston North

The author is Senior Lecturer in Statistics at Massey University and has an interest in the statistical aspects of gambling. From this point of view he considers that the laws relating to gaming are deficient in certain respects and that statisticians and law makers should consult if amendments to the laws and regulations are contemplated. This is particularly pertinent if legal casino operations are to commence in New Zealand.

Probability theory and gambling have a long history of association. Records exist of fascinating correspondence between gamblers and several of the learned men of the seventeenth and eighteenth centuries and there is little doubt that the initial impetus to the development of probability theory sprang from this correspondence. These are some of the earliest examples of collaboration between statistical experts and their clients. Modern collaboration exists in many areas but there is room for more between statisticians and lawyers. The calculation of probabilities for most common gambling games is not trivial and it involves at least a clear understanding of probability concepts and a good knowledge of combinatorial techniques. Setting appropriate rules to govern the proper operation of legalised gambling presupposes such skills; skills which are unlikely to be possessed by many law makers. It is here that collaboration with a statistician becomes relevant.

Recent publicity regarding the likely legislation of casino operations in New Zealand together with a interest in Lotto, has led me to investigate the Gaming and Lotteries Act (1977/84) together with its subsequent amendments and associated regulations. This examination indicates the need for such collaboration for any future significant changes to the Act which may be contemplated. I would not wish to see statistical inadequacies in the present Act perpetuated by their inclusion in amendments or replacement Acts.

The definition of "random"

The words "random", "randomly", "at random", "on a random basis" and "entirely at random" appear in numerous places in the Act and in the Lotto Rules (1987/192) and Housie Regulations (1986/202). While the first four terms might be regarded simply as grammatical variations, inclusion of the word "entirely" suggests that in law there exist different degrees of randomness. Such phrases do have two different connotations to statisticians but it is not clear whether these same distinctions are implied by the law.

As a general definition, random selection of prize winners simply means selection according to any chance scheme provided only that a player is not certain of winning the prize nor certain of losing it. Thus a scheme involving 51 players whereby one player has a 50% chance of winning and the remainder only 1% each would still be regarded as random within the interpretation of this general definition. Of course it would be hardly be considered fair! More strictly defined the word random implies that all outcomes are equally probable; that is that all players have an equal chance of winning. This is clearly a much more precise definition.

I believe that this latter is the intent of the law since s 3(a) of the Act defines an illegal game of chance as one, the nature of which is such that the chances involved are not equal between all the participants. If this is the intent, then the wording of the Act and its associated regulations should be amended to make this point clear.

Exactly the same sort of definitional difficulty arises when the words "by lot", "by chance", "wholly by chance" are used in various places in the Act. I believe the intended legal interpretation should be by equal chances, even though s 3(b) of the Act in referring to games played against a bank or banker regards them as illegal if the bank does not pass from one participant to another by chance, (that is the weaker interpretation).

The question of fairness

Those who gamble often have quite strong ideas of what they consider to be fair. Apart from the most obvious one of equal chances discussed above, there is one relating to the prize structure in the sense that there ought to be a fair and adequate disclosure of any fact that materially affects the chances of winning or the expected return.

The recently offered Lotto Combo tickets are a case in point. The problem arises when a player possesses, say, two tickets which have at least some prize winning combination of numbers in common. The chance of winning and the expected return on the two tickets are decreased. To see how this occurs take the extreme example of two tickets with exactly the same six numbers and examine the Division One prize, that is correctly selecting all six winning numbers. Since the two tickets are the same the player still only has one chance rather than two to win the Division One prize. There would be no problem if when that player won, his expected return did not change and he obtained double the prize money. This is never the case in Lotto because the

prize pool is split among all the winners. If a player were the only winner in Division One he would receive no extra money by purchasing two identical tickets. If he shared the prize pool with one other person he would receive one half of the pool with the purchase of one ticket and two thirds of the pool with the second identical ticket. This argument is valid for any prize pool, for any number of winners splitting the prize and for any pair or more of tickets which have identical data.

The promotion of any combination game would probably be prohibited under any strict interpretation of a fairness rule, if such a rule existed. Notwithstanding, the Lotteries Commission should be required to advertise the consequences of playing Lotto with these types of multiple tickets. Whether the neglect to do so constitutes a breach under the non-disclosure provisions of s 9 of the Fair Trading Act (1986/121) is an interesting question.

This situation is further complicated by other aspects of the Lotto Rules. Section 24 on the validation of price winning tickets requires that another ticket with identical data should not have been already paid. This leads to possible confusion with s 6(1) of the rules which states that each selection of six numbers shall be a separate entry and with s 20 which states that each selection is eligible for one prize only. Some degree of clarification is clearly needed.

The selection device used

Section 95 of the Act relates to the method of selection. It simply states that every New Zealand lottery, which includes Lotto, shall be drawn in such a manner and under such conditions as determined by the Lotteries Commission from time to time. This vagueness is only partially dispelled by s 13(1) of the Rules which states that drawings shall be made using electro-mechanical equipment or other such equipment as the Commission may determine.

The currently used device apart from the reservations about it to be discussed in the next section, is probably the best way to draw winning numbers. It is flexible to use – "fixing" the Lotto outcome is difficult and the problems associated with the physical mixing or drawing of ticket stubs do not occur. Furthermore it avoids the use of a computer in the selection of winning numbers; a device which is only pseudo-random, of which some people are suspicious and which is more susceptible to breaches of security. The vagueness in the Act and the Rules could nevertheless be further reduced by deletion of the option "other such equipment".

Quality control

By the far the most serious omission from the Act and its associated Rules and Regulations is the question of statistical quality control. Some provisions are made in s 96 of the Act for scrutiny over equipment and the proper operation thereof and over the drawing and accuracy of announced results. In addition under s 83 one function of the Lotteries Commission is to make rules regulating the conduct and operation of New Zealand Lotteries and the Governor-General may make similar regulations by Order in Council under s 141. There even exist provisions under s 133(1) for the Secretary of the Department of Internal Affairs to appoint inspectors of gaming who under s 135 have the power to enter premises and examine records, tickets, any machine or equipment, etc. Even more, s 8 of the Housie Regulations concerning the use of random selection devices permits the Secretary of the Department of Internal Affairs to revoke the authority to use such a device if he considers it to be unfair or unreliable. (Strangely enough it is not therein defined as an offence to use an unfair device in spite of s 3(a) of the Act concerning equal chances to all participants.) These powers of regulation are all very well but they are far too vague and there is a complete absence of any specification as to the methods by way of which such supervision or examination should proceed, at least from the quality control point of view.

For example, there is strong evidence that for an unknown period of time the Golden Kiwi would have been classified as an illegal game of chance under s 3(a) of the Act as described as above. Numbers were not being drawn with equal probability. This was detected by an alert member of the public and not by any officially appointed inspector or scrutineer, nor even by the very people who operated the game. The solution was childishly simple, to mix the marbles more thoroughly between draws. When this was performed the problem vanished. A second example involved the Pennsylvania Lottery in which, when discovered in 1980, certain numbered balls in the machine had been heavily weighted. As a consequence these numbers were far more likely to occur than others.

Now it may well be that the Lotteries Commission does perform statistical tests of randomness on results of Lotto and other lotteries; and does occasionally weigh the balls in the Lotto machine, replacing them with a new set if they are out by a certain amount. If this is so it is not publicised in any way that I am aware of. The facts of the matter are that it is not required by law to do so nor is any inspector of gaming or other scrutineer specifically instructed to do so. Indeed the latter may not even possess the statistical skills necessary for these tasks.

I believe that the Act and its associated Rules ought to be amended to include far more specific provisions for statistical and other scientific testing of any equipment used and of the record of outcomes from a historical sequences of draws. In respect of this latter point s 22(3) of the Lotto Rules only require that records be kept for twelve months after each drawing. This raises the statistical question as to whether this would produce a sample of outcomes big enough to generate sufficient power in the statistical tests needed to detect any significant deviations from randomness. Should any of these statistical tests fail, the resulting action or remedy required should be clearly specified in the Rules.

Minor questions

Sections 3(a) and 3(c) of the Act when read together make it unclear as to whether the banker, that is the person or organisation, if any, who conducts the game and against whom gamblers stake their money, is or is not a participant. If the banker is, then many of our games

of chance are quite definitely unfair and may even be considered illegal under the interpretation of s 3(a) concerning equal chances between all participants. On the other hand if the banker is not a participant then s 3(c) concerning the rotating of the role of banker between participants is evidently in need of some clarification.

Section 73 of the Act concerns members of the New Zealand Lotteries Commission, being five persons appointed by the Minister of Internal Affairs having regard to the appointees' knowledge, skill or experience relating to the functions and powers of the Commission, plus the Secretary for Internal Affairs. Given that one of the functions of the Commission is to make rules regulating the conduct and operation of New Zealand Lotteries and as I have argued many such regulations are of a statistical nature, it would seem appropriate that at least one member have significant statistical training. Failing this, a statistician could be co-opted to assist with such functions of the Commission in terms of its power to enter into arrangements under s 86(2) of the Act. The evidence to me seems to suggest that neither of these events has occurred.

Thirdly, s 28 of the Lotto Rules concerning prizes in excess of $1,000.00 which are posted in the form of a cheque to winners, deems such prizes to have been received by the winner at the time when the letter containing the prize would in the ordinary course of post be delivered. This seems heavily stacked in the Commission's favour, in that the Commission appears to be absolved of all financial responsibility a day or two after posting out the winners' cheques. In these days of consumer awareness and protection I feel that the rule makers have been unduly stringent.

Casino gambling and Amendments to the Act

If the introduction of legal casino operations into New Zealand is to go ahead then this will clearly have to be preceeded by major changes to the Act. Many of the points I have raised above are highly relevant, particularly in respect of the variety of new gambling devices and their statistical quality control. I consider it to be imperative that in the event of such changes taking place to the Act, a statistician or someone with expertise in the statistical aspects of gambling and quality control be included in any group convened to draft new legislation. □

Further Reading

Readers of this journal who are interested in further investigation of these difficulties may, after perusing the relevant Act and its associated rules and regulations, wish to consult the following:

Bellhouse, D R "Toward a Legal Definition of 'distributed at random'." *University of Western Ontario Law Review*, 18; 361-368, 1980.

Bellhouse, D R "Fair is Fair: New Rules for Canadian Lotteries." *Canadian Public Policy*, 8; 311-320, 1982.

Barit, W. "Testing the Golden Kiwi." *New Zealand Statistician*, 19; 33-36, 1984.

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years, but the consequential amendment of subs (4) was not made.

The constitutional status of this footnote is not clear. What is perhaps significant is that eventually Parliament felt it necessary to amend the provision in s 2 of the Bylaws Amendment Act 1976. Cumbrous though the procedure may be, such amendment, it is suggested, offers the safest course and has the signal virtue of placing the text of the law beyond doubt.

Conclusion

The reader will have gathered that this paper was partly conceived as a legal flight of fancy. However, two serious points lurk beneath the slightly strained interpretation of s 116 of the Protection of Personal and Property Rights Act 1988 essayed here. First, there is the unsatisfactory divergence between the Courts and the Clerk of the House in the matter of the duty they owe to implement Parliament's will. Judicial protestations of fidelity to the published text and querulous constitutional excuses for declining to interfere in situations where the Clerk of the House and parliamentary counsel experience no embarrassment in intervening would seem wholly unjustified. Secondly, this episode affords a supplementary justification, if such were needed, for encouraging the Courts to eschew "scrutinis(ing) molecularly" the legislative text (*Arataki Honey Ltd v Minister of Agriculture* [1979] 2 NZLR 311, 316 per Jeffries J) and to give the widest effect to s 5(*j*) of the Acts Interpretation Act 1924, adopting that purposive method of statutory interpretation that is finally coming to be hailed as "the dominant approach" in New Zealand. (See Burrows, *Recent Developments in Statutes and their Interpretation*, 1988, pp 17-26.) □

1 The relevant rules are set out in full in Bennion's valuable book, *Statutory Interpretation* (1984: London) p 109.

2 [1957] AC 436. The Red Queen in *Alice's Adventures Through the Looking-Glass* remarked that she sometimes believed as many as six impossible things before breakfast: was this, perchance, one of them?

3 To the extent that s 5(*l*) of the Acts Interpretation Act 1924 expressly permits a provision to be amended or repealed in the same parliamentary session as it was passed, such a thing becomes possible. On reflection, a statute that partially repeals itself is only mildly odder than the Acts Interpretation Act 1924 that lays down that its provisions shall apply to its own interpretation.

4 This is of course to assume that "repeal" of a provision covers the abrogation of an enactment that never actually came into force. In as much as a provision in a statute can be held in abeyance, and repealed in a later Act before it has actually been brought into force, is such an eventuality utterly incredible? See Bennion, *Statutory Interpretation* pp 413-4.

5 Nor does the more relaxed approach to statutory interpretation prevailing in New Zealand Courts in some recent cases necessarily assist the situation. Even if Courts do now feel less reluctance to refer to Hansard and other "extrinsic" aids, once considered utterly beyond the pale, as Sir Robin Cooke, one of the more vigorous promoters of this shift, acknowledged in *Real Estate House (Broadtop) Ltd v Real Estate Agents Licensing Board* [1987] BCL 1311, "An explanatory note or a speech in the House could not be allowed to alter the meaning of an enacted provision which in its terms is clear beyond doubt." See, generally, Burrows, *Recent Developments in Statutes and their Interpretation* (1988) pp 17-26.

6 There are several illustrations of errors appearing in English printed Acts passed, where, upon it being discovered that the printed Act was not a faithful replica of the Act as passed, the printed Act has been withdrawn. The Elementary Education Act 1882 was withdrawn owing to discrepancies between the two versions, and the Companies Act 1907 and the Landlord and Tenant (Rent Control) Act 1945 contained significant errors requiring reprintings.

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(iii) The principal defence issue was that there was insufficient evidence to go to the jury that the material involved was cannabis.

At his jury trial, in Rotorua, Cruse was acquitted of cultivation but convicted of possession of cannabis for supply of the harvested cannabis and of permitting his premises to be used for the storage of cannabis belonging to two persons who were subsequently to be convicted of manslaughter of a man suspected of stealing their supply, but who were not witnesses of the Cruse trial.

Cruse appealed against these convictions. On the evidence the Court of Appeal could have dealt with the case on the basis that the jury may have accepted evidence that Cruse knew sufficient about the cannabis to be caught by confessional hearsay. At page 12:

> The Courts have accepted various kinds of evidence short of scientific analysis as capable of proving beyond reasonable doubt that a particular substance was the controlled drug. We can see no justification for any judicial attempt to limit what may suffice. It must always be a question of fact in a particular case. *There is no logical reason* why circumstantial evidence may not be sufficient, although obviously always care must be taken to ensure that it is capable of pointing unequivocally to the nature of the substance.
>
> A factor which can be of importance and is of importance in this case in our opinion is whether an alternative substance is a reasonable possibility. There is no onus on the defence to prove in such a case that the materials were not cannabis, but if the defence are unable to point to anything in the evidence raising a reasonable doubt on the question of its identity, then the conclusion that the circumstantial evidence put forward by the Crown is enough is one more readily to be drawn.

In *Devcich* six kgs of cannabis was found concealed in the appellant's barn. Evidence suggested it had been grown in a plot in trees on the farm. There was no confessional hearsay. The DSIR certificate was excluded. Evidence of an experienced drug detective was said to be adequate evidence to go to the jury that the material was cannabis. This was so even though he allowed in evidence that the issue whether resin was present was one for a scientist. The Court of Appeal thought that that one question was inadequate to detract from his otherwise ample expertise.

In every case it is a question of fact and circumstantial evidence may be sufficient.

The attack on the admissibility of the analysis certificate will prove to be a less fruitful and successful defence in future. □

Rival Justices

Begin by considering the intimidating range of questions about what justice requires and permits, to which alternative and incompatible answers are offered by contending individuals and groups within contemporary societies. Does justice permit gross inequality of income and ownership? Does justice require compensatory action to remedy inequalities which are the result of past injustice, even if those who pay the costs of such compensation had no part in that injustice? Does justice permit or require the imposition of the death penalty and, if so, for what offenses? Is it just to permit legalized abortion? When is it just to go to war? The list of such questions is a long one.

Attention to the reasons which are adduced for offering different and rival answers to such questions makes it clear that underlying this wide diversity of judgments upon particular types of issues are a set of conflicting conceptions of justice, conceptions which are strikingly at odds with one another in a number of ways. Some conceptions of justice make the concept of desert central, while others deny it any relevance at all. Some conceptions appeal to inalienable human rights, others to some notion of social contract, and others again to a standard of utility. Moreover, the rival theories of justice which embody these rival conceptions also give expression to disagreements about the relationships of justice of other human goods, about the kind of equality which justice requires, about the range of transactions and persons to which considerations of justice are relevant, and about whether or not a knowledge of justice is possible without a knowledge of God's law.

So those who had hoped to discover good reasons for making this rather than that judgment on some particular type of issue – by moving from the arenas in which in everyday social life groups and individuals quarrel about what it is just to do in particular cases over to the realm of theoretical inquiry, where systematic conceptions of justice are elaborated and debated – will find that once again they have entered upon a scene of radical conflict. What this may disclose to them is not only that our society is one not of consensus, but of division and conflict, at least so far as the nature of justice is concerned, but also that to some degree that division and conflict is within themselves. For what many of us are educated into is, not a coherent way of thinking and judging, but one constructed out of an amalgam of social and cultural fragments inherited both from different traditions from which our culture was originally derived (Puritan, Catholic, Jewish) and from different stages in and aspects of the development of modernity (the French Enlightenment, the Scottish Enlightenment, nineteenth-century economic liberalism, twentieth-century political liberalism).

Alasdair MacIntyre
Whose Justice, Which Rationality?
(1988)