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New Zealand Bar Association

The growth of the separate or independent bar has been a feature of the New Zealand legal profession in recent years. While the number of active, full-time practising barristers is difficult to assess accurately, the approximate number at the present time would seem to be about 200. Of that number, perhaps 25 are full-time, practising Queen's Counsel.

By comparison with those practising in the field of litigation as barristers and solicitors, either on their own account or in law firms, the separate bar therefore remains relatively small. However, there is little doubt that its influence is very great and that barristers sole have been fulfilling a perceived need in respect of litigation work. That need can perhaps be best described as one for specialist advocates, who are appearing in Court frequently, who are therefore known to the Judges and who are sufficiently free from office administration and client day-to-day servicing demands to be able to concentrate their time and energies as being counsel learned in the law and experienced in Court.

For some time, there has been a feeling among barristers at the separate bar that the time had come when the formation of their own association dedicated solely to fulfilling the interest of barristers sole and to issues affecting the Courts was needed. Such an association was not seen as supplanting the Law Society but as being complementary to it. However, there had developed amongst barristers a community of spirit which most wished to foster. There were also thought to be some issues which were peculiar to barristers sole which the Law Society, representing all lawyers, might not be able to pursue.

Accordingly, some two or three years ago Charles Hutchinson QC, as one of his last acts before moving into a much-earned retirement, called a meeting of barristers in Auckland to consider the formation of an association.

Further meetings followed, from which was established a steering committee charged with examining the viability of creating a Bar Association and with making recommendations as to the form of such an Association. The Chairman of that Committee was Mr E W Thomas, QC (now Mr Justice Thomas) who later became the founding President when the Association was ultimately formed.

One of the initial issues that arose was the relationship between the Association and the Law Society. Many barristers were concerned that nothing should be done which might sour the relationships which they had with the Law Society. On the other hand, the need for a separate Association was also seen by many as being of considerable importance. The matter was compounded by the Law Society deciding around this time to establish a Barristers' Section in the Society.

The possibility of a separate Association and a Barristers' Section of the Law Society was not attractive because of its potential divisiveness and accordingly negotiations took place between the respective Presidents (Mr Thomas and Mr Graham Cowley). These culminated in the signing of a document entitled "Memorandum of Co-operation between the New Zealand Law Society and the New Zealand Bar Association" which laid down rules intended to prevent any clash between the respective Groups. In addition, it was agreed that in early 1992 a postal ballot is to be held of barristers in New Zealand to determine whether they wish to remain as members of a separate Association or to become members of a section of the Society. According to that vote will the future of the fledgling Association be determined, it being agreed on all sides there "should be only one organisation available to represent barristers practising at the independent bar".

None of that of course is intended to abrogate the right (and obligation) of barristers to continue to remain full members of the Law Society. That is the position, for example, in Western Australia, which has a semi-fused profession not unlike New Zealand.

Following its formation the Bar Association in February held its inaugural dinner in Wellington, emphasising its national character. Speeches were delivered by Sir Robin Cooke, Mr Justice Thomas (as he had by then become), Dr George Barton QC (who had delivered his patent to the High Court on that day) and Judge Pethig. The dinner was attended by 100 practising barristers and a further 20 invited guests including High Court Judges, the Chief Judges of the District Court and Labour Court and the President of the New Zealand Law Society.

The Association's next planned venture is a weekend seminar in June at which papers are to be presented on topics of immediate relevance to barristers and other similar activities are to be held on a regular basis.

A noteable feature of the Association has been the widespread support given to it by barristers. It has generally been acknowledged that Mr Justice Thomas' early initiatives, hard work and lobbying were critical to its establishment but there appears to be a continuing wave of enthusiasm among barristers for its maintenance as a permanent part of the legal system in New Zealand.

With the development of sets of Chambers that is occurring in Auckland and Wellington especially, it is hoped too that it may serve as a focal point for providing young lawyers who have chosen to practise in the Courts as barristers rather than from law firms with a degree of support, advice and assistance that they have hitherto not always been able to obtain. If, as a result, standards of advocacy are improved, then the Association for that reason alone will be a success.

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Case and Comment

The National Women's case in the Court of Appeal

In *Green v Matheson* [1989] BCL 2056, the Court of Appeal determined what will probably be the first of a number of issues arising from the Report of the Cervical Cancer Inquiry in 1988. That issue was whether all emotional or psychological effects of a personal injury by accident as defined in s 2 of the Accident Compensation Act 1982 are "physical and mental consequences of any such injury or of the accident" within that definition, so as to bar recovery of damages at common law. The statutory bar occurs in s 27 of the 1982 Act, which states that where any person suffers personal injury by accident "no proceedings for damages arising directly or indirectly out of the injury . . . shall be brought in any Court in New Zealand independently of [the 1982] Act". In a contemporaneous judgment, *Willis v Attorney-General* [1989] BCL 2063, the Court dealt with the separate but related issue arising from the relationship between actions for false imprisonment and the 1982 Act. The two judgments must be read together for a full picture of the Court's general approach. However, in this note the *Matheson* case will be treated separately on its particular facts.

The facts of the Matheson *case*

The background to the case is well known. The defendant was the plaintiff's gynaecologist and the specialist with overall responsibility for her care and management whilst she was enrolled as a patient at the National Women's Hospital. It is alleged that a selected group of patients suffering from carcinoma in situ of the cervix, including the plaintiff, were deliberately treated by lesser procedures than was common for the purpose of enabling the defendant to attempt to prove that carcinoma in situ was not a pre-malignant disease. The plaintiff also alleges that, having been diagnosed as having carcinoma in situ, she was managed in accordance with this policy without her knowledge or consent. Ultimately she contracted invasive cancer of the cervix and was obliged to undergo a hysterectomy and a pelvic lymphadenectomy, involving surgery and radiation treatment.

The plaintiff pleaded three causes of action – trespass to the person, breach of fiduciary duty, and negligence. The gist of the claim for trespass to the person was an allegation that the treatment she received was less than adequate or proper, and that her consent to that treatment was obtained by false representations, therefore not amounting in law to a true or valid consent. In addition, that she underwent a large number of unnecessary procedures, each of which constituted a trespass to her person. These allegations also formed the heart of the actions of breach of fiduciary duty and negligence.

Whilst the plaintiff's allegations covered periods of time both before and after the passing of the Accident Compensation Act 1974, the statement of claim contained – in respect of each cause of action – a disclaimer of any allegation that the plaintiff had suffered personal injury by accident and of any intention to recover damages arising directly or indirectly out of any such personal injury by accident. Notwithstanding this disclaimer, in the case of both breach of fiduciary duty and negligence it was pleaded in respect of the period after 1 April 1974 (when the Accident Compensation Act 1974 came into force) that the plaintiff had suffered considerable pain and suffering as the result of the defendant's actions, thereby implying that such claims were not barred by the 1982 Act.

According to the Court of Appeal, everything for which the plaintiff sued fell within the ordinary meaning of the words "personal injury by accident", which was "well capable of applying to any adverse consequences to a patient's health caused by wrong medical treatment" without the need to refer to the extensory concept of "medical misadventure". However, the Court had no doubt that the plaintiff's claim equally fell within the category of "medical misadventure". According to Cooke J:

> It all arose from the way in which she was dealt with as a medical case. If her case was mishandled, it was her misfortune or ill-luck; this falls squarely within the idea of misadventure. To the extent that she may be able to establish that she suffered in any actionable way from any acts or omissions of the defendants, we think that inevitably she must establish "medical misadventure". In other words, she could not succeed in the Court without proving "medical misadventure" and the Act does not allow her to claim damages for this.

The question of compensatory damages

The plaintiff claimed exemplary damages, which clearly are not barred by the 1982 Act (*Donselaar v Donselaar* [1982] 1 NZLR 97; *Auckland City Council v Blundell* [1986] 1 NZLR 732). Compensatory damages arising from any injury resulting from an accident occurring before 1 April 1974 (when the 1974 Act came into force) are not barred as the result of the accident compensation legislation. There may of course, be a problem under the Limitation Act 1950 in this respect. However, the limitation period may be extended in cases of

fraud (s 28 of the 1950 Act) and fraud for this purpose includes wilful non-disclosure by fiduciaries (*Inca Ltd v Autoscript (NZ) Ltd* [1979] 2 NZLR 700: *Matai Industries Ltd v Jensen* [1988] BCL 857).

The key question, then, revolved around the availability of compensatory damages in respect of acts or omissions occurring on or after 1 April 1974. Here the Court adopted definitively the obiter suggestion in *Blundell* (at 738-9) that:

> . . . once there is a personal injury by accident within the scope of the Act, all the emotional or psychological effects fall within the statutory words "The physical and mental consequences of any such injury or of the accident". Those words are not limited to mental consequences identifiable by some particular medical or psychiatric description, nor to what is often called shock or trauma. Parliament cannot have intended fine distinctions in this area.

The consequences pleaded for the plaintiff — including "interference with her bodily integrity", "diminished life expectancy" and "being made the subject of research and experimentation without her knowledge and consent" — were held to be within the words "The physical and mental consequences of any such injury or of the accident". These words, according to Cooke J "are all-embracing as regards effects upon the person". In reaching their conclusion, the Court adopted the view of Henry J in *Dandoroff v Rogozinoff* [1988] 2 NZLR 588, that:

> precise classification of feelings and of mental consequences is not feasible and that there must nearly always be the elements of overlap which do not allow of finite distinction . . .

Thus the tenable view that a distinction between medical or psychiatric conditions and distress, humiliation and the like is not only feasible but suggested by the pattern of the legislation (see S M D Todd [1987] NZLJ 234) has now been rejected. Whilst this simplifies the immediate question, the Court's reasoning has a number of consequences, some predictable and some perhaps less so.

Consequences

The first, and most predictable, consequence is a considerable reduction in the monetary compensation which is potentially recoverable in cases of this type. Whilst the plaintiff had claimed several hundred thousand dollars in general and aggravated damages under each head of claim, the maximum allowable global figure under the 1982 Act is $27,000. Of course, had the "lump sum" figure in the 1974 Act been amended to keep pace with inflation it would have been significantly higher (around $95,000 on one estimate: *The Press*, 22 November 1989) but still nowhere near the sum claimed by the plaintiff.

Secondly, whilst "diminished life expectancy" can certainly be seen as a physical consequence of the medical treatment, is it necessarily the case that "interference with bodily integrity" and "being subjected to research and experimentation" fall into the same class, or that awareness of such matters is to be seen inevitably as a mental consequence of personal injury by accident? These latter allegations may be seen as merely being descriptive of the fact that one important function of the tort of battery is to prohibit unwanted intrusion on another's person whether injury-causing or not: indeed, historically this is the very basis of the tort. Damage is not an ingredient of the action, battery being actionable per se, and the element of injury to feelings has led to quite substantial awards in cases where the plaintiff has suffered no physical injury at all (see *McGregor on Damages*, 15 ed, London, 1988, p 1024).

To draw an example from recent medical disciplinary cases, a doctor who conducts an unnecessary examination of a female patient's breasts for purposes unrelated to medical treatment commits a battery. It is submitted that it remains strongly arguable that that patient should not be seen as thereby suffering a personal injury by accident within the meaning of the Accident Compensation Act 1982. If there is no personal injury by accident, damages will remain available in respect of the emotional consequences of the battery which remain outside the scope of the 1982 Act because they do not derive from an injury within the meaning of the Act. The unavailability of aggravated compensatory damages in cases such as *Matheson*, whilst such damages remain available for — say — the unwanted haircut or unauthorised kiss, will then present an anomaly. This anomaly will be compounded if current proposals to abolish lump sums under the accident compensation scheme are carried through.

Against the above analysis — as we shall shortly see — is the counter argument that the touching being an accident in the sense of being an unlooked-for mishap or untoward event which is not expected or designed (*Fenton v Thorley* [1903] AC 443), the emotional response to what has happened converts the whole into personal injury by accident.

Thirdly, since battery has always been regarded as being actionable per se, nominal damages should surely still be available in an appropriately-framed case in respect of the insult to the person which is the gist of the tort. Such damages will not necessarily arise "directly or indirectly out of the injury . . ." under s 27 of the 1982 Act. They might be said to arise directly or indirectly out of the accident, but it is not the accident which triggers the bar in s 27. It may be that a plaintiff in a case of this kind should also be able to recover damages representing, say, the plaintiff's distress at having been misled by a person in a position of trust and authority. It is arguable that such a head of damage remains conceptually separate from the "personal injury by accident" which may result and it is the injury component of this concept which determines the bar on damages. The trial Judge would then be left to separate such damages from those stemming from the personal injury by accident, a task which may be only slight less artificial than that which the Court was keen to avoid in its reasoning on the "mental consequences" claim presented in the present case. A claim for

damages on this basis seems close to the allegation of breach of fiduciary duty in *Matheson's* case. However, in *Matheson* the heads of damage alleged to have been suffered as a result of the alleged breach were pain and suffering and all the other consequences pleaded in the claim for trespass to the person and negligence: the kind of consequences, in other words, which would normally attach themselves to a personal injury by accident.

An alternative construction of the two judgments would be to draw from them the conclusion that the causes of action are barred as such, other than in the context of an action for exemplary damages. Whilst in the *Matheson* decision the Court of Appeal directed its reasoning to the consequences alleged to have flowed from the pleaded torts, in *Willis* (where the main allegation was one of false imprisonment) the Court stated that damages (other than exemplary) for assault or battery would be so barred. However, it is submitted that this statement must be read in the context of the Court's later reference in the *Willis* judgment to detention "accompanied by physical injuries". As illustrated earlier in this note, even a battery need not lead to an "injury" within the meaning of the 1982 Act and on this basis alone should not attract the statutory bar.

Further, to hold that nominal and compensatory damages were ruled out in all circumstances in respect of assault and battery might be to eliminate the cause of action with no certainty that anything would replace it since, under s 79 of the Accident Compensation Act 1982, compensation for "pain and suffering" is at the Corporation's discretion and must be of "sufficient degree" to justify payment. It is difficult to believe that Parliament can have intended such a result. Nevertheless, in *Re Chase* [1989] 1 NZLR 325, which was not cited in either the *Matheson* or *Willis* judgments, the Court of Appeal appeared to hold that the 1982 Act had this effect.

In the *Chase* case, the deceased was shot and killed by police officers whilst executing a search warrant in his flat. One cause of action pleaded by the administrator of his estate against the Attorney-General (as nominal defendant) was assault, for which compensatory damages were claimed. These damages were associated with fear of harm to Chase's person. According to Cooke P (at p 329):

> As to personal harm, the technical distinction between trespass to the person and battery is relied on; it is pleaded that before the shooting the police created in the deceased a grave apprehension of imminent harm or offensive conduct. The contention is that this constituted an assault and was not personal injury by accident within the meaning of the Accident Compensation Act. I think, however, that an assault falling short of physical harm is nevertheless an accident from the point of view of the victim; and that the mental consequences of the assault such as fear are "personal injury by accident" within para (a)(i) of the non-exhaustive definition of that term in s 2 of the Act. Everything suffered by the deceased personally in the course of the police raid was either physical or a mental consequence of an accident.

The Court (comprising also Somers J and Henry J) held unanimously that the claim was statute barred. Whilst the Court was here dealing with a claim for compensatory, as opposed to nominal, damages, the analysis it provided would apply equally to the latter.

It is respectfully submitted that the analysis in *Chase* is flawed in that it overlooks the "injury" component of the definition of "personal injury by accident". In order for "mental consequences" to be covered under para (a)(i), there must first be a *personal injury* by accident. Once such an injury exists, then the mental consequences of "any such injury or of the accident" are also covered by the definition. It seems relatively clear from the definition that the mental consequences envisaged by para (a)(i) are both separate from, and contingent upon, some initial injury having been suffered.

To hold, as the Court appeared to hold in *Chase*, that claims for the mental consequences of all "accidents" are covered by the Accident Compensation Act is, with respect, to stretch the statutory wording too far, given the wide meaning attaching to the word "accident". Such an analysis would have the effect of removing a major function of the tort of battery, that of deterring interference with a person's bodily integrity, with no guarantee of any replacement (whether in terms of compensation or deterrence). As an example, consider the earlier hypothetical case of the patient whose doctor deliberately conducts an unnecessary examination. If an action for compensatory damages is statute barred, what compensation would the mental consequences of the invasion of bodily integrity attract under s 79 of the 1982 Act? It is to be hoped that this aspect of the decision will be reconsidered.

It might be argued that the continuing availability of exemplary damages in the intentional torts provides a practical, if rough, solution to many of the problems outlined above. This might be thought particularly to be so since the boundary between aggravated damages and exemplary damages remains cloudy notwithstanding Lord Devlin's analysis in *Rookes v Barnard* [1964] AC 1129. Nevertheless one should not overlook the fact that the assessment of exemplary damages is further complicated in cases affected by the 1982 Act — such as the *Matheson* case — due to the necessity to assess exemplary damages without the balance provided by the corresponding assessment of compensatory damages (see the comments of Cooke J in *Donselaar v Donselaar* [1982] 1 NZLR 97).

Fourthly, in the *Willis* case, in analysing the scope of the 1982 Act, the Court of Appeal drew a distinction between those torts which imposed a duty of care for the protection of the plaintiff's personal safety (thereby potentially attracting the bar on claims for damages) and those torts which were concerned to safeguard other interests. As we have seen, the tort of battery, arguably, does not fall exclusively into the former category and the *Willis* analysis might thus support point two above by analogy. But it raises a further question in

relation to more clear-cut causes of action such as the tort of deceit, which are not traditionally analysed in terms of personal safety and which might also be brought into play in circumstances of this type (see, for example, the discussion of *Hatcher v Black, The Times* 29 June 1954, in P D G Skegg, *Law, Ethics and Medicine*, Oxford, Clarendon Press, 1984, pp 93 ff). The tortious measure of damages is recognised as the correct measure for deceit (*Doyle v Olby (Ironmongers)* [1969] 2 QB 158) and awards have been made for worry, strain, anxiety and unhappiness in such cases (see, for example, *Archer v Brown* [1985] QB 401). Unlike battery, breach of fiduciary duty and negligence, the cause of action in deceit will accrue before any personal injury by accident occurs in most medical cases. It will not arise directly or indirectly from injury, even although the continuing effects of the false representation necessary for the tort could be analysed as "medical misadventure".

Other issues

Whilst the *Matheson* case was concerned with a comparatively narrow issue, the litigation raises some fairly fundamental quesions of a wider nature which need to be resolved. These issues include the desirable balance between the Accident Compensation Act 1982, the common law, and professional self-regulation in a number of areas.

The first area is deterrence. Controversy surrounds the deterrent value of the common law remedies (see Richard S Miller, "The Future of New Zealand's Accident Compensation Scheme", *University of Hawaii Law Review*, Vol 1:1, p 1). Nevertheless, it is commonly recognised that the 1982 Act remains deficient in this respect. This highlights the need for an institutional counterweight. However, the procedures under the Medical Practitioners Act 1968 continue to attract criticism for their low maximum penalty and lack of independent accountability. Changes to the 1968 Act are stalled at the present time until the Government's occupational licensing group reports to Cabinet. If one accepts deterrence as a necessary attribute of the law in this field, the present situation thus offers the worst combination possible.

The second area is compensation. The *Matheson* case highlights the discrepancies between damages at common law and compensation under the 1982 Act in one particular area. It remains the case, of course, that the limited provision for lump sum compensation under the 1982 Act must be read together with the vastly greater scope of the legislation as compared with the common law and the more flexible forms of compensation available under the legislation. However, when considering the abolition of lump sums for pain and suffering, one should not overlook the "social contract" argument arising from the original introduction of the Accident Compensation Act 1974 and its removal of the ability to sue in tort. The *Matheson* decision illustrates how all-embracing that removal has been. In the context of the "social contract", it is worth remembering that in a compensation system geared primarily to earnings, women suffer discrimination: not only are their average earnings lower, but they are less likely to be earning at the time of sustaining an accident. Thus, the system of lump sum compensation is correspondingly more significant for women as a group not least because – in the present context – they tend to be the subject of "medical misadventure" cases more frequently than men, due in large part to their reproductive life cycle (see Carolyn Faulder, *Whose Body Is It?* London, 1985, p 4). If, as seems likely, lump sums are to be abolished, close attention should be paid to what is to replace them just as, in turn, they replaced remedies in tort.

The third, and most significant area, is that surrounding the broad ethical and legal issues of informed consent and randomised controlled clinical trials. This will no doubt be canvassed in the full hearing of *Matheson's* case and it is already the subject of a wide literature. No matter what legal outcome emerges from the experiment at National Women's Hospital, there can be no doubt that it is in this area that one must look for the most permanent reform.

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Damages for the mental consequences of false imprisonment

Willis v Attorney-General [1989] BCL 2063

The facts

For some years now a hardy perennial in examinations in the law of torts has been a problem question turning on the relationship between the tort of false imprisonment and the Accident Compensation Act 1982. The Court of Appeal expressly left open the extent to which causes of action in false imprisonment were barred by the 1982 Act, if at all, in *Blundell v Attorney-General* [1986] 1 NZLR 732, although obiter observations on the topic were made in that case. In *Willis v Attorney-General* [1989] BCL 2063, the Court addressed the question directly.

The three plaintiffs in *Willis* alleged that they had been wrongfully and unlawfully detained by Customs officers who suspected them of offences arising from the importation of four cars from the United States. Criminal charges were laid against two of the plaintiffs as the result of the investigation but the informations were dismissed after a summary trial in the District Court. All three plaintiffs then sued the Attorney-General alleging false imprisonment, and the plaintiffs who had been charged sued also for malicious prosecution and negligence. The trial Judge, Hillyer J, held that he should refer the issues to the Accident Compensation Corporation under s 27(4) of the 1982 Act. It was from this decision that the plaintiffs appealed.

The relationship between each cause of action and the 1982 Act will be treated in turn.

Malicious prosecution and negligence

The claims for malicious prosecution and negligence arose from allegations that an employee of the Customs Department had been under observation by the Department on suspicion of improper or fraudulent activities and that the Department had "used" the plaintiffs as a means of pursuing and punishing its employee. Amongst other things, the plaintiffs alleged considerable humiliation, inconvenience and distress under

each head of claim. They denied any allegation of personal injury by accident or claim for damages arising out of personal injury by accident.

As Cooke P noted, in delivering the judgment of the Court, on its face such an action is remote from the field of accident compensation. Under s 27(1) of the Accident Compensation Act 1982, an action for damages is not barred unless the claim is for damages arising directly or indirectly out of personal injury by accident. In its contemporaneous decision in *Green v Matheson* [1989] BCL 2056, the Court had noted that the phrase "personal injury by accident" must be interpreted as an integrated phrase and in accordance with the natural and ordinary use of language. As a consequence:

> In the context of an Act dealing with compensation for personal injuries, it is obvious that "personal injury by accident" refers to a mishap causing harm to the person. It cannot include harm to financial or property interests or reputation, even though the damages recoverable for that kind of harm may include in some cases redress for injured feelings or disappointed expectations.

Whilst the definition of "personal injury by accident" includes "the physical and mental consequences of any such injury or of the accident", as Cooke P observed, that wording is such that these consequences are not brought in unless there has been "personal injury by accident" in the first place. That latter phrase is, according to the Court, "total and non-technical". Whilst the 1982 Act was not coincident with the action for damages for personal injuries caused by negligence, which it was designed to supplant, "interpretations taking the bar in the Act beyond that field have to be carefully scrutinised". Cooke P continued:

> "Personal injury by accident" is an integrated phrase, to be seen and applied as a whole and without an unnatural breaking down which would rob it of the impact it makes as a whole . . . It is not an expression that would naturally be used in ordinary speech to describe malicious prosecution or breach of a duty to safeguard the plaintiff's proprietary or economic interests or reputation. The fact that damages for distress and the like may be claimed, and in some cases recovered, on these causes of action does not in the natural and ordinary use of language convert the incident complained of and its consequences into personal injury by accident.

Observing that a claim for damages was unaffected by the 1982 Act where the duty of care alleged to have been broken is not one imposed for the protection of the plaintiff's personal safety, Cooke P held that it followed as a matter of law that the action for malicious prosecution and negligence could not be barred by the Act.

False imprisonment

In respect of malicious prosecution and negligence, the answer had been relatively simple. The issues arising from the alleged false imprisonment, left open in *Blundell's* case, were muddier.

The plaintiffs claimed to have been detained against their will and the statement of claim alleged – amongst other things – humiliation and distress. However, there was no suggestion of an assault or battery. Nor is force necessary to perfect a cause of action in false imprisonment. Force is not essential to the cause of action, to the degree that a person may be imprisoned (in the sense of having their liberty totally restrained) without knowing it (*Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44). In such a case only nominal damages will be appropriate if the person concerned has suffered no damage (*Murray v Ministry of Defence* [1988] 1 WLR 692).

With this background to guide it, the Court of Appeal then applied the tests of the purposes of the Accident Compensation Act 1982 and "the natural and ordinary use of language". In doing so, the Court reached the conclusion that false imprisonment as such was outside the purview of the Act. In Cooke P's words "In ordinary speech we do not think that it would be said of anyone who had been detained as the plaintiffs claim to have been that he or she had suffered personal injury by accident". The Court held that the claims for false imprisonment were not barred by the 1982 Act, noting that:

> If a plaintiff were to claim damages (other than exemplary) for assault or battery, the position would be different. Such claims are barred . . . . If the detention of a plaintiff has been accompanied by physical injuries, damages cannot be claimed for those or for the pain and suffering they have caused.

What, then, of the borderline cases in which personal injury has been sustained? Of these, Cooke P stated that:

> No doubt there is a grey area in which it can be argued that distress or humiliation or fear for which a plaintiff alleging false imprisonment seeks damages amounts to or overlaps with personal injury by accident. But to make the Act work as Parliament must have intended . . . we think that the clear rule must be adopted that any claims for any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope of the Accident Compensation system and unaffected by the Act. If such mental consequences have been caused by both false imprisonment and assault or battery, a plaintiff can still claim damages for them. It is enough if the false imprisonment has been a substantial cause.
>
> Trial judges will adopt a commonsense approach, guided by what is within the broad spirit of the Accident Compensation system and what is outside it. Any difficulties are likely to be more theoretical than real.

In remarking that a plaintiff can still claim damages for mental consequences caused by both false imprisonment and assault or battery, Cooke P was presumably intending to eliminate from the calculation of such damages the pain and suffering resulting from physical injuries (having previously stated that damages could not be claimed in this latter respect). Nor should it be overlooked that damages for the mental

consequences of such injuries in terms of humiliation, distress and the like are now statute barred after *Matheson*.

Comment

The dividing line which the Court has established in *Willis* will eliminate most of the problems which have emerged in this particular area. As with *Matheson*, it might seem that Cooke P's references to assault and battery being statute barred should be read in context as assault and battery giving rise to physical or mental injury. Whilst it is submitted that a "technical" assault or battery, giving rise to no mental or physical injury in the ordinary sense of those words should remain actionable, such a conclusion would now almost certainly require a revision of the Court's views in *Re Chase* [1989] 1 NZLR 325 (discussed above in the context of *Matheson's* case). Such a cause of action may well arise in conjunction with false imprisonment in cases of wrongful arrest, the classic example being the store detective who seizes a suspected shoplifter by the arm (battery) or who indicates that, unless the suspect comes quietly, he or she will be forcibly detained (assault). Certainly the reasoning in *Chase* is difficult to reconcile with the underlying theme in *Willis*, that interpretations taking the bar in the 1982 Act beyond the field previously covered by personal injury actions in negligence have to be carefully scrutinised. Given that neither assault nor battery require proof of injury to the person in order for the plaintiff to succeed, it seems strongly arguable that neither tort is one primarily imposed for the protection of the plaintiff's personal safety (one criterion adopted by Cooke P in *Willis* for holding that the common law actions in that case could proceed). The torts – as the decided cases tend to illustrate – seem far more closely concerned with the protection of bodily integrity from what may be described (for want of a better word) as insult.

That problem cases will still arise even were *Chase* to be reconsidered is illustrated by *Re Attorney-General: Decision 1011* [1983] NZACR 553. In this case the appellant, while driving a car, was stopped and arrested by the police under the mistaken belief that he was a dangerous criminal. The appellant's claim for damages for assault, wrongful imprisonment and malicious searches was referred to the Accident Compensation Appeal Authority.

Regrettably the Appeal Authority's decision lacks any description of the methods used to apprehend and arrest the appellant, although it was noted that the chain of events was not "physically traumatic" (newspaper reports at the time indicated that the appellant was led from his car at gunpoint). However, the Appeal Authority stated that it could "be readily assumed that the circumstances of the arrest and subsequent interrogation would produce emotional reactions including fear and uncertainty". In this context it was alleged that the appellant had suffered mental injury in the form of a severe anxiety state of mind, aggravating a pre-existing mental condition. The Appeal Authority went on to hold that the actions of the police constituted an external causative incident which assumed the character of an "accident" because of the resulting mental state, which amounted to an injury (applying *Jones v Secretary of State for Social Services* [1972] AC 944).

After *Willis* it is clear that a chain of events of the kind in *Re Attorney-General* will not operate so as to bar an action for false imprisonment or unlawful search. But where, as in the latter case, a person's mental state is such that an assault causes a discernible pychiatric condition, ie an "injury" within the meaning of the 1982 Act, compensatory damages under that particular cause of action will be statute barred not only in respect of mental injury itself but also, following *Matheson*, in respect of emotional responses to that injury. If *Chase* is to be followed, the whole chain of events in *Re Attorney-General* would be covered by the 1982 Act in so far as allegations of assault are concerned even without a medically recognised injury.

Who decides whether a claim is barred?

In *L v M* [1979] 2 NZLR 519, a majority of the Court of Appeal held that what is now s 27(4) of the Accident Compensation Act 1982 gives the Accident Compensation Corporation exclusive jurisdiction to determine whether or not a person has suffered personal injury by accident. Further that, if the Corporation decides that there is cover in a particular case then, in the absence of a successful appeal, the Court must declare that any action for damages is barred. Cooke J, as he then was, dissented, holding that whilst the Corporation has exclusive jurisdiction to determine cover the Court must be left to decide whether proceedings were barred.

L v M was not mentioned in either *Matheson* or *Willis*. Cooke P was the only Judge in *Matheson* and *Willis* who had sat on *L v M*, and in *Matheson* His Honour provided a gloss on the majority decision in *L v M*. Referring to s 27(3) of the 1982 Act, which gives the Corporation exclusive jurisdiction to determine whether or not any person has suffered personal injury by accident, and to s 27(4) which requires a reference to the Corporation if any such question arises in Court proceedings, Cooke P stated that:

> These provisions must refer to real questions. If on the true interpretation of the Act there can be only one answer, namely that the claims or some of them are barred, Parliament cannot have intended Court proceedings to be delayed by a reference to the Corporation. It would only be an idle and time-consuming ritual. Such references will be appropriate, for example, where there are questions of fact or of mixed law and fact needing to be elucidated by the Corporation's processes, or some issue requiring an exercise of a discretion by the Corporation. But in so far as what the plaintiff alleges clearly falls, on the true interpretation of the Act, within the prohibition of damages claims in s 27(1), there is no point in a reference to the Corporation and no requirement for one. It is then the duty of the Court to give effect to that prohibition, which is a key feature of the Act.

Similarly, in the *Willis* case, the Court, concluding that there was no question requiring reference to the Corporation, allowed the appeal, vacated the order made in the High Court, and permitted the action to

go to trial. This echoes the dissent of Cooke J in *L v M* where, on precisely this point, His Honour stated that in respect of allegations of false imprisonment:

> The elucidation or development of the common law in such areas, which will be necessary as part of the process of deciding whether the action does fall within the barring words [in the 1982 Act], seems naturally a function of the Courts (at p 528).

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The Shotter duty

The demise of the tortious duty of care espoused by Wylie J in *Shotter v Westpac Banking Corporation* [1988] 2 NZLR 316, now seems likely. In *Shivas v Bank of New Zealand* [1990] BCL 12, Tipping J was of the view that the *Shotter* duty was unnecessary and undesirable.

Shotter

In *Shotter*, Wylie J imposed a new tortious duty on bankers. His Honour noted that:

> A duty of explanation, warning or recommendation of separate advice arises when a bank should reasonably suspect that its customer may not fully understand the meaning of the guarantee and the extent of the liability undertaken thereby or that there is some special circumstance known to the bank which it should reasonably suspect might not be known to the prospective guarantor and which might be likely to affect that person's decision to enter into the guarantee.

It is, of course, a well-established principle that, because a guarantee is a contract *non uberrimae fidei*, there is no general duty of disclosure by a bank to an intending guarantor. Disclosure only has to be made where there is some aspect of the relationship between the bank and the principal debtor which the intending guarantor would not naturally expect to exist. (*Hamilton v Watson* [1845] 12 Cl & Fin 109; 8 ER 1339). Thus, matters affecting a principal debtor's creditworthiness do not, in general terms, have to be disclosed (*Seaton v Heath* [1899] 1 QB 782). The *Hamilton v Watson* formulation, with its limited disclosure requirement, has been extensively followed by Commonwealth Courts and while Wylie J was content to accept the continued validity of that formulation, he felt that a bank was also under a positive tortious duty of disclosure in the circumstances detailed in his test. His Honour had no doubt that the new duty could properly co-exist with the *Hamilton v Watson* rule, noting that the case of *Goodwin v The National Bank of Australasia Ltd* (1968) 117 CLR 173, which followed *Hamilton v Watson*, concerned "an alleged duty of disclosure, breach of which would be tantamount to a misrepresentation vitiating the contract. Negligence was not an issue . . .". And so it was that a new and additional duty of disclosure was cast on bankers.

The duty was eagerly seized upon by those acting for guarantors seeking to avoid liability. It was proffered as a defence in the applications for summary judgment in *Westpac Banking Corporation v McCreanor* [1988] BCL 234, *ANZ Banking Group (NZ) Ltd v Allport* [1988] BCL 867, *Westpac Banking Corporation v McDougall* [1988] BCL 865, *Westpac Banking Corporation v Duffy* (unreported decision of Heron J, High Court, Palmerston North, CP 197/88, 28 September 1988). *BNZ Finance Ltd v Penman* [1989] BCL 895, *Bank of New Zealand v Currie* [1988] BCL 2052, and was considered by Heron J in the application for an interim injunction in *Cockburn v Bank of New Zealand* [1989] BCL 807.

It was clear, however, that the duty was going to come in for close scrutiny. In *Allport*, it was argued that a bank that raises a customer's overdraft limit without reference to a guarantor, is in breach of the *Shotter* duty. Gallen J thought that the duty was "not without difficulty in this context and would . . . require argument in depth". In *Penman*, Master Hansen felt that, if the duty of care was found to exist at all, it was properly limited to a bank's own customers, although in the earlier decision of *McDougall*, he had noted that "[e]ven if [the guarantor] was not a customer of the bank in this particular case, I am satisfied that it is an arguable defence to say that a bank manager has a duty of care to an elderly, confused woman who has been told she is signing a document to open a bank account when in reality she is guaranteeing a sum of thirty thousand dollars".

In *McCreanor*, Hardie Boys J totally rejected the existence of any duty such as that proffered in *Shotter*. He noted:

> I have difficult in accepting that by invoking a tortious duty of care the Court should negate the very clear line of authority based on equitable principles that a Bank is under no duty to explain, except in the circumstances described in *Hamilton v Watson* and the authorities that have followed it . . . . Thus with great respect I cannot agree with the conclusion reached by Wylie J in the *Shotter* case . . . .

More recently, the validity of the *Shotter* duty arose for determination by Tipping J in *Shivas v Bank of New Zealand*.

Shivas

In this case, the trustees of a family trust had executed a guarantee and collateral memorandum of mortgage in favour of the bank. When the bank proceeded to enforce its securities, the trustees sought to avoid liability. They alleged, inter alia, that the bank owed them a duty of care in tort to correctly advise them as to the full extent of their liability under the guarantee, or, alternatively, to ensure or recommend that they had independent legal advice before signing. The *Shotter* duty was advanced in support of their allegations. Tipping J rejected these arguments, holding that, in his judgment, there was no such duty of care in tort to an intending guarantor, irrespective of whether or not the guarantor was a customer of the bank.

His Honour thought that there were a number of difficulties with the *Shotter* duty.

First, he had difficulty in reconciling the first limb of the *Shotter* duty, viz, that the duty arises when a bank should reasonably suspect that its customer may not fully understand the meaning of a guarantee and the extent of the liability undertaken thereby, with the more limited duty under the *Hamilton v Watson* formulation. Tipping J cited with approval the statement of Hardie Boys J in *McCreanor* noted above.

Secondly, His Honour considered that the second limb of the *Shotter* duty, viz, that the duty also arises where there is some special circumstance known to the bank which it should reasonably suspect may not be known to a prospective guarantor and which might be likely to affect that person's decision to enter into the guarantee, did not significantly differ from the traditional duty of disclosure set out in *Hamilton v Watson*. Tipping J noted that "the formulations are so similar that to complicate matters by having parallel but not identical duties in tort and as a matter of fiduciary obligation is undesirable".

Thirdly, His Honour observed that if there were such a duty as formulated in *Shotter*, its breach would not allow the guarantee to be set aside, but merely permit recovery of damages in such a situation

> would of necessity be complicated by the possibility or probability, according to the circumstances, that the intending guarantor would have proceeded with the transaction after full explanation or independent advice.

In the result, His Honour noted that there were "other and sufficient remedies" available.

Finally, Tipping J was of the view that, as a matter of policy, the position of a guarantor was already adequately covered in law. He noted:

> If the guarantor cannot succeed on one or other of the recognised causes of action in my view the pendulum would be swinging too far if one were to permit an action for the tort of negligence on the premise not of advice negligently given but on the basis of a failure to explain, warn or recommend separate advice . . . . A reasonable balance must be struck between a *laissez faire* approach and one of undue paternalism . . . . In my judgment the balance between the parties is satisfactorily struck in terms of the protection available to a guarantor without his being able to invoke additionally a duty of care in tort of the kind in question.

In all the circumstances, His Honour found that there was no duty of the kind formulated in *Shotter*.

The likelihood of the *Shotter* duty being accepted as a proper incident of the banker-customer relationship, now looks remote. Whilst bankers will undoubtedly welcome Tipping J's decision for its rejection of the *Shotter duty*, there is, in reality, no practical lessening of potential lender liability, given the essentially similar nature of the *Shotter* duty to that of the doctrine of unconscionability (see the writer's article "Guarantees — Is there a new duty on banks?" [1988] NZLJ 319), is doubtful. However, bankers will, perhaps, find some comfort in Tipping J's view that the existing laws governing the disclosure obligations under the bank-customer relationship, properly strike the right balance in terms of the legal protection afforded to intending guarantors. Yet, while that view is undoubtedly correct at law, it was the Law Reform Committee of South Australia in its report "Reform of the Law of Suretyship" (1977) that described the *Hamilton v Watson* formulation as reflecting the "commercial morality in the *laissez faire* era of 1845" which produced "an intolerable situation in 1976". In New Zealand, reform has been mooted by the Ministry of Consumer Affairs in its 1988 discussion paper "Consumers and Credit" and it seems reasonable to predict that we will soon see further consumer protection legislation which places greater statutory duties of disclosure on banks.

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The Glasgow lease — a clue?

By W K S Christiansen, Associate Professor, Head of Department of Property, University of Auckland

Readers might perhaps recall an article on the Glasgow lease at [1983] NZLJ 348. This recorded that extensive research had failed to discover any connection between the form of perpetually renewable ground lease found in New Zealand and the city of Glasgow in Scotland.

In fact, a definitive relationship between the lease and the name it has acquired remains elusive. The writer's curiosity has, however, remained and inquiries have from time to time continued. A clue has perhaps emerged. A one-time undergraduate of mine reported that she had seen a reference in a publication devoted to horse racing which might provide an answer!

This pointed to a connection to a Lord Glasgow. An inquiry was addressed to the present Earl of Glasgow, resident in Scotland though not in Glasgow itself. The Earl's reply suggested that if there was a connection it might be attributed to the fifth Earl of Glasgow who "was one of the major figures of the English Turf". There was also a reminder that the seventh Earl of Glasgow had been Governor of New Zealand from 1892 to 1897.

This was only a tenuous connection. But then a more useful clue was contained in a book published here during 1988 (*Tapestry of Turf* by J Costello and P Finnegan, Moa Publications Ltd, Epsom, Auckland, p 103). This refers to a horse named "Musket" which was a dominant sire in New Zealand during the 1880s.

This horse had been bred by a Lord Glasgow, one would assume the fifth Earl who died in 1869, and then auctioned and brought to New Zealand. The one and only clue is an assumption, stated by the authors of *Tapestry of Turf*, that the sale was "ostensibly a 99-year lease since Lord Glasgow's will forbade the selling of his horses".

This is all we have to go on: the suggestion of a long lease as opposed to an outright sale, the name Glasgow attaching to the horse's breeder (it was sold after the fifth Earl's death), and the horse's subsequent successful career in New Zealand. Perhaps the seventh Earl during his gubernatorial tenure in Wellington was instrumental in perpetuating or establishing a connection between earldom and lease.

The final answer to the question: who affixed the Glasgow label on the New Zealand form of ground lease, remains elusive. □

Election petitions under the Electoral Act 1956

By R J O'Connor of Christchurch

In more than one case the Courts have altered the representation in Parliament for a particular electorate as a result of an election petition. The electoral system is one of the basic elements of our constitution and the electoral petition is a means by which the integrity and credibility of the system is maintained. This article looks at a number of decisions of the Courts in this area of constitutional law.

Fundamental to the functioning of any democracy is the law regulating the conduct of elections. The public interest makes many demands on the conduct of elections, particularly the demand that contested electoral results be determined judiciously and with expedition. The recent successful Wairarapa election petition has once again brought to attention the avenues that are available in law to contest unsatisfactory electoral results.

1 The history

The law relating to election petitions has developed historically and at a pace similar to that defining democracy itself. Lord Denning in *Morgan v Simpson* [1974] 3 All ER 722, 725 described the common law method of election and of contesting electoral results in the following terms:

> It was open. Not by secret ballot. Being open, it was disgraced by abuses of every kind, especially at parliamentary elections. Bribery, corruption, treating, impersonation, were rampant. They were not investigated by the Courts of law. They were the subject of petition to Parliament itself.

As democracy became more sophisticated so did the law concerning election petitions. The Privy Council in *Nair v Teik* (1967) 2 AC 31 said:

> Constitutionally decisions on questions of contested elections were vested in the assembly for which the contested election had been held, but in the course of the nineteenth century many countries, including this country, and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the assembly itself were apt to be governed rather by political considerations than the justice of the case, it was right and proper that such questions should be entrusted to the Courts.

Accordingly in England the right to hear election petitions, previously exercised by Parliament, was transferred to the Courts by the Parliamentary Elections Act 1868. As was noted in *Re Hunua Election Petition* [1979] 1 NZLR 251 the law in New Zealand in this area has developed similarly to that in England. The New Zealand Election Petitions Act 1858 provided that election petitions, as traditionally had been the law, be presented to the House of Representatives. However this power was transferred to the Courts, to be exercised by two Judges of the then Supreme Court, by the Election Petitions Act 1880. The successive statutes governing election petitions in New Zealand have been the Electoral Act 1902, Part V of the Legislature Act 1908, Part V of the Electoral Act 1927 and the present Part VI of the Electoral Act 1956.

2 The law

The present law governing election petitions is comprised of a mixture of those provisions contained in Part VI of the Electoral Act 1956 ("the Act") and the common law. Section 155(1) of the Act provides that:

> No election and no return to the House of Representatives shall be questioned except by a petition complaining of an unlawful election or an unlawful return presented in accordance with this part of this Act.

Section 156 provides that election petitions are to be heard by the High Court and may be brought by any one of the following classes of person:

(a) A person who voted or had a right to vote at the election.
(b) A person claiming to have had a right to be elected or returned at the election.
(c) A person alleging himself to have been a candidate at the election.

The Act goes on to require that the petition must be presented within forty-nine days after the date on which the Returning Officer publicly notifies the result of the poll. It is to be heard by three Judges of the High Court. The Court is given wide powers to "inquire into and to adjudicate on any matter relating to the petition in such manner as it thinks fit." The respondent to the petition is given the right to give evidence in the same manner as if he had presented the petition himself. The Act also makes provision to ensure that, in such a field where the public interest is of paramount importance, the trial of the petition is to be heard as speedily as is "practically consistent with the interests of justice." The Court is required by s 166 of the Act to be guided by the substantial merits and justice of the case without having

regard to legal forms and technicalities. It may also admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that it may not otherwise be admissible in the High Court. In the *Re Hunua* case it was noted that the Act contains specific provisions permitting the Court to declare an election void. Such provisions are to be found in s 163 headed "avoidance of election of candidate guilty of corrupt practice" and in s 164 headed "avoidance of election for general corruption". Apart from these two provisions the Act makes no reference to any other power of the Court to declare an election void except by an indirect reference in s 167 which generally provides that no election shall be declared invalid by reason of any technical or administrative irregularity if the Court is satisfied that the election was so conducted as to be substantially in compliance with the law and that the irregularity did not affect the result of the election.

It was argued in *Re Hunua* that the power of the Court to declare an election void was limited to the circumstances referred to in ss 163 and 164. The Court held, however, that the common law power to declare an election void still existed subject to the circumstances referred to in s 167. This common law power was elucidated by Lord Coleridge CJ in *Woodward v Sarsons* (1875) LR 10 CP 733 where he said:

> . . . we are of the opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws.

As referred to earlier the Court has, in addition, wide powers of inquiry and adjudication as contained in section 164(4) of the Act. That provision refers particularly to the Court's power to direct a recount or scrutiny of the votes given at the election and requires the Court to disallow the vote of every person proved to have been guilty of any corrupt practice or whose name has been wrongly placed on the electoral roll for the electoral district concerned.

At the conclusion of the trial of the petition the Court is required to give a Certificate of the result to the Speaker of the House. The result so certified is final and conclusive and cannot be appealed from. Parliament is then required to give the necessary directions for confirming or altering the return, or the issuing of a writ for a new election, or for carrying out the Court's determination as the case may be.

3 The Practice

Since the 1972 General Election there have been four election petitions presented to the Court. This part of this article is concerned with the identification of the main issues that were raised in each of these petitions with the intent of illustrating the workings of the Electoral Act in each instance.

(a) *Re Wellington Central Election Petition, Shand v Comber* [1973] NZLR 470.

At the general election held on 25 November 1972 Mr Comber was returned as the elected member for the Wellington Central electoral district. His majority, as publicly notified by the Returning Officer was twenty-seven votes. Shortly afterwards the defeated candidate, Mr Shand, presented an election petition complaining "that the votes of numerous electors who voted in the election were disallowed when they ought to have been allowed and included in the result of the poll." This decision exemplifies the general requirements of the Act that the Court not be fettered by technicalities but rather be concerned with the justice of the case.

In this case the petition as filed in the Court failed to name either the Returning Officer or the Registrar of Electors as respondents to the petition as required by the Act. The Petitioner sought to remedy this defect by filing a notice of motion for orders that those two officers be joined to the petition as second and third respondents respectively. In response the Respondent sought that the petition be struck out on the grounds that it failed to comply with the requirements of s 156 of the Act in that, although it complained of the conduct of those two officers it failed to name them as respondents. The Court held that the Returning Officer and the Registrar of Electors should have been named in the petition and served as respondents, and then went on to consider whether this defect was fatal to the validity of the petition itself. The case of *Wellington City Election Petition* (1897) 15 NZLR 454, where non-service on an officer was treated as an irregularity which could be excused, was applied. The Court also mentioned s 166 of the Act which prescribes a non-technical approach to the trial of election petitions. It said that it would be contrary to the apparent spirit of the Act to regard the Court as fettered by technicalities and accordingly it was held that the irregularity complained of was not fatal to the validity of the petition.

However, the Court was only prepared to exercise its discretion to grant the Petitioner the orders sought by him if the justice of the case required it. It was found that it was doubtful whether the Petitioner's case had proceeded beyond the indefinite and exploratory stage, and indeed the material before the Court was described as "insubstantial". It was said by Cooke J that:

> In short we do not consider that the Petitioner has made out a sufficiently strong case for the exercise of the Court's discretion in his favour. In general the public interest requires early finality and certainty in the results of parliamentary elections. In the present case it has not been shown that a departure from that principle would be just.

The Petitioner's application to rectify the technical defect was therefore not granted and an order that the petition be struck out was made.

(b) *Re Hunua Election Petition* [1979] 1 NZLR 251

The result of the general election held on 25 November 1978 as it related to the Hunua electoral district was a majority of three hundred and one votes in favour of

Mr Douglas over the next highest polling candidate, Mr Peters. Within the time limit required by the Act Mr Peters presented an election petition seeking a determination that Mr Douglas was not duly elected and that he, the Petitioner, was duly elected or alternatively that the election was void. As contrasted with *Re Wellington Central Election Petition* this petition was based on grounds that were many and detailed. It provides many examples of the objections that may be raised by a Petitioner to challenge an electoral result. The Petitioner set out some twenty grounds on which he relied to challenge more than eleven hundred votes cast at the election. In reply the Respondent sought to challenge some three hundred and thirty votes.

However, prior to the consideration of the various grounds raised a number of general objections were raised by the Respondent, and these were dealt with first by the Court. Mr Douglas firstly challenged Mr Peters' right to be a candidate in the Hunua electorate and cited s 25 of the Act in his support. That section provides:

> (1) Subject to the provisions of this Act, every person registered as an elector of any electoral district, but no other person, is qualified to be a candidate and to be elected a member of Parliament for that or any other electoral district . . .

It was argued that Mr Peters had ceased to be validly registered as an elector of the Northern Maori electoral district by virtue of his having moved his place of residence into the Western Maori electoral district and that as a mater of fact he was not registered in Western Maori. The argument was that Mr Peters was not validly registered in any electoral district, and therefore could not be a candidate in terms of s 25. The relevant sections of the Act referred to by the Court were s 2, which defines "elector" as "a person registered or qualified to be registered", and s 28, which provides:

> The nomination of any person as a candidate for election shall not be questioned on the ground that although entitled to be registered as an elector of any district, he was not in fact registered as an elector of that district but was registered as an elector of some other district.

The Court held that as Mr Peters was qualified to be an elector of Western Maori he fell within the provision of s 28 and accordingly his candidature could not be questioned as argued by the Respondent.

The Respondent also sought to challenge the compilation of the Hunua electoral roll. It was submitted by counsel "that the role so compiled was so far a departure from the law as to elections as to call for a declaration that the election was invalid, and that this should lead to a by-election". A number of matters were cited in support of this argument. It was firstly argued that the decision taken by the Chief Electoral Officer to centralise all the electoral cards for the whole country at the chief electoral office at Lower Hutt was a method of compilation not prescribed by the Act. Section 60 requires that there should be an electorate officer for each electoral district and that he is charged with the duty of compiling the electoral roll for that district and with keeping it up to date. The Court, with this provision in mind, held that centralisation was indeed a method of compiling the electoral roll not prescribed by the Act, and that accordingly the Electorate Officer was in breach of his duty under s 60. However the Court also applied s 167 of the Act which limits the Court's common law power to invalidate elections in the following terms:

> No election shall be declared invalid by reason of . . . (c) any absence of, or mistake or omission or breach of duty by any official whether before, during or after the polling . . . if the Court is satisfied that the election was so conducted as to be substantially in compliance with the law as to elections, and that the failure . . . or breach did not affect the result of the election.

The Court considered that it was not only necessary that persons who apply to be registered as electors should be registered but that it was paramount that they should be registered lawfully. It said that centralisation appeared to have achieved that to a greater degree than would otherwise have been possible. Accordingly the Court was satisfied that the compilation of the roll was conducted "substantially in compliance with the law" and that the breach of duty by the Electoral Officer did not in the overall result affect the election.

A further issue raised by the Respondent concerning the compilation of the roll concerned the "carrying forward" of registrations on earlier electoral rolls to the rolls used in the 1978 elections. Section 41 provided that persons of Maori descent had the option to choose whether they enrolled on a Maori or a general roll. Section 43B restricted this by requiring such persons to exercise that option only at the time of each quinquennial census. However many persons who were registered on the Maori roll failed to exercise that option at the immediately preceding census in 1976 and according to the state of the law at the time they were therefore not entitled to registration on either a Maori or a general roll until they had made a fresh application for registration. However the Electoral Office made the decision to "carry forward" pre-1978 registrations on to the 1978 rolls notwithstanding the failure of many Maori people to exercise the option required by s 43B. In early 1978 many persons in this category did in fact apply to enroll on the Hunua general roll. Consequently there were many names that appeared on the relevant Maori roll, incorrectly in law, and at the same time, correctly in law, appearing on the Hunua general roll.

The subsequent general roll registrations were upheld by the Court as lawful, but the comment was made that the Maori rolls compiled for the 1978 election doubtlessly contained a large number of persons who were not qualified as Maori electors, their names being "carried forward" without the exercising of the entitling option required by s 43B. The Court said that had a petition been presented affecting any of the Maori electoral districts it would have been difficult to avoid declaring the election void on the

grounds that the rolls contained an unspecified number of unqualified persons.

The Respondent also alleged that the Petitioner's scrutineers present at the polling booths "challenged" all or many of the Polynesian voters either directly to the voters themselves or indirectly by demanding the Deputy Returning Officer present to do so. Apparently some eleven hundred challenges were made and counsel submitted that such a large number was against the spirit of the Act in that such amounted to an obstruction to intending voters. The right to "challenge" voters is set out in s 104 of the Act, which provides that, if required by a scrutineer the Deputy Returning Officer shall ask the voter his or her name and whether he or she has already voted. In every such case the answers are to be in writing signed by the person to whom they are put. The Court held that this section was "plainly" there to be availed of and accordingly the allegation was rejected as not affecting the validity of the election.

The Court then proceeded to deal with the Petitioner's challenges to specific votes. Counsel for Mr Peters produced evidence that a number of voters, who had elected to be placed on the relevant Maori roll, had subsequently enrolled on the Hunua general roll as well. It was argued that because of the provisions of s 43B of the Act, which prevented transfers from the Maori roll to the general roll except at the time of each quinquennial census, that such subsequent enrolments were invalid. The Court upheld this argument and disallowed a total of two hundred and five votes under this head.

The Petitioner also alleged that there were a number of votes cast by persons who were not resident in the Hunua electoral district and were, therefore, not entitled to be registered as electors in Hunua. Some one hundred and eight votes were consequently disallowed. In addition several instances of plural voting were found to have occurred and a further thirteen votes were consequently disallowed. Seven votes were disallowed by reason of either the death of the voter or the voter's name having been struck off the roll prior to the poll.

An analysis was also made by the Court of s 106 which dealt with the permitted method of indicating voting preference on the ballot paper. That section provided:

> (1) The voter, having received a ballot paper, shall immediately retire into one of the inner compartments provided for the purpose, and shall there alone and secretly exercise his vote by marking his ballot paper by striking out the name of every candidate except the one for whom he wishes to vote.

The Court concluded that this provision was mandatory in its effect and that all votes that were not exercised by striking out the names of those candidates not intended to vote for were informal and invalid. This particular ruling was subsequently liberalised in *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 where it was held that if the voter's intention was clear on the face of the ballot paper then the vote should be allowed. On the basis of the rulings made by the Court on the various points raised a recount of the votes cast in the election was conducted with the result that the Petitioner, Mr Peters, was found to have a majority of votes and was held to be duly elected in the place of the Respondent, Mr Douglas.

(c) *Re Taupo Election Petition* [1982] 2 NZLR 244

At the general election held on 28 November 1981 the Returning Officer for the Taupo electoral district declared Mr McClay to be duly elected with a majority of twenty-six votes over the next highest polling candidate, Mr Ridley. Mr Ridley applied for a judicial recount under s 117 of the Act. The recount reduced Mr McClay's majority to fourteen votes. Mr Ridley subsequently presented an election petition alleging that Mr McClay was not duly elected on the grounds that there were votes that were wrongly disallowed, that a number of votes cast on irregular ballot papers were counted notwithstanding such informality and that persons not qualified to vote in Taupo had voted and had had their votes counted. Mr Ridley challenged a total of ninety one votes and in reply Mr McClay challenged one hundred and forty-one votes.

Counsel for Mr Ridley contended that there were a number of special votes which were disallowed on the basis that the voters in question were not qualified to vote, but which should have been allowed. Section 99 of the Act defines who is entitled to vote:

> Subject to the provisions of this Act, the following persons, and no others, shall be qualified to vote at any election in any district; namely:
>
> (a) Any person whose name lawfully appears on the main roll or any supplementary roll for the district:
> (b) Any person who has applied for registration as an elector of the district between writ day and polling day and has satisfied the Registrar before or within 7 days after polling day that he became qualified for registration as an elector of the district not earlier than one month before writ day and not later than the day before polling day:
> (c) Any person who is qualified to be registered as an elector of the district, and was at the time of the last preceding election duly registered as an elector of the district or, where a change of boundaries has intervened, of some other district in which his then place of residence within the first-mentioned district was then situated:
> (d) Any person who is qualified to be registered as an elector of the district, and has since the last preceding election and before 6 o'clock in the afternoon of writ day applied for registration as an elector of the district or, where a change of boundaries has intervened, of some other district in which his then place of residence within the first mentioned district was then situated.

By the application of these provisions the Court found that eighteen special votes previously disallowed were cast by persons in fact qualified to vote. Accordingly these votes were allowed. In addition a number of special votes were

challenged by the Petitioner on the basis that the declaration required by the Electoral Regulations 1981 to be made by the special voter was in one or more respects defective. In particular he sought to establish that a number of special votes had been wrongly disallowed by the Returning Officer on the basis that the voter declarations thought to be improperly witnessed were in fact properly witnessed. Persons authorised to witness such declarations include an issuing officer, a person authorised to take statutory declarations under the Oaths and Declarations Act 1957, a person authorised by a candidate for the purpose and a relative of member of the special voter's household. Section 9(1) of the Oaths and Declarations Act authorises a member of Parliament to take statutory declarations, however the witnessing of a number of declarations by the Petitioner was questioned. While he was the member for Taupo in the previous Parliament the Court held he ceased to be a member of Parliament on the dissolution of Parliament by the Governor-General on 29 October 1981. Accordingly voter declarations taken by Mr Ridley after the dissolution of Parliament were held to be improperly witnessed and therefore properly disallowed by the Returning Officer. In general terms the Court held that where a voter declaration is witnessed by an unauthorised person then the declaration is invalid and the vote must be disallowed.

The Petitioner also challenged five special votes on the grounds that the ballot papers in question did not contain a list of all those persons nominated as candidates as required by section 87(2) of the Act. The Court, nevertheless, held that this omission was not fatal to the validity of the votes. The ballot papers were regular in all other respects, the voters were qualified to vote and had clearly indicated the candidate for whom they wished to vote. The Court said that

> it was the clear intention of Parliament that an omission by an official should not invalidate any special vote.

The result of the petition was such that the Petitioner succeeded on thirty of his challenges and the Respondent on ninety of his. In the event the petitioner was unsuccessful and Mr McClay held his seat in Parliament.

(d) *Re Wairarapa Election Petition* [1988] 2 NZLR 74

At the general election held on 15 August 1987 the Returning Officer declared Mr Boorman, with a majority of seven votes, to be the duly elected member for the Wairarapa electoral district. He defeated Mr Creech, the next highest polling candidate. Mr Creech applied for a judicial recount under s 117 of the Act, the result of which gave Mr Boorman a majority of one vote. Mr Creech then presented an election petition seeking orders that "Mr Boorman was not duly elected, that he, the Petitioner, was so elected, and that Mr Boorman had committed a corrupt practice in the conduct of the election". This petition exemplifies the consideration by the Court of two distinct issues. The first concerned the residency qualifications required of voters by the Act, and the second the allegation of corrupt practice.

Residential Qualifications

Both the Petitioner and the respondent relied upon the residential provisions contained in the Act to challenge a number of votes. Section 39 provides:

> (1) Subject to the provisions of this Act every adult is qualified to be registered as an elector of an electoral district if:
>
> (a) That person is:
> (i) A New Zealand citizen; or
> (ii) A permanent resident of New Zealand; and
> (b) That person has at some period resided continuously in New Zealand for not less than one year; and
> (c) That electoral district –
> (i) Is the last in which that person has continuously resided for a period equalling or exceeding one month; or
> (ii) Where that person has never resided continuously in any one electoral district for a period equalling or exceeding one month is the electoral district in which that person resides or has last resided.

While s 39 makes provision for the residential qualifications a person must possess in order to be registered as an elector, s 37 contains the rules for determining place of residence within New Zealand in the following terms:

> (1) Subject to the provisions of this section the place of a person's residence within New Zealand at any material time or during any material period shall be determined for the purposes of this Act by reference to the facts of the case.
>
> (2) For the purposes of this Act a person can reside in one place only.
> (3) A person shall be deemed to reside where he has his usual place of abode notwithstanding –
> (a) That he is occasionally or temporarily absent from that place; or
> (b) That he is absent from that place for any period because of his service or of that of his spouse under the Crown or as a Member of Parliament; or
> (c) That he is absent from that place for any period because of his occupation or employment or that of his spouse, whether as a seaman, an actor, or a commercial traveller or otherwise.
> (4) A person who has permanently left his former place of abode shall be deemed not to reside at that place . . .
> (5) If a person has two or more usual places of abode he shall be deemed to reside in the place in which he spends the greatest part of his time.

The determination of a voter's place of residence is crucial to the determination of the electoral district in which he or she is qualified to be registered as an elector (see s 39 cited earlier), and to vote (see s 99, also cited earlier). The Court, in interpreting these provisions, held that s 37 required an objective rather than a subjective assessment of residence. The section shows an intention in the Act to equate "place of residence" with "usual place of abode". The Court said that the rules prescribed by s 3 were directed to the physical facts

of each case rather than to the emotions of familial association, sentiment or loyalty. A person's usual place of abode was to be determined by reference to the normal pattern of living of that person in the time leading up to the election.

A number of situations were considered by the Court under this head. It was found that it was the practice of many workers to reside in Wellington from Sunday evening, or Monday morning, and to return to the Wairarapa over each weekend. The Court held that, notwithstanding emotional ties to places of residence in the Wairarapa, a person in these circumstances had two usual places of abode. By applying s 37(5) the Court inferred that, as the greater part of the person's time was spent in Wellington, his "usual place of abode" was in Wellington and therefore he was not entitled to be registered as an elector in the Wairarapa. A number of votes were accordingly disallowed. There were also a large number of students who formerly lived at their family home in the Wairarapa but took up residence in such cities as Palmerston North, Wellington and Christchurch to attend university. The Court ruled that the case of a student living away from home, even though solely for the purpose of gaining tertiary education, should be determined on its facts under s 37(5). That is, if a student spends a greater part of his time away from his family home, then his "usual place of abode" is not his family home but the place of residence where he spends the greater part of his time. A number of votes were accordingly disallowed on the basis that each particular student in question had gained a qualification in an electoral district other than the Wairarapa.

Allegation of corrupt practice

The ground on which the charge of corrupt practice was founded was the allegation that the Respondent, Mr Boorman, had incurred election expenses in excess of the maximum permitted by s 139(2) of the Act. That section reads as follows:

> The total election expenses of a candidate shall in no case exceed $5000.00.

Therefore, the issue in question was whether all the payments made on account of election expenses aggregated more than $5000. There was much dispute as to which items should be included in the calculation and which should not have been. Election expenses are defined in s 139(1)(a) in the following terms:

> Election expenses means expenses which relate exclusively to the campaign for the return of the candidate and which are incurred by or on behalf of the candidate within 3 months immediately preceding polling day in respect of –
> (i) Advertising and radio or television broadcasting
> (ii) Publishing, issuing, distributing, and displaying addresses, notices, posters, pamphlets, handbills, bill-boards and cards.

In the words of the Court the term "election expenses" is limited to what might generally be called publicity and advertising. It does not include many other expenses which are necessarily incurred in conducting an election campaign. It is confined to that part of the campaign which by words or sounds is intended to pursuade the voter generally or in particular to favour the candidate.

It was argued by the Respondent that the cost of a series of advertisements relating to his campaign opening meeting should not be included in his election expenses. His argument was that as his guest speaker spoke for a period of time almost three times the length of the Respondent's speech that the meeting was not exclusively a campaign meeting. The Court rejected this argument and included the costs incurred in its calculation of election expenses.

It was brought to the attention of the Court that a common strategy in election campaigning was to have dual or multiple advertising to escape the exclusivity test contained in s 139(1)(a). It was argued that an advertisement that gives equal prominence in all respects to more than one parliamentary candidate could not be said to relate exclusively to the campaign of one or other of the candidates referred to in the advertisement. The Court rejected this argument on the basis that s 139 stipulates that to qualify as an election expense the expense must relate exclusively to the candidate's campaign. It was not necessary for the content of the advertisement to relate exclusively to the candidate.

One particular advertisement considered by the Court referred to the Respondent and the member of Parliament for the Southern Maori electoral district, which electoral district includes the area covered by the Wairarapa. However it was found that the reference to the member for Southern Maori occupied only a one-twentieth part of the total advertisement. The Court described this reference and another such advertisement containing a similarly prominent reference to a candidate for a neighbouring electoral district as mere shams. The costs of these advertisements, despite the references to more than one candidate, were accordingly included in the calculation of election expenses.

The Petitioner also argued that the cost of a letter printed on parliamentary paper and despatched by post paid for by the parliamentary services system should come within the definition of "election expenses" in that although the Respondent himself or his committee did not pay the costs, he knowingly aided and abetted the payment of those costs by the parliamentary services system. The Court held that the letter amounted to electioneering and that it was exclusively related to the campaign of the Respondent, and was therefore caught within the definition of "election expenses". It was further sought to include within the calculation a value for the time donated by certain persons in compiling advertising material. Nevertheless the Court held that such donated times or services were not by their nature expenses and therefore should not be included. It was noted, however, that the cost of goods and materials donated was a different matter. The Court said that if appropriate this cost should be included in the calculation of election expenses.

While the question of whether or not the maximum limit of election expenses provided for by the Act included Goods and Services Tax or

not was not raised by counsel the Court said that it was relevant and proceeded to decide the issue. It was said:

> GST in relation to any goods or services becomes so far as the purchaser is concerned part of the purchase price, and when paid becomes an expense. Whether or not the purchaser can subsequently recoup the tax depends in a broad sense on whether he is an end user or an intermediary. Whatever the position might be of an intermediary able to recoup the tax it is clear that the expenditure incurred for election expenses was not of that category, no refund or recoupment was possible and the tax forms part of the overall expenditure. While it may seem harsh that indirectly the limit on expenditure is reduced by the amount of GST this is no more illogical than that the limit should have been indirectly increased by the removal of sales tax on some goods which was replaced by GST.

The Petitioner argued that the total of the Respondent's election expenses amounted to $28,356.63 exclusive of GST. In reply the Respondent conceded a total figure of $5596.70 including GST. While the Court did not attempt to exactly quantify the Respondent's election expenses it did conclude that the maximum limit was in fact exceeded. Given this it was necessary for the Court to determine the consequences of this finding in terms of s 139(2). That provision emphatically prohibits any excess over $5000. Apart from any criminal prosecution under s 150, and the punishment on conviction prescribed by that section, there is a penalty prescribed under s 163 on a candidate found guilty of a corrupt practice that his election shall be void. The Court said the offence of committing a corrupt practice, given that it was contrary to sense and justice that a person should be liable to the ultimate penalty no matter how faultless he may be, was not one of absolute liability. It concluded:

> . . . that this is one of those offences which, because of the essentially regulatory and controlling nature of the provision, justifies the interpretation that proof or an inference of mens rea is not required, but the Respondent can escape liability by showing absence of fault.

However the Court found that the Respondent had failed to take any step which might reasonably have been taken to monitor or question the expenditure as it unfolded. The Court in addition said:

> It does not matter that the defendant was unaware at any particular time that payments in excess of $5000 were made. What has to be shown is that he knowingly assisted and participated in the formation of the campaign and the decisions as to the extent and scope of the advertising. It will then be inferred from the necessary consequence of payment being required that he was aiding and abetting the offence.

The Respondent was accordingly found guilty of a corrupt practice in that he indirectly paid and knowingly aided and abetted other persons to pay a sum in excess of $5000 for election expenses. Section 163 of the Act requires that where a candidate has been elected and is proved to be so guilty then his election shall be declared void. However the result of the final count of all the votes was that the Petitioner, Mr Creech, was found to be duly elected in place of the Respondent with a majority of thirty four votes. As Mr Boorman was not elected it was not necessary to declare the election to be void under s 163.

4 Conclusion

The law of election petitions is as old as New Zealand's democracy. Indeed it provides a mechanism by which the practice of our democracy might be preserved from corruption and of ensuring a fair and accurate result of elections. However, and as each of the election petitions cited testify, it is a mechanism employed only when results on polling day are sufficiently close. While any voter or candidate may bring an election petition alleging any falsity in the result it is inevitable that such are only embarked upon when a political result is achievable, that is when it is conceivably possible to change the person returned as the Member of Parliament. As was noted in *Re Hunua* there have been instances in the recent past where an election petition could have been justifiably, in law at least, brought before the Court, but was not as the sitting member would not have been removed. Such decisions are the stuff of politics. While this may offend against the intent of the law, such considerations are not the concern of politics. □

Law and Order: The red light test

A minimal definition of a well-ordered society is that its drivers stop when they see a red light. Some episodes that indicate why people on occasion fail to respect red lights can also, incidentally, illuminate the *terminus a quo* and the *terminus ad quem* of recent political events.

In Shanghai during the Cultural Revolution, the Red Guards found it unacceptable that red should mean "stop". They wanted the system of traffic lights changed to make red signify "go". Chou En-lai was allegedly willing to go along with the proposal, until his driver told him that red lights were easier to notice in the dark and in bad weather.

In Beijing, more recently, I heard the following explanation of why cyclists cross at red lights: it is so hard to get spare parts for brakes that many bike riders prefer to take a calculated risk rather than stop.

In Sao Paulo, also recently, I was surprised when my otherwise law-abiding host failed to stop at red. He explained that it was more dangerous to stop: given that the driver behind him would certainly assume that he wasn't going to stop, the risk of being hit from behind if he did was considerable.

In Chicago, there are many intersections where drivers in the outer lanes prefer to go against the red light, knowing that if they stop they risk being held up at gun-point by robbers hanging around at the side of the road.

Jon Elster

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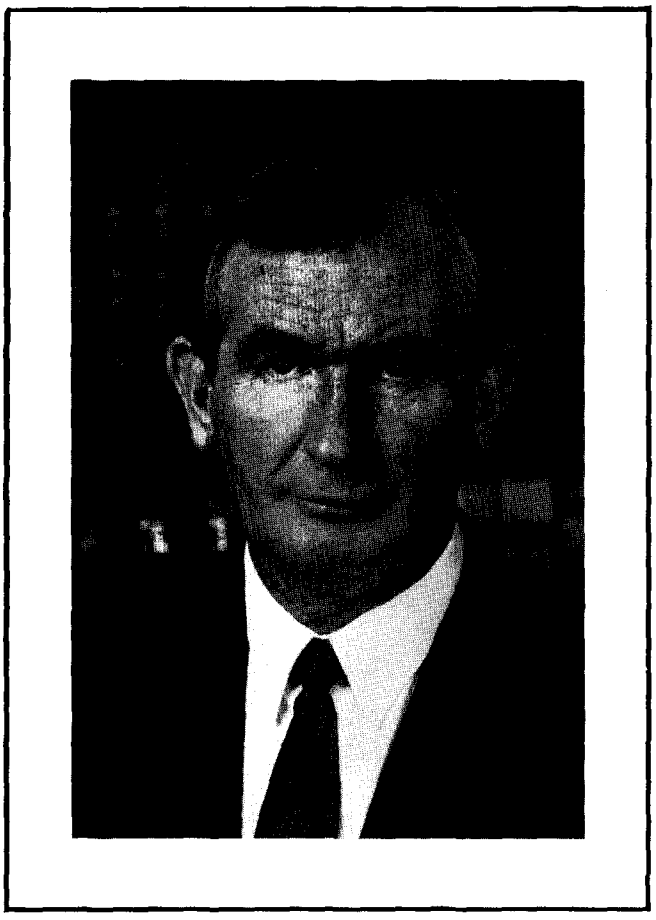
25 January 1990

Judicial appointment

Mr Justice Thomas



In February 1990 His Honour Mr Justice Thomas was sworn in as a Judge of the High Court. His Honour will sit in Auckland.

The Judge is 56 years of age, and is married with three children. His Honour graduated LLB from Victoria University of Wellington in 1957. During his University courses he won a number of prizes: Union Prize 1955, Joynt Scroll (debating) 1955, Stout Cup 1956, and was both Junior Editor and then Senior Editor of the *Victoria University Law Review.*

In later years His Honour has continued to have a distinguished academic interest as a serious student of the law. In 1974 he was the recipient of both the Fulbright/Hays Research Grant and the Spencer Mason Trust Study Award. In 1974-75 he was Visiting Scholar, Harvard Law School for a full academic year. He was the FW Guest Memorial Lecturer at the University of Otago in 1976, and in 1977 he was awarded the Bruce Elliott Memorial Prize. In 1985 His Honour received the International Trial Lawyer of the Year Award. This latter distinction was more particularly in respect of the famous "ticks and crosses" case concerning the electoral system. His Honour was counsel in a number of leading cases over the past few years, more particularly in the commercial field. These cases have included *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152, *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, and the *Securitibank* litigation during the 1980s. In 1985 His Honour was counsel for the Plaintiffs in the cases against the New Zealand Rugby Football Union concerning a proposed tour of South Africa. More recently the Judge was counsel in the international arbitration proceedings held in Geneva in which Greenpeace obtained damages against the French government in respect of the "Rainbow Warrior" sinking.

His Honour has given, and has had published a number of legal papers and lectures on such topics as town planning and harbours (1973) through corporate governance (1983) to the rule of law and administrative law (1987).

The Judge's professional career was largely spent in the firm of what is now Russell McVeagh McKenzie Bartleet & Co where he was a partner from 1958 to 1979. In 1979 he became a Barrister sole, and he was appointed Queen's Counsel in 1981.

His Honour has been active in Law Society affairs at both District and New Zealand level. He was on the Council of the Auckland District Law Society from 1971 until he became President for the year 1981/82. The Judge has been active on many committees of the New Zealand Law Society. He has served on two of the principal statutory bodies concerned with the Courts and the profession. He was a member of the Rules Committee 1984-1990, and he was appointed to the Disciplinary Tribunal in 1983 and in 1984 he became Chairperson, an office he held until 1989. His Honour's remarks on his retirement from that office were published in the *New Zealand Law Journal* at [1989] NZLJ 121.

In 1989 His Honour was a founding member and the first President of the New Zealand Bar Association until his appointment to the Bench. An editorial on that Association, acknowledging His Honour's initiative, is published in this issue of the *New Zealand Law Journal* at [1990] NZLJ 113. □

Unreasonable mistakes and mens rea

By Janet November, Judges' Clerk, District Court, Wellington

This article is a reply to the article by Elizabeth Garrett entitled "Mistaken Mistakes" appearing at [1989] NZLJ 355. It is the view of Janet November that the cases of DPP v Morgan *[1986] AC 182 and* Metuariki *[1986] 1 NZLR 488 are more important than* Strawbridge *[1970] NZLR 909 as a result of the Court of Appeal decision in* Millar v Ministry of Transport *[1986] 1 NZLR 660, concerning the categorisation of offences for the purposes of determining the requirement or not of mens rea.*

"Mistaken Mistakes" is a thought-provoking analysis of the Court of Appeal's decision in *Millar v Ministry of Transport* [1986] 1 NZLR 660. The author's purpose is:

> . . . to demonstrate the significance of *Strawbridge* to the jurisprudence of the Criminal Law.

It is the contention of this article that it is not *Strawbridge* [1970] NZLR 909, itself which is so significant, but *Strawbridge* as modified by the New Zealand Court of Appeal in *Metuariki* [1986] 1 NZLR 488, following the dicta in *Wood* [1982] 1 NZLR 233, and the House of Lords' "landmark decision" in *DPP v Morgan* [1986] AC 182.

That is to say it is the *Strawbridge* without reasonable grounds category of offence (to use Cooke P's terminology in *Millar*) which is now important in the categorisation of offences in New Zealand.

Since *Millar v Ministry of Transport* it is clear that there are three main categories of offence in New Zealand:[1]

The three categories are derived from the Canadian Supreme Court judgment *R v Sault Ste Marie* [1978] 85 DLR (3d) 161, which was approved by the New Zealand Court of Appeal in *Civil Aviation Department v MacKenzie* [1983] NZLR 78. Put deceptively simply the categories are, as is now well-known:

Class 1 The "truly criminal offences" where mens rea is an ingredient of the offence and must be proved by the prosecution either as an inference from the commission of the actus reus or by additional evidence;

Class 2 The public welfare/regulatory offences where liability is strict but the defendant may have a defence if he can prove total absence of fault (or all due diligence) on the balance of probabilities; and

Class 3 The public welfare/regulatory offences of absolute liability, if the *MacKenzie* defence is inconsistent with the object of the legislation (*Millar*, supra at 699).

Unfortunately the three categories are not quite so clear as they seem. This was obvious in *Millar*, where Cooke P and Richardson J initially listed seven separate categories before amalgamating them into three.

In particular class 1 has an important subcategory (*Strawbridge* without reasonable grounds) which I will discuss below. Ms Garrett suggests that:

> . . . while a merging of the categories is possible the merging advocated by the President is not justified by the case law.

However, the above classification has been followed in many decisions since *MacKenzie* and in several cases since *Millar*, including the Court of Appeal decision of *Blair v Department of Labour* [1988] BCL 1310.[2] The difficulties of classification were foreseen by McMullin J in *MacKenzie* (at 95) and noted again by several High Court Judges.[3] The problems really lie with offences which are borderline "truly criminal" /public welfare or borderline strict liability/absolute liability. To some extent there is a continuum of types of offence rather than clearly defined categories.[4]

Nonetheless this writer submits that the approach to classification in *Millar* is both justified and serviceable. However, I will confine this article mainly to a discussion of class 1.

Class 1: Mens rea offences

In *Millar* (supra) the Court of Appeal held that normally there is no criminal offence committed without proof of mens rea (at 669).

As Cooke P and Richardson J state in the majority judgment:

> . . . but as a general approach to statutory offences when the words give no clear indication of legislative intent and there is no overriding judicial history, it will

> be right to begin by asking whether there is really anything weighty enough to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability.

This presumption of mens rea then is the first principle to be applied when considering which category is appropriate. As Wright J said in *Sherras v De Rutzen* [1895] 1 QB 918 921:

> There is a presumption that mens rea . . . is an essential ingredient in every offence.

In the words of Lord Reid in *Sweet v Parsley* [1970] AC 132:

> . . . whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. (at 148, H)

Related to this fundamental presumption is Lord Reid's "universal principle that if a penal provision is reasonably capable of two interpretations that interpretation which is most favourable to the accused must be adopted" (at 149, E).

In *Millar* the New Zealand Court of Appeal specifically approved this universal principle (at 669).

Class 1 then is the normal situation, the "truly criminal" category. This phrase is used by many Judges including Lord Reid in *Sweet v Parsley* at 149 F, Lord Scarman in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1 and Richardson J in *MacKenzie* who noted the distinction drawn by the Canadian Supreme Court in *Sault Ste Marie* (per Dickson J at 165) between truly criminal and public welfare offences. This distinction seems to have originated in the 19th century cases such as *Sherras v De Rutzen* (supra). But unfortunately there appears to be no judicial explanation of what is meant by "truly criminal".

Within Class 1, however, is an important subcategory, as noted above, labelled by the majority in *Millar*, "*Strawbridge* without reasonable grounds" – the second of the three separate categories listed at 665 in *Millar*, which now form class 1 offences. In this group of offences the doing of the prohibited act in itself imports mens rea so that initially the prosecution does not have to prove a mental element (see Cooke P at 665 and 667). But if there is any evidence or material either from the prosecution case or called by the defence raising the issue of absence of the requisite mens rea, due usually to an honest but mistaken belief that the act was innocent, the onus reverts to the prosecution to prove the mental element (usually knowledge) beyond reasonable doubt. I will call this category "*Strawbridge* without reasonable grounds" or class 1B for brevity.

In *Strawbridge* [1970] NZLR 909 (which was the intermediate category prior to *MacKenzie*) it was decided that where mens rea could be inferred from the doing of the prohibited act, not only did the accused have to adduce some evidence of an honest belief in facts which would make his act lawful, but he also must show his honest belief was held on reasonable grounds. However, in *Metuariki* [1986] 1 NZLR 488, which like *Strawbridge* was a prosecution for misuse of drugs, reasonable grounds for a belief were not found to be necessary, following the approach in *R v Wood* [1982] 1 NZLR 233 and the House of Lords' decision in *Morgan* [1976] AC 182.

In Smith and Hogan's *Criminal Law* (6 ed, 1988), the authors state:

> It is settled by the landmark decision in *DPP v Morgan* that mistake is a defence where it prevents *D* from having the mens rea which the law requires for the crime with which he is charged. Where the law requires intention or recklessness with respect to some element in the actus reus, a mistake whether reasonable or not, which precludes both states of mind, will excuse.

Prior to *Morgan* it had been generally assumed that for mistake (of fact) to be a defence reasonable grounds were necessary for the mistaken belief (as was held in *Strawbridge*, supra). An exception to this in England was the decision of *Wilson v Inyang* [1951] 2 KB 799 where Lord Goddard held that so long as the defendant had an honest belief in circumstances it mattered not that the belief was unreasonable. Glanville Williams in 1951 MLR at 845 heralded this decision as:

> . . . the most important contribution ever made to criminal jurisprudence by an English Divisional Court, repudiating in general terms, the hoary error that a mistake to afford a defence to a criminal charge must be reasonable.

The New Zealand Court of Appeal appreciated the significance of the laying to rest of the "hoary error" by the House of Lords in *Morgan* as is shown by *Wood* (supra), where McMullin J giving the judgment of the Court said:

> In view of the House of Lords' decision in *Morgan* it is clear that there is no obligation on the part of the defendant to prove she had reasonable grounds for the belief that she claims honestly to have had that the plants were other than cannabis plants.

The United Kingdom Courts did not acknowledge the full significance of *Morgan* until 1987 in *Beckford* [1987] 3 All ER 425.

In *Metuariki* (supra) the Court of Appeal held that to establish a prima facie case the Crown had to prove the accused had supplied "magic mushrooms" and that they were a controlled drug. It would be assumed that the accused knowingly supplied a controlled drug. But if there was some evidence that he was honestly mistaken and thought the mushrooms were innocent vegetable matter (albeit having properties which could make him feel "high"), then he was entitled to be acquitted, whether or not his mistake was reasonable. In *Millar* (supra) the Court of Appeal confirmed that there was no requirement of "reasonable grounds" where an accused raises evidence to negate mens rea. There was no discussion in *Metuariki* as to which main category of offence supplying magic mushrooms belonged. The Court followed *Sweet v Parsley* (supra) and *Strawbridge* both of which had decided offences involving drugs were "truly criminal". *Metuariki* is thus a class 1B, mens rea, "*Strawbridge* without reasonable grounds" case.

Strawbridge, *Wood* and *Metuariki* were all concerned with what Ms Garrett calls "possessory offences" (possession of drugs in these instances). In possessory offences as she says mens rea is assumed but can be negated by honest mistake of fact, or ignorance, a term she prefers in this context.[5]

There are also other types of offences falling into class 1B.

It would seem that the case of *Stanbury v Hohaia*, [1988] BCL 681, was decided on the basis that presenting a firearm at another contrary to s 52 Arms Act 1983 is an offence in the class 1B, "*Strawbridge* without reasonable grounds" category. There was no discussion of categories of offence, this being presumably a "truly criminal" type of offence. The appellant had been aroused from a deep sleep by the young lady from the flat below asking him to turn down his stereo. He came to the door with an imitation gun under the mistaken belief that this was another burglar, his flat having already been broken into and his antique silver stolen that evening. Allowing the appeal against conviction Jeffries J said, "if an act is committed under a mistake of fact which disproves any criminal intent it is not a crime", and that an honest and reasonable belief in the existence of facts and circumstances which would make the act lawful would negate mens rea. As discussed above, however, the reasonableness of the belief is now irrelevant, if mens rea is an ingredient of the offence.

Recent Transport Act decisions provide other examples of offences falling into class 1B and are also illustrative of the "truly criminal"/regulatory borderline. In *Tibble*, [1985] BCL 1934, Henry J discussed the mental element required for failure to stop a motor vehicle at the request of a uniformed traffic officer contrary to s 66(1) Transport Act. Henry J found this to be a class 1 offence requiring proof of mens rea, here proof of knowledge. He said it would be:

> . . . inappropriate to visit the penal provisions of the section on a person in respect of whom knowledge has not been established. I do not think it is a public welfare/regulatory offence of the type referred to in *MacKenzie*. In the majority of cases no doubt the element of knowledge can be inferred from the circumstances under which the officer makes his request or signal and some positive evidence will need to be adduced to negate the inference.

So failure to stop is a "*Strawbridge* without reasonable grounds" type of offence. Unfortunately Henry J did not explain why he found it was not a regulatory offence of the *MacKenzie* category.

Similarly in *Cameron v Ministry of Transport* [1987] 2 CRNZ 646 Tipping J found the offence of failure to accompany a traffic officer to be an offence involving mens rea.

> However, once there is a proof of a request to accompany [a traffic officer] in circumstances in which any normal person would appreciate he or she was being requested to accompany, the Judge may in the absence of evidence to suggest a contrary conclusion, draw the inference that the accused had a conscious appreciation of the risk. (class 1B).

Millar v Ministry of Transport (supra) is another example of an offence (driving while disqualified) falling into class 1B.

Driving while disqualified is one of those borderline situations where there have been diverse judicial opinions as to whether or not it is a mens rea offence; (in England it is an absolute liability offence).

In *Millar* the New Zealand Court of Appeal unanimously held that mens rea was an ingredient of the offence because "the dominating purpose of the statute is to ensure enforcement of Courts' orders" and this was insufficient reason for not applying Lord Reid's universal principle. So the interpretation most favourable to the accused should be adopted (at 673):

> A tendency to imperil the public safety is not the main reason for penalising disqualified driving. (at 669)

In other words there was nothing of sufficient weight to disturb the presumption of mens rea. On proof that a disqualification was in force, however, the defendant's knowledge of this fact would be presumed in the absence of evidence suggesting otherwise (at 699, line 30).

If there is any such evidence the prosecution must affirmatively prove knowledge beyond reasonable doubt.

In practice there is probably a fairly fine distinction between class 1B ("*Strawbridge* without reasonable grounds") where the defendant has the evidentiary onus of showing absence of mens rea, and class 2 (strict liability) where the defendant bears the full onus of proving total absence of fault on the balance of probabilities.

However, in principle it is important that any offence that could be classed "truly criminal" should be in class 1.

This article will not discuss public/welfare regulatory offences as distinct from "truly criminal" mens rea offences. Suffice to say that if a Court finds the presumption of mens rea has been rebutted in a particular case, probably because the offence is of a public welfare/regulatory nature, it then has to decide whether the offence is of strict or absolute liability. As the Court of Appeal put it:

> The next inquiry is whether the statutory purpose and the interests of justice are on balance best served by allowing a defence of total absence of fault with the onus on the defendant. (*Millar* at 668)

Ms Garrett concludes her article with the surprising statement that:

> The potential of *Millar*, it is submitted, is the obliteration of the regulatory offence category as well as the *Morgan* category.

If by the "*Morgan* category" she means "*Strawbridge* without reasonable grounds" this writer hopes this article has shown that category (or class 1B, mens rea) to be in no danger of obliteration.

As for the regulatory offence category (by which it is assumed she means class 2, strict liability – although class 3 absolute liability offences are also "regulatory") there

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The ownership and control of mineral and other natural resources

By Peter Ackroyd and Rodney P Hide of the Centre for Resource Management, Lincoln College

This article is a response to an article by Mr Barry Barton [1989] NZLJ 100 which was itself a response to an earlier article by one of the present authors, Mr Peter Ackroyd, [1988] NZLJ 41. The original article argued that mining rights should rest in the owner of the land, rather than as at present, largely in the Crown. Mr Barton saw certain problems in the suggestion and contended that it was likely to produce harmful results in complicating title to minerals even to the extent that mining activity could be impaired. This whole question is now made particularly topical by the judgment of the Court of Appeal in the Tainui *case. The authors have purposely avoided discussing that case which they consider raises issues that are specific to that situation.*

Recently in this *Journal* Mr Barry Barton argued against Ackroyd in favour of continued state ownership and state control of minerals ([1989] NZLJ 100). What follows is our reply.

Our counter critique rebuts Barton's attack on private trading, allays his fears of landowners profiting at other people's expense, and blasts his reliance on the state to protect the environment. We also show that his argument would require the state to control all resources, and hence people's lives, and not only would reduce us all to civil servants but would also set the stage for ever-increasing conflict over resource use. In short, we show Barton not only to be wrong, but to be dangerously wrong.

Markets fail and transaction costs are positive

We begin with Barton's economic analysis. His method is straightforward enough. He evaluates private mineral ownership by comparing the real world with the neoclassical economist's perfect market model. Finding the real world wanting, he concludes in favour of state ownership and state control.

Barton's evaluation is undone by explaining the perfect market model. The perfect market model describes an imaginary world. It is a world of instantly adjusting prices. All transactions are costless. Everyone has perfect information. There are no entrepreneurs or lawyers in this world. There is no need for them. The market is perfect, and, in terms of the economist's criterion of Pareto efficiency, the resulting resource allocation cannot be improved upon. It is not possible to make anyone better off without making someone else worse off.

Barton recognises quite correctly that the real world does not conform to the perfect market ideal. He observes that in the real world there are transaction costs, and correctly notes that transaction costs "may prevent the parties from negotiating voluntary exchanges" and thereby "lead to situations where economically efficient results are not achieved" (p 102). People thus do not prosper to the extent they would if transactions were costless.

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are a number of examples of recent cases to testify to the continuing existence of regulatory offences both in the strict and the absolute liability categories.[5] In fact it is this writer's opinion that the availability of the *MacKenzie* defence has endangered class 1 mens rea offences to some extent. But I will discuss this in another article. □

1 A four-fold classification is possibly more accurate, to include those offences where the legislature has specified the mental element as Simon France has discussed in "Absolute Liability Since *MacKenzie*", 1987 NZLJ 50.

2 Recent High Court decisions following the *MacKenzie-Millar* categorisation include:

Class 1 – *Tibble v Ministry of Transport* [1985] BCL 1934; *Tikao v Ministry of Transport*, 18 June 1986, High Court, Christchurch, AP 97/86; *Cameron v Ministry of Transport* [1987] 2 CRNZ 646.

Class 2 – *Savill v Ministry of Transport* [1986] 1 NZLR 653; *Bevin v Police*, 21 May 1987, High Court, Hamilton, AP 18/87; *Ministry of Transport v Strong* [1987] 2 NZLR 295; *Ministry of Transport v Crawford* [1988] 1 NZLR 762.

Class 3 – *McLaren v Ministry of Transport* [1986] 1 NZLR 653; *AHI Operations v Department of Labour* [1986] 1 NZLR 645; *Department of Health v Multichem Laboratories* [1987] 1 NZLR 334.

3 For example, Gallen J in *O'Neill v Ministry of Transport* [1985]] 2 NZLR 513 at 517 where he says:

> The criteria for the precise definition of public welfare offences are, with respect, not entirely clear from either the *Sault Ste Marie* case or the decision of the Court of Appeal in *MacKenzie*.

4 It would be more correct to categorise elements of offences but for simplicity I shall refer to classes of offence applying to a whole offence and not to the individual elements.

5 Ms Garrett submits that *Strawbridge* is a case of mistake (p 356). However, she contends that in "possessory" offences mens rea is negated by ignorance. As her definition of mistake (as "an error of perception as between objects") is limited, it seems to this writer that it is preferable to continue to use the time-honoured phrase "mistake of fact" which can include ignorance. ("Mistake" according to the *Concise Oxford Dictionary* means "thing incorrectly done or thought through ignorance or inadvertence").

However, it does not follow that people would prosper better if resources were state owned and state controlled. Yet this is what Barton concludes. He leaps from the fact of transaction costs to the conclusion that minerals should be allocated by government. Such a leap would be justified only if government could costlessly mimic the perfect market. Unfortunately, government can do no such thing. Bureaucratic procedures and political processes are not costless, and indeed, transaction costs skyrocket whenever government takes control and decides resource use politically.

Moreover, the transaction costs incurred when government takes control cannot be cut by streamlining planning and consent procedures. The costs incurred are a consequence not of the manner in which these procedures are conducted but of the very fact that they involve government allocating property rights. Whenever valuable property rights, such as the right to mine or not to be disturbed by mining, are up for political grabs, people will commit considerable resources chasing them. The costs thereby incurred are ignored by Barton; he considers only the costs of private trading.

Barton likewise goes astray in respect of externalities. An externality occurs when one person's actions impose costs or benefits on another that are not reflected in price. Externalities, assumed away in the perfect market model, are pervasive in the real world, and from this Barton concludes it best that minerals remain nationalised. The leap once again to government would be justified only if government were omniscient and knew that set of shadow prices that would produce a Pareto-optimal result. However, government is not omniscient; government does not know the Pareto correct prices, and government cannot mimic the perfect market. Moreover, state ownership and state control, by doing away with privately negotiated prices, only make the problem of externalities worse. Miners and landowners do not directly negotiate with each other and neither side in consequence has regard to the costs their actions impose on the other. State ownership and state control thus create externalities.

The assumption that government is omniscient also leads Barton astray regarding monopoly and oligopoly. He favours the existing state monopoly because he fears that private ownership would result in a single person or group owning sufficient mineral resources so as to influence price (a circumstance contra the perfect market model). But a state monopoly is a deathly cure for a healthy patient. Private title will no doubt lead to ownership being concentrated in the hands of successful entrepreneurs, but this is all to the good because successful entrepreneurs are those people who can best use resources to supply what other people want. Entrepreneurs who fail the profit and loss test must make way for the successful. No such test applies to a state monopoly. The state's ownership is not contested in the market.

Another of Barton's fears is that private mineral owners, prompted by "[d]reams of financial windfall," would sell their mineral title (or retain title to minerals when they sold their land) and so fragment mineral ownership (p 101). Barton argues that in consequence it could become difficult to know who owns what. That is to say, transaction costs could become high, making mining the more difficult. However, fragmentation represents the realisation of the gains to be had through trade and as such is an advantage of private ownership, not a disadvantage, and Barton himself suggests how transaction costs could be kept low: "[m]ineral title should be apparent from the certificate of [land] title" (p 102).

The foregoing criticisms expose Barton's method of analysis. He does nothing more than compare the real world with the perfect market, and then opt for perfect government; the assumption being that government is perfect in ways that real markets are not. The conclusion in favour of state ownership is inevitable given this initial unstated premise.

Distributive justice as against justice proper

Hard on the heels of his economic analysis, Barton questions whether private ownership is just. He concludes that it is not. Private property, he believes, benefits only those who have it, whereas state property benefits everyone.

In response to Ackroyd's proposal to return mineral ownership to land owners, he asks: "Why should those New Zealanders fortunate enough to own land be singled out to have the benefit of this distribution of Crown assets?" (p 103). Better, he reasons, that the profit to be had from minerals be "channelled into the community through the state" (p 103), and distribution, he believes, is best achieved through state ownership. "Taxation can be used to appropriate the rent, but it is usually difficult and controversial" (p 103); much better if the state owns the resource outright.

Barton's mistake here is to consider production and distribution separately. Having decided in favour of state ownership and state control for productive purposes, he switches his attention to a just distribution of what is produced. He overlooks in the switch that resources are not lying around just waiting to be carved up for everyone's benefit. Before they can benefit anyone, resources first have to be made. The making of resources requires initiative, investment, and lots of hard work. It is precisely the "dreams of financial windfall," so disparaged by Barton, that motivate people to make resources and so provide the benefits that he is anxious to redistribute. Taking away the profit to be had from mining would take away all incentive to invest in mineral exploration and new mining technology. The incentive to create new resources and better use of existing ones would be destroyed. The manner of dividing the resource pie is not without implications for the size of the pie.

Barton's focus on distribution divorced from production ignores that the resource pie can be made ever larger. As a consequence he considers justice solely in terms of distributive justice and not in terms of just conduct. Justice as just conduct requires that people's property be respected — not taken and redistributed according to some unspecified criterion of distributive justice. The special virtue of justice as just conduct is that it supports productive activity and outlaws transfer activity. A government that confines itself to enforcing just

conduct is not available to be used to grab what others have produced. People wanting to improve their lot must then produce what their fellow citizens want and are prepared to pay for. The encouragement just conduct provides to productive activity, along with the discouragement to transfer activity, explains why civilised behaviour and rising standards of living go hand in hand.

Moreover, it is simply untrue that private property benefits only those who have it. Workers too benefit. They benefit because secure title encourages capital investment, greater output, and hence higher wages. Consumers also benefit. They benefit because to survive financially private owners of productive factors have to use them to produce what consumers want at prices consumers are both willing and able to pay. The benefits arising from private property are not conferred upon a special class but rather extend to all.

Citizens don't care for the environment; governments do

Barton also comes down in favour of state ownership because he believes that state control is necessary in order to protect the environment. However, it is private property, not state property, that encourages people to care for the environment. What Barton proposes as the solution is in fact the problem.

Barton wants what he calls environmental values taken into account in any decisions to mine. "Environmental values," his readers are carefully to note, "are not consonant with the values that a landowner will seek to protect" (p 103). "In the capacity of property owner an individual has relatively narrow and specific interests, while the interests of society as a whole are very broad" (p 103).

By way of example Barton notes that "surface owners are very likely to be very concerned with soils and revegetation, but less concerned with water quality or the creation of new access roads — two of the more serious consequences of mineral activity" (p 103). To make good this deficiency he proposes "a resources and environmental regime that will allow all values, commercial and ecological, to be taken into account" (p 103). However, he explains neither the necessary "resources and environmental regime" nor the mysterious metamorphosis from property owner to bureaucrat and politician that his argument presupposes. The omission is understandable: no such regime is possible and no such metamorphosis occurs.

Barton nonetheless has no option but to believe that such a regime and such a metamorphosis are possible. He has to rely on government because he fails to understand why it is that people care for some things and not others. Private owners care for their soils and their vegetation because they are their assets; it is in their interests to care for them. They care comparatively less for water quality, and the costs of roads, because the water is not their asset, and roading costs are shunted on to taxpayers. People would behave quite differently if roads had to be financed privately and waterways were privately owned. Private owners would never allow miners freely to pollute their waterways.

The problem of state ownership is borne out by recent New Zealand history. Native forests, gas reserves and lakes and rivers have been over exploited precisely because they are owned and controlled by the state and thus available to be developed for political purposes at the expense of economic ones. Waterways and the air have likewise been freely polluted because of a lack of private property in these resources. What is needed for better environmental protection is not state property but private property. It is private ownership not state ownership that encourages people to care for the environment.

All power to the state

Notwithstanding the variety of arguments that he marshals against private property and free enterprise, Barton's bottom line is clear: he wants resource use decided by experts in government. That is, he wants police power wielded not simply to enforce property rights but to make people use resources in ways they themselves would not freely choose.

The chief advantage that he sees in outright state ownership is that it gives government a free hand to direct resource use. "Public ownership brings with it two important benefits. The first is control" (p 103). State ownership enables government "to choose when and where to allow its resources to be developed" (p 103). Private ownership by contrast hinders government control.

> A government can always impose its will on private owners by legislative measures, but there are limits on what interference with private rights will be acceptable in political and legal terms, both nationally and internationally (p 103).

Barton neglects to mention why there exist political and legal limits on state interference with property. The limits exist in order precisely to prevent those in power imposing their will on people. Without these limits resource use would be totally subject to government control. People's ability to survive and make a living would be conditional upon government consent, and civilians would have to fit in with government plans just as surely as if they were employed in the civil or military service. The limits placed upon the state's interference with property thus provide an essential defence against totalitarianism.

Barton thus fails to link his ideas about resource management with his theory of state. His argument in favour of continued state ownership and state control of minerals is an argument against private citizens having the freedom to decide resource use for themselves. It is an argument in favour of state planning at the expense of private planning. And state planning must be total: nothing in Barton's argument is unique to minerals. As a matter of logic, he must favour nationalisation of all natural resources — land included. He would place ultimate power to decide resource use with government.

Social consensus and society as a whole

Barton has no problem with state ownership and state control. He considers government's will to be synonymous with the interests of "society as a whole," and he writes of a "social consensus that is expressed, for example, in legislative

policy" (p 102).

Barton assumes that in respect of resource use there is an interest held by "society as a whole," that government can discern this interest, and that citizens will fall into line with government decisions. The sociologist in him thus conceives of society as a single organic entity with its mind resident somewhere in government. But a human society is no such thing. A human society consists of individual people each having their own mind, and there is no collective mind that can decide resource use in the interests of "society as a whole." People's aims and aspirations differ, and it is not possible to decide what use of resources best serves the interests of the whole or to achieve consensus about how people should use resources. Indeed, people in New Zealand have on occasions been roused to violence by mining policy contrary to their interests.

Besides, what makes great and civilised societies possible is the rejection of shared ends in favour of shared rules of just conduct. These rules allow people to divide their labour and to co-operate, without agreement on overall purpose. In civilised society citizens refrain from using government to direct others on the use of their property and in return are left free to enjoy their property undisturbed, subject, of course, to respecting their neighbours' property rights. Private property thus provides people with the freedom to pursue their own aims and aspirations, with their individual actions co-ordinated not by decree but by prices privately negotiated. Rules of just conduct thereby provide the foundation for a free and prosperous society.

Barton's approach to resource management would undermine both freedom and prosperity. He would have resource use decided not by private property owners but collectively by government. Political contests would thereby replace private negotiations, with control over resources being decided by one's political clout and not by one's ability to supply what one's fellow citizens want.

Barton's policy prescription, what is more, is a prescription for ever-increasing conflict over resource use. Neighbours in New Zealand get along fine because they understand what the fence between them means. The farmer knows that to gain control of his neighbour's back paddock he must buy it. Barton would put the paddock up for grabs with the fence's position periodically decided by government. The result would be a political contest setting neighbour against neighbour. Conflict as needless as this is precisely what is happening in New Zealand in respect of water and minerals and land uses subject to government consent procedures. The policy of not protecting property rights but of putting them up for grabs in the lolly scramble of government consent procedures is a policy guaranteed to set fellow citizen against fellow citizen. Mr Barry Barton's approach to resource management is thus a prescription for a war of every man against every man.

Conclusion

Arguments in support of continued state ownership and state control do not hold water. Nonetheless, privatising minerals does present hurdles that must be overcome if the benefits of private ownership are to be enjoyed.

First, the benefits of private property must be more widely recognised. This means overcoming superstitions such as that an overall plan is needed to co-ordinate resource use, that private property owners somehow exploit their fellow citizens, and that the free market is inimical to environmental protection and sound natural resources management.

Second, the expectations of interest groups have to be revised downwards. With resources state owned and state controlled, miners expect to be able to mine "their" minerals, conservationists expect "their" resources to be protected, and farmers expect to be able to farm "their" land undisturbed. Politicians for their part encourage extravagant expectations in the bid to win electoral support. Privatisation of its very nature would be apportioned once and for all after which time their allocation would be left to the market.

Third, politicians and bureaucrats have to surrender considerable power. Privatisation would mean a mining policy of no policy, with the decision to mine or not mine left entirely to private citizens.

The hurdles to privatisation are not insurmountable, and perhaps are more imagined than real. After all, the arguments excusing state ownership and state control fly in the face of reason and experience, and privatisation clearly would provide a freer, more prosperous and more peaceful New Zealand. □

London's new telephone area codes

All New Zealand lawyers and their clients who contact the British capital by telephone, facsimile machine or computer, will need to use the new codes from 11.01 am New Zealand time (a minute past midnight in the United Kingdom) on 6 May 1990.

The two new international dialling codes will be +4471, for the central London area, and +4481 for the rest of the capital, instead of the +441 dialling code currently used for the whole area according to a media release from Consultus.

"Not only should lawyers remember to amend their own contacts' code numbers but it would be a valuable service to their clients if they provided them with a reminder and possible advice on what to do. Whether business people keep their London telephone numbers in an address book or an auto-dialler they should take immediate steps to obtain the new codes before the change," International Quality and Commercial Manager at British Telecom Mr Steve Robertson said.

The code change is significant for New Zealand because of the increasing amount of telecommunications traffic between the two countries.

Mr Robertson said it was the huge increase in demand for telecommunications services in recent years which had necessitated the need to change the code.

Because of the growth in demand for services, London is said to be rapidly running out of telephone numbers. The new codes will double the available quantity of seven-digit London numbers. □

Books

Banking books

Paget's Law of Banking
Edited by Mark Hapgood
Butterworths, 1989 ISBN 0406 33353X, $456.00

Banking Under Pressure - Breaking the Chains
By Tim Clarke and William Vincent
Butterworths, 1989, ISBN 0406 114102

Current Developments in International Banking and Corporate Financial Operations
Edited by Koh Kheng Lian, Ho Peng Kee, Choong Thung Cheong and Boo King Ong
A Butterworths Asia publication

Reviewed by Stuart Walker of Dunedin

Introduction

Historically, the legal incidents of New Zealand banking law were very much based on the English common law. By the 1980s, with the enactment of the likes of the Credit Contracts Act 1981 and the Fair Trading Act 1986, the banking industry was to become increasingly subjected to statute law. Legislation was to significantly control what were the acceptable, legitimate and reasonable standards of commercial behaviour by bankers.

Further legislation seems likely. In her introduction to the Ministry of Consumer Affairs' recent discussion paper "Consumers and Credit", Margaret Shields noted that

> [o]f all the problems faced by New Zealand consumers, credit problems are perhaps the most severe and widespread. This is the consistent message I have received from consumers and community groups since I became Minister of Consumer Affairs.

New consumer credit legislation would seem to be the inevitable follower to that report. And, whilst common law will continue to play an important role in shaping the law of banking, it is inevitable that it will be legislation which will be used to correct injustices and inadequacies that arise.

Paget

Traditionally, one of the most important texts in the scholarship of banking law was *Paget's Law of Banking*. It was first published in 1904. By 1982 there had been nine editions. The tenth edition by Mark Hapgood has now been published.

Paget is, of course, an English text. Whilst it continues to provide a useful discussion of the common law, the differing statutory enactments of England and New Zealand mean that the value of *Paget* to those advising on New Zealand banking law, is now diminishing. The first 120 pages of *Paget* are devoted to a discussion of England's Banking Act 1987, Companies Act 1985, Financial Services Act 1986, Insurance Companies Act 1982 and Consumer Credit Act 1974. Whilst this legislation can sometimes be useful from a comparative perspective, any commentary on it is of little use in the New Zealand context.

The text states the law as at June 1989. It includes a commentary on many of the recent developments in the law of banking. There is a discussion of the doctrine of undue influence in light of the English Court of Appeal's decision in *Bank of Credit and Commerce International SA v Aboody* [1989] 2 WLR 759, a commentary on letters of comfort consequent upon *Kleinwort Benson Ltd v Malaysian Mining Corporation Bhd* [1989] 1 All ER 785 and, as would be expected, a review of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1987] AC 80.

There are, however, some noticeable omissions. Whilst there is a short discussion on the liability of bankers when giving investment advice, there is no discussion on bankers' liability when advising on foreign currency loans, an area of law which has received considerable attention from the Courts in Australia. The doctrine of unconscionability, which will play such an important role in the law of banking, receives only a brief discussion. Surprisingly, there is no mention of the Privy Council discussion in the New Zealand case of *O'Connor v Hart* [1985] 1 NZLR 159 [1985] AC 1000. Further, there is no discussion of the doctrine of economic duress and, consequently, no discussion of cases such as the Privy Council's decision in *Pao On v Lau Yiu Long* [1980] AC 614 and the House of Lords' decision in *Universe Tank Ships Inc v International Transport Workers Federation* [1983] 1 AC 366. The decision of the Privy Council in *The Royal Bank Trust Co (Trinidad) Ltd v Pampellonne* [1987] 1 Lloyd's LR 218 receives only a footnote reference. Yet the minority decision of the Privy Council, which was delivered by Sir Robin Cooke and Lord Templeman, will undoubtedly prove to be important in the New Zealand context. Further, the author states that the significance or otherwise of the word "only" after the phrase "account payee" on a cheque "has not yet been considered judicially". That statement may be

correct in the United Kingdom, but it is not correct in the New Zealand context given Davison J's judgment in *New Zealand Law Society v ANZ Banking Group Ltd* [1985] 1 NZLR 280.

To date, *Paget* has been an outstandingly valuable text. Whilst it will continue to be an authoritative banking work, its usefulness as a commentary on the laws which affect banking in New Zealand has markedly declined from that of earlier editions. With New Zealand having its own unique statutory framework controlling the law of banking, this is, of course, not unexpected.

International banking

In the last decade, the banking industry, and the products and services offered by that industry, have become increasingly complex. This complexity has been particularly evident in the field of international banking; a field of bonds and floating rate notes, brokerage of swaps, commercial paper facilities, takeovers, multi-currency clauses, note issue agreements and revolving underwriting facilities. These sorts of transaction create a myriad of new legal and business issues. International banking and finance is an important field of commercial law and is the subject of the text *Current Developments in International Banking and Corporate Finanacial Operations* edited by Koh Kheng Lian, Ho Peng Kee, Choong Thung Cheong and Boo King Ong.

It comprises edited versions of papers delivered at the Fourth Conference of International Banking Law which was held at the Faculty of Law, University of Singapore in 1988. There are 26 articles which cover a number of topical legal problems in the area of international corporate finance and monetary transactions.

The book is divided into four parts.

Part One discusses some of the more modern facilities in banking. It looks at the legal and commercial issues surrounding many of the new forms of banking structures such as electronic funds transfer systems, swaps (the exchanging of cash flows) and commercial paper facilities.

Part Two deals with corporate finance, reorganisation and insolvency. It covers tropics such as insolvency restructuring, the securitisation of assets by banks, corporate restructurings and bankers' liabilities when acting as manager or adviser in such restructurings.

Part Three deals with a range of extra territorial aspects of banking law and corporate financial operations. There is a discussion of the emergence of multi-national banks, the technological changes which are occurring in the banking industry and the issues of conflict that can arise in international banking transactions.

Part Four deals with banking and corporate financial operations in ASEAN, China and Japan. It concentrates on the current developments in the structure of banking and financial operations in those jurisdictions.

The book will be of immediate interest to lawyers, bankers, accountants and other professionals who have to deal with trans-national transactions involving international business and finance.

Not unexpectedly, the book has a decidedly legal flavour. Its value lies in the quality of the articles which are presented by leading academics and legal practitioners, and the range of topics which is covered. By way of example, there is an article on international money transfers by Bradley Crawford, a partner in McCarthy & McCarthy in Canada, a discussion on the securitisation of assets by banks, by Hal Scott, Professor of Law at Harvard University, and a discussion by M Sornorajah, Associate Professor of Law at the National University of Singapore, on the international effects of confiscatory orders and embargoes. Whilst the last article may sound somewhat esoteric, it contains an interesting discussion on sovereign embargoes affecting international financial transactions and includes a discussion of some of the extra territorial assets seizures by the USA: the freezing of assets of Iran during the hostage crisis, the Libyan freeze in 1986 (which resulted in the litigation in *Libyan Arab Foreign Bank v Bankers Trust Co* [1988] 1 Lloyd's Rep 259), and the Panamanian matter where USA sought to destabilise the dictatorial regime there.

The book will be an immensely useful reference work for those involved in the field of international banking.

Banking on change

Those wanting a readable discussion of the changes which are occurring in the UK banking and financial services industry should get *Banking Under Pressure — Breaking the Chains* by Tim Clarke and William Vincent. The book is written from an essentially economic perspective and tells of the changes which are occurring in the banking industry as a result of deregulation. It discusses the likelihood of the banking industry facing acquisitions and mergers, and of the continued political and economic changes which are affecting the way bankers do business.

The authors' thesis is that the banking industry is in a time of dramatic change. This is not, of course, a startling proposition. However, the authors do give a worthwhile perspective on the various and diverse changes which are now affecting banks in the United Kingdom.

The text is divided into three main parts. Part One discusses "The importance of the banking industry: or, Why we need banks", Part Two — "How banks used to make money", and "Why making money will get harder, and harder, and harder", while Part Three looks at "The consequences for banks, the world and all that" or "why the world is a much more dangerous place in which to be a bank".

On a lighter note, the book contains a number of segments that can only be described, at least so far as most banking books are concerned, as unorthodox. In the preface, readers are given a taste of what is in store for them, where there is a quote from Miss Piggy, in *Miss Piggy's Guide to Life* (As Told to Henry Baird), who proffers the following advice:

> A lot of people also urge you to put some in a bank, and in fact — within reason — this is very good advice. But don't go overboard. Remember, what you are doing is giving your money to somebody else to hold on to,

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Defining strike action

By Professor A J Geare, Department of Management, University of Otago

In this article Professor Geare considers specifically the question of whether seasonal workers declining to start work can be said to be on strike and whether an overtime ban amounts to a strike. Professor Geare is the author of The System of Industrial Relations in New Zealand *(2nd revised edition 1988).*

Two cases have recently been heard in New Zealand involving the meat industry. In both instances, the apparent substance of the case and the actual outcome understate the deeper implications for industrial relations and the Labour Relations Act 1987. This paper examines the *Alliance* case (*NZ Meat Processors etc IUW v Alliance Freezing Co Ltd* AC 154/87, 30 November 1987) which on the surface involved the legality of suspending striking workers, and resulted in a decision favouring the union. Of greater general interest was how the Court defined strike action and the implication of the decision on job security for seasonal workers. A later paper will consider the *Tomoana* case (*Auckland and Tomoana Freezing Works etc IUW v Weddel Crown Tomoana Ltd* WLC 81/88, 18 August 1988). Both cases produced a definite "winner" and "loser", but in reaching its decision the Court has created the possibility that the "loser" could ultimately become the"winner" and the "winner" find itself a "loser".

Description

On 25 November 1986, ten workers started work with the Alliance Freezing Company for the 1986/87 killing season. They were employed that day preparing the relevant parts of the employer's plant for the commencement of slaughterboard operations by two "chains" (lines of slaughterboard workers) on the following day. However, those operations did not start the next day because none of the slaughtermen who had been called up by the employer to commence work on 26 November reported to the company. The reason for that, in brief, is that at the end of the previous season those slaughtermen had resolved among themselves that they would not work in the 1986/87 season until certain terms and conditions of employment for them were embodied in a signed document. Such a document had not been signed by that date.

On 26 November, after it became apparent that there would be no slaughterhouse operations, and that hence none of the work normally performed by the ten workers employed would be available, the employer paid them till the end of that day and issued each a notice of suspension. The suspension under s 128 of the Industrial Relations Act 1973, which was still in force. (This section is identical to s 240 of the current Labour Relations Act 1987.) This s 128 allowed an employer to suspend non-striking workers if there was a strike and as a result of the strike the employer was unable to provide normal work. There is no dispute that as a result of the decision of the slaughtermen to refuse work, the employer was unable to provide for the ten workers concerned, the work that was normally performed by them. The question the Court had to determine was whether or not the action of the slaughtermen constituted a "strike".

A strike was defined under s 123 (with no change in the current s 231) as follows:

continued from p 138

> and I think that it is worth keeping in mind that businessmen who run banks are so worried about holding on to things that they put little chains on all their pens.

Quite why this quote is included in the book is not clear. Presumably, it was somehow considered to be worthy of inclusion because of its connection to the book's subtitle "Breaking the Chains" and the contrived front cover illustration showing a broken chain.

The book begins with the reader being told that "[t]he history of banking ebbs and flows, like life itself, through many channels, which intermingle in interesting and sometimes surprising ways." This leaves the reader wondering just what that statement means and whether the authors were ever connected with scriptwriting American soap operas.

The book contains a number of other bizarre statements. For example, the authors argue that "banking ought to be far more of a licence to print money than commercial television ever will be." Just what does that mean? There are also some rather muddlingly mixed-up metaphors. For example, in their discussion as to the future role of banks, the authors conclude:

> In short, the banks may have paddled up another blind alley, their heads are now in the lion's mouth, but their paddle is slowly being eaten by termites. In short, they will, over the next decade, be under increasing pressure.

The reader is also told about John Cleese (with a rather obscure reference to the dead parrot sketch in *Monty Python's Flying Circus*), Captain Mainwaring (remember *Dad's Army* and the bank manager in charge of the Walmington-On-Sea's Home Guard?), Japanese motorcycles, Hell's Angels, English cricket victories, nettles being firmly grasped, and "the whales of British banking" being "spared the harpoon of a foreign bid".

This book is informative and, at times, amusing. Given the content of most banking books, surely that can't be all bad. □

(1) In this Act the term "strike" means the act of any number of workers who are or have been in employment of the same employer or of different employers –

(a) In discounting that employment, whether wholly or partially, or in reducing the normal performance of it; or
(b) In breaking their contracts of service; or
(c) In refusing or failing after any such discontinuance to resume or return to their employment; or
(d) In refusing or failing to accept engagement for any work in which they are usually employed; or
(e) In reducing their normal output of their normal rate of work –

the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers; but does not include a stopwork meeting authorised by an employer.

(2) In this Act the expression "to strike" means to become a party to a strike.

The advocate for the company claimed that the action by the slaughtermen was a strike under 1(c) or 1(d). She submitted that the slaughtermen referred to were "workers who are or have been in the employment of (the employer)", and that their refusal of work at what was intended by the employer to be the commencement of the killing season was a strike, because it was an act of "refusing or failing" after seasonal discontinuance of their employment "to resume or return to their employment" as provided in s 123(1)(c), or of "refusing or failing to accept engagement or any work in which they (were) usually employed" as provided in s 123(1)(d).

The union's advocate disputed the above interpretation. She submitted that before a strike, as defined, may come into existence there must exist not only a discontinuance, refusal, or reduction of labour, but also there must be in existence a contract of employment, which is affected by that discontinuance, refusal or reduction.

Decision

The Court agreed with the union advocate that there must be a contract or contracts of employment before there can be a strike and did not accept the employer's argument that 1(d) legislated specifically for the seasonal employment situation. The Court was of the view that historically the provision was developed for a different purpose. The Court followed the opinion of the editors of *Mazengarb's Industrial Laws of New Zealand* (3 ed), when they claimed:

> The purpose of this amendment was no doubt to extend the definition to include a refusal to perform overtime usually undertaken . . .

Analysis of the decision

The decision of the Court was to reject the contention that s 1(d), refers to seasonal workers; refusing to start work in the new season. The rejection was on two main grounds:

(1) that 1(d) was introduced in 1951 to include a refusal to perform overtime.
(2) that workers must be under contracts of employment at the commencement of the strike.

However, the interpretational issue is far from clear and there are a number of serious questions that need to be put.

The authority used by the Court in the contention that 1(d) referred to overtime was the third edition (1956) of *Mazengarb's Industrial Laws of New Zealand*. This publication has a deserved reputation in New Zealand and is something of an institution in industrial law circles. However, there is a danger of reification and in forgetting that the commentary is simply the view of the then editor. In the case of the third edition, the editor was one F D O'Flynn. O'Flynn may, of course, be correct and indeed he has some qualified support from Mathieson (*Industrial Law in New Zealand*, 1970, p 407) who states that the definition of a strike covers the "act of a number of workers to work overtime" [sic – presumably "refusing" was omitted as a typo]. In a footnote Mathieson then claims that the coverage of a refusal to work overtime comes particularly from 1(d). Unfortunately O'Flynn gave no reasoning or justification for his quoted supposition although it is possible to hypothesise on why he took that stance. As will be discussed below, it is highly probable that it was a result of the 1951 Waterfront Dispute.

Strikes were first defined in the 1908 Industrial Conciliation and Arbitration Act (ICA Act), and the three "acts" of workers which constituted a strike included:

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(a) discontinuing that employment whether wholly or partially . . .
(b) breaking their contracts of service
(c) refusing or failing after any such discontinuance to resume or return to their employment.

The above definition was continued in the 1925 ICA Act, but was supplemented at the start of the Second World War by the 1939 Emergency Regulations 1939/204. The regulations widened the definition by including:

(d) refusing or failing to accept engagement for any work in which they are usually employed
(e) any reduction in the normal output of workers in their employment.

The year 1951 brought the famous Waterfront Dispute. Popularly known as the "1951 Waterfront Strike", it is also referred to as the "1951 Waterfront Lockout" by supporters of the Waterside Workers Union. The dispute was triggered by a refusal to work overtime, and those who claim it was a lockout point out that under the 1925 ICA Act a refusal to work overtime was not a strike. At one time, the writer (Geare, *The System of Industrial Relations in New Zealand*, 2 ed, 1988, p 35) indeed agreed, but pointed out that "Such action was defined as a 'strike' under the wartime Emergency Regulations which were still in force. Overtime

bans were not defined as strikes under the ICA Act, and hence many refer to the incident as the 1951 Lockout". At the time of writing the writer considered that act (e), not act (d), incorporated overtime bans – but has since come to the view that his opinion was incorrect.

However, the 1951 Amendment to the ICA Act introduced two new acts which constituted strike action:

(d) in refusing or failing to accept engagement for any work in which they are usually employed
(e) in reducing their normal rate of work.

– and it is highly probable that O'Flynn assumed that since the Amendment came in just after the 1951 Waterfront Dispute that the changes were as a response to the overtime ban which triggered the 1951 Dispute.

This is in fact not so. As shown above, the 1951 Amendment closely follows the 1939 Regulations – and so it would have required amazing crystal ball gazing in 1939 for the new acts to be a response to the 1951 overtime ban. The then Minister of Labour is quoted in the *New Zealand Parliamentary Debates* (1951) as saying:

> Clause 19 and Clause 20 substitute new definitions for the terms "strike" and "lockout", and members can read those for themselves. The definitions are in effect much the same as those provided in the Strike and Lockout Regulations of 1939. (p 839)

The question to be considered is whether 1(d) specifically refers to overtime bans. If it does not, then the employer's position in the *Alliance* case is strengthened.

In *Lightfoot v Auckland Boilermakers etc IUW* (1920) 21 BK AW 1056, it was ruled that an overtime ban was a strike under the 1908 ICA Act, being an act of workers in combination "in discontinuing that employment whether wholly or partially", even though workers, as individuals, had a right to refuse overtime.

Similarly in 1935, under the 1925 ICA Act, the Court of Arbitration in *Anderson and others v Georgeson* [1935] GLR 238 again found that a combined refusal to work overtime was a strike, ruling that:

> It is clear that their action, in partially discontinuing their employment and breaking their contracts of service, in the circumstances set out in the findings of the lower Court, constituted a strike within the meaning of the Industrial Conciliation and Arbitration Act.

In a much more recent case, the same Judge who later heard the *Alliance* case, clearly considered an overtime ban was covered under 1(a). In the case *Inspector v Wilsons (NZ) Portland Cement* AC 218/86, the Court considered that in the situation of a vote to ban overtime:

> It is inescapable in our view that a strike was intended to occur. It is plain that the employees in the departments affected by the proposed redundancies voted on 22 December 1983 to reduce the normal performance of their employment by refusing to work overtime from midnight on 13 January 1984.

The evidence is fairly convincing that 1(d) was not intended to cover overtime bans, and certainly was not required. the Court had, not frequently, but on at least two occasions ruled that 1(a) covered such action. Indeed, McLagan claimed in Parliament (*New Zealand Parliamentary Debates*, Vol 295 1951) that in the first proposal for the 1951 amendment, the wording for 1(a) was:

> In discontinuing that employment whether wholly or partially and whether by refusing or failing to work overtime or otherwise.

McLagan was perfectly correct, and in Bill form, the 1951 ICA Amendment was precisely as he quoted. The significance of this fact is that the evidence is now overwhelming that contrary to the Court's views in this particular case, and contrary to the view of the then editor of *Mazengarb*, 1(d) was not introduced to cover a refusal to work overtime. Not only had the Court regarded 1(a) as covering a refusal to work overtime in the cases cited above, but Parliament also clearly associated overtime refusal as coming under 1(a). This in itself does not *confirm* the employer advocate's view that 1(d) covers the refusal of seasonal workers to start a new season – but it strongly supports it. One must ask – if 1(d) does not cover that problem, then what is its purpose?

In refuting the employer advocate's case, the Court accepted the proposition that workers must be under contract of employment before they can be legally regarded as going "on strike". This point will be considered along with a justification for an interpretation of 1(d).

As quoted earlier, the definition of a strike refers to "the act of any number of workers who are or have been in the employment of the same employer or different employers . . .", and the definition of a worker (under the IR Act 1973) was "any person of any age of either sex *employed* by an employer . . ." (my emphasis). Strict interpretation reveals a ludicrous situation. Once workers are no longer in employment – but merely "have been in employment", they are by the old definition no longer "workers" (since, to be workers, they must be *in employment*). Rational drafting requires either the definition of worker to be broadened (as it is under the current LR Act 1987) to include those intending to work, or the definition of a strike to refer to "any number of *persons* who are or have been in employment."

The Court considered this situation and assumed that 1(d) could be expressed as follows:

> In this Act the term "strike" means the act of any number of persons of any age of either sex employed by an employer to do any work for hire or reward who are or have been in the employment of the same employer or of different employers – . . .
>
> (d) In refusing or failing to accept engagement for any work in which they are usually employed . . .

Notwithstanding that technically there can be no "correct" interpretation, what is a fair and

liberal interpretation expressing the intent of the legislature? I submit with respect that the following is a more fair and liberal interpretation:

> In this Act the term "strike" means the act of any number of persons of any age of either sex who are employed or who have been employed by an employer to do any work for hire or reward who are or have been in the employment of the same employer or of different employers – . . .
>
> (d) In refusing or failing to accept being hired for any work in which they are usually employed . . .

It is submitted, again with respect, that due consideration by the Court was not given to the implication of the wording "*accept engagement* for any work in which they are usually employed" (my emphasis). Definitions of "engagement" in the *Concise Oxford Dictionary* include: "Action of engaging; state of being engaged". The definition of "engage" includes: "Hire (servant or employee)". Popular usage, it is submitted, would accept that the phrase "engagement for work" refers to *hiring*, and not to accepting tasks in a work environment. Indeed, the Court's interpretation makes the words "engagement for" redundant. If the legislative had intended 1(d) to refer to a refusal to accept *tasks* – they would have used the phrase "in refusing or failing to accept work . . . ". 1(d), as actually written, clearly envisages a refusal to be hired.

To re-emphasise, the express use of the phrases "or *have been* in employment" and "*engagement* for any work" (my emphasis) indicate the legislature envisaged persons not *currently* under a contract of employment combining in concert to act in a way which represents a strike. Certainly the Court in this case was correct in stating that "any of the slaughtermen called was free to reject the offer" – just as Courts in the past have ruled that although an act by an individual worker may be perfectly legal and acceptable, similar acts by a *number* of workers, acting in concert would be a strike. As stated in *Ross v Moston*, "the gravamen of a strike is the combination of the workers", in taking particular action.

In the *Alliance* case, the slaughtermen in question had all been under contracts of employment, with Alliance. Early in 1986 they agreed in combination not to start the next season until conditions were met. When they took their action in November 1986 they were not necessarily "workers" since some or all may have been unemployed. (Some may have been in off season jobs with other employers.) However they all had been employed by Alliance. In fact in this case, it is accepted that the agreement *not* to work, was made by the slaughtermen while they all were in employment at the end of the previous season.

This paper has argued that in fact the decision in the *Alliance* case should in fact have favoured the employer. The slaughtermen, by agreeing in combination not to accept engagement for the new season, when it was usual for them to accept such engagements, were in fact "on strike". The Court however decided for the union, with the union possibly winning great satisfaction for the success in itself, as well as the $300 they won for each of the ten workers the Court found were unlawfully suspended. However it is possible the union has opened a Pandora's box as it is possible for the employer to now use this decision against the union.

Tradition in the meat industry has been to act as if a "thread" of a contract of employment existed for each worker through the off-season. Engagement at the start of the season comes in waves, since at the start of the season there is insufficient work for full operations. Workers with "seniority" (length of service with the employer) are hired first. The Court accepted that:

> each of the men called to work on 26 November (approximately 110) had an established place on a seniority list. That seniority list had been established in accordance either with local custom or with the award, or both. The employer was regarded by the slaughtermen as bound to call those particular slaughtermen at the commencement of the new season, and to do so in a particular order.

The Court, however, went on to say

> The status at law of the seniority list was not argued before us and we make no decision about that, because one thing is clear: the seniority list arrangement did not create or contribute to a contractual employment relationship in the circumstances placed before us. We so hold . . . the award does not create a contract of employment, nor does it create by itself continuance of the employer/employee relationship during the off season if no work is offered or done . . .

This writer is in agreement with the Court that in law, there is no contract of employment during the off-season. However, in practice in the meat industry, it has always been assumed that a "thread" of a contract of employment existed. With this ruling, however, any employer can in fact assume that there is *no* obligation to offer any particular person engagement at the start of the season. The seniority list could still be followed for those offered engagement, but particular individuals need not be offered employment at all.

It must be emphasised that there is *no criticism* of the Court's ruling on the issue of the contract of employment. In fact, any employer could well have requested a ruling on that matter, if so inclined. However the matter only came up almost incidentally as a result of two facts.

(1) The union claiming ten workers were unlawfully suspended.
(2) The union advocate arguing, and gaining the Court's agreement that act 1(d) in the definition of a strike referred to a refusal to do overtime work and that contracts of employment must be in existence for a strike to occur.

It has been asserted that the argument outlined in fact (2) above was fallacious – but as a consequence it now opens up the possibility of employers taking an aggressive stance and refusing to re-hire former freezing workers with poor work or attendance records. Ironically, the "winner" in this case – the union – could well find itself the "loser" and vice versa. □

The right to leave New Zealand

By N J Jamieson, Senior Lecturer in Law, University of Otago

The proposed Bill of Rights contains a provision that everyone should have the right to leave New Zealand. In this article Mr N J Jamieson examines the implications of this provision if taken literally as the statement of a fundamental right that cannot be restricted. After looking at the matter historically in respect of the writ Ne exeat regno *he goes on to raise the question as to whether in fact the clause is intended also to effectively repeal all existing restrictions such as those stopping defaulting debtors leaving the country. He also looks at the question of distinctions between the original Maori inhabitants, the pakeha settlers, the question of nationality and citizenship, and finally, the position of newer immigrants including those from the island countries such as Western Samoa.*

What does our proposed Bill of Rights mean when it provides that "everyone shall have the right to leave New Zealand"? The recent report – denoted the *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* — confirms the inclusion of this provision. But what do the words mean?

Freedom of movement versus ne exeat regno

Article 42 of Magna Carta 1215 provides that anyone may leave the kingdom and return at will, except in time of war when he may be temporarily restrained for the common good of the kingdom. Blackstone (*Commentaries* i, 265) upholds this liberty to leave the country at common law, but notes that it may be taken away by the royal writ *ne exeat regno.* Can the writ be issued against subjects at large or only against specific individuals? Blackstone does not say, but Coke (3 Inst c84) is more particular. For a long time, as Coke points out, some important classes of royal subject – peers because they were crown counsellers, knights because they were responsible for the defence of the realm, and archers because they might teach aliens the art of artillery – needed special permission to leave the country. The liberty, whether exercised at large or with special permission, could not be exercised irresponsibly.

The right to leave one's country does not diminish one's allegiance to the Crown. The sad case of *DPP v Joyce* [1946] AC 347 where Joyce was hanged for treason for broadcasting anti-British propaganda at a time when he had renounced his nationality but forgotten to revoke his passport, demonstrates this at one extreme; but the ANZUS withdrawal speech of former Prime Minister David Lange made at Yale in April 1989 only demonstrates the other.

The constitutional context in which our Prime Minister, in the eyes of many, broke Cabinet confidence to speak of ANZUS withdrawal while lecturing at Yale is fascinatingly complex. Less than a year before, statements by a senior investigating solicitor Mr Keith Peterson of the Department of Justice about the need for further enquiry into white collar crime had been dismissed by the Deputy Prime Minister as the result of Mr Peterson having been "engaged on a frolic of his own". Four months after this, another public servant in the person of Dr Graham Scott, Secretary to the Treasury, also came into open confrontation with the Government over a paper he had given to the Australian Institute of Public Administration on reforming the public service in New Zealand. Dr Scott was warned off giving rise to any further debate on constitutional issues by the Prime Minister, even though, in the Prime Minister's own words, Dr Scott was "perfectly entitled to give rise to these hallucinations in Australia" as long as he made it clear he was not speaking for the Government of New Zealand. It is fitting, therefore, that the Prime Minister's own judgment against others caught out for breach of confidence should be just as vigorously applied to himself. In Wycliff's words – "in what dome ye demen, ye schuln be demed".

So much for the origins of the conflict surrounding David Lange's ANZUS withdrawal speech made as a result of exercising his right to leave New Zealand; but what was going on contemporaneously as well as what happened consequentially was of even greater constitutional significance. At the same time as the PM lectured at Yale, Opposition MPs broke constitutional convention by travelling overseas to negotiate foreign policy with the United States of America. This was done notwithstanding that the United States withheld from the Prime Minister already there the usual official reception accorded a visiting dignitary from Her Majesty's Government in New Zealand.

How tragic or merely comical the juxtaposition of such strange events will finally prove for New Zealand's constitutional history is hard to say. Eyewitness accounts from the corridors of power have dried up since Tom Scott stopped writing the Aotearoan equivalent of the *Anglo-Saxon Chronicle* for the columns of the *New Zealand Listener.* In any case perhaps it is always what happens next rather than what is said next that determines the result for any fast-changing society. The fact is that as the Prime Minister's ANZUS withdrawal speech was being given at Yale, and New Zealand's foreign policy was being negotiated by members of the Opposition in Washington, a Bill doing away with the death penalty for treason was being prepared for introduction in Wellington. Of course, not all lese-majesty need be

high treason — as Dun Mihaka demonstrated by baring his bottom to the Queen.

Legal history

The ebb and flow of *ne exeat regno* through legal history provides a fulsome study. After the consequences of his ANZUS withdrawal speech, Prime Minister Lange may have wished that the Governor-General had prevented him from taking the trip. Would the writ *ne exeat regno* have been issuable to prevent the breach of Cabinet confidence by the Crown's chief minister in the United States? Glanville Williams (1948, 10 Camb LJ at 70, n31) quotes from *Ridge's Constitutional Law* to the effect that even in peace-time an individual may be prevented from leaving the kingdom by the writ *ne exeat regno.*

All the same, the Court of Queen's Bench in *Felton v Callis* [1968] 3 All ER 673 had some difficulty in tracking down the writ. *Halsbury's Laws of England* treated it as being extant but obsolescent. *The Final Report of the Supreme Court Practice and Procedure* (1953): Cmd 8878) recommended its modification as being "useless in its present application". "On the footing that the writ still exists", asked Megarry J, in *Felton v Callis*, "ought it to be issued?"

The case of *Felton v Callis* was brought by a creditor suspicious that this former co-partner was about to leave the country without settling his debts. The issue of the writ depended, *inter alia*, on the debts being equitable debts, because "by a process of adaptation familiar to all English lawyers, the prerogative writ was transformed into the equitable counterpart of arrest on mesne process at law".

This bears out what Williams (op cit) had already noted in 1948. The writ *ne exeat regno* now seems confined to individuals who are defaulting debtors. *Taswell-Langmead's Constitutional History* draws the same conclusion. The writ would thus apply now only to John Kirk as a privately defaulting debtor rather than to the public figure of David Lange as the Crown's chief minister travelling to Yale.

All the same, even the arrest of defaulting debtors on mesne process may not operate any longer in New Zealand. As Richard Sutton says in *Creditors Remedies* (1978, p 19) "the debate is probably beside the point". This is because of the fusion of law and equity in New Zealand since the Supreme Court Ordinance of 1841.

If this is so, then the loss of every form of *ne exeat regno* testifies to the remarkable declension of the royal prerogative in New Zealand. It is an example of the way in which a petty function, such as the arrest of defaulting debtors on mesne process, can erode away the prime function of what was always intended as an extraordinary remedy at constitutional law.

Renewal of law

What is already passing away may not yet be complete, however. There is still another correlative possibility for the resurgence of the prerogative writ of *ne exeat regno* in New Zealand. Because the petty function of arresting debtors on mesne process no longer operates to wear away and transform the writ from public to private law, the prime function of the prerogative writ remains to gather strength and perform its original purpose in constitutional contexts.

The continuing viability of *ne exeat regno* can never be demonstrated without the instant case. The temptation for legal commentators is to reject the likelihood of its resurrection. Thus de Smith in his *Judicial Review of Administrative Action* dismisses it as being beyond his "concern with the living rather than with the dead or moribund". But this only testifies to the antagonism of the constitutional lawyer towards the constitutional historian. This antagonism, opened up by Dicey in his efforts to prove the autonomy of constitutional law, constitutes a major faultline of legal scholarship between past and present. The result is to overlook the renewal of law as a juristic phenomenon.

The current revival of indigenous law in New Zealand means that we are in the middle of such an experience, but to be in the middle of something does not make for the most conclusive and convincing of illustrations. A better example of the renewal of law arises from the Bill of Rights 1688.

Imperial Statutes

In 1881 the Government Printer for New Zealand published a selection from the Acts of the Imperial Parliament apparently in force in New Zealand. It was prepared by the Commissioners under the Revision of Statutes Act 1879. The Commissioners introduced the Bill of Rights (1 Will and Mar, Sess II, c 2) as well as the Act of Settlement (12 and 13 Will III c2) as "having little practical application", it only being deemed desirable "that they should be inserted on account of their historical interest".

The decision in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 that the Bill of Rights 1688 is not just of historical interest but of practical application in being the law of the land will doubtless sing in the ears of the Law Commissioners, and make their eyes pop with amazement when the time comes for their bodily resurrection. The decision in *Fitzgerald v Muldoon* is a fitting remembrance that, unlike Scots law, there is no doctrine of desuetude in English or New Zealand law. Whatever remains extant, therefore, can only with great risk be described as obsolescent. Statutes and cases may gather strength rather than fade away through lack of use. The heritage of the common law sees their survival as a sign of strength. It is only relatively recently (and therefore with but limited authority) that some cases suggest otherwise. This is the open-ended process by which the doctrine of precedent is firmly entrenched in our common law.

Without the corresponding doctrine of desuetude it would be rash to presume the dead writ of *ne exeat regno* incapable of resurrection. The probability of this happening depends, as it did with the Bill of Rights 1688 in *Fitzgerald*'s case, with the context of constitutional concern. Constitutional remedies, whether based on Magna Carta, the Bill of Rights 1688, or the Treaty of Waitangi defeat their own purpose (as did *ne exeat regno* when reduced to the level of arresting defaulting debtors) once they are argued in a commonplace way as if over the kitchen sink.

Perhaps this is the point to our new Bill of Rights when it proposes that everyone has the right to leave New Zealand. On this argument the purpose of article 11(3) is to put an end to all possibility of issuing the writ *ne exeat regno.* If so then the article operates indirectly not

directly. Does this mean that all other creditors' remedies to stop defaulting debtors leaving the country likewise disappear under the common law doctrine of implied repeal?

Freedom of movement versus "stop the tour"

Finnigan v NZ Rugby Football Union Inc (No 3) [1985] 2 NZLR 190, began by seeking an interim injunction to prevent the All Black rugby team from touring South Africa. It would be hard to imagine a case more apt in which to argue *ne exeat regno*. The case arose in "national circumstances" as one shoulder heading to the judgment of Cooke J testifies. And "in truth", as was said in that judgment "the case is unique and it was a unique problem that confronted this Court in June 1985". Nevertheless there were other matters that could have got in the way of issuing the writ. Unless the exercise of the prerogative in New Zealand is entirely domestic, how could the writ be issued if, as was held by the Court "no hearing by the Privy Council in London in 1986 could reproduce the situation or the background". Of course there is the legal fiction of Her Majesty in right of Her Government in New Zealand being different from Her Majesty in right of Her Government of Great Britain. It must be extremely schizophrenic for what purports to be a corporation sole to be split over the various countries of the Commonwealth. As it happened, however, "the substance of [the] proceedings was extinguished by the decision of the New Zealand Rugby Union not to tour South Africa [that] year and the agreement between the parties to the effect that the proceedings should not continue". Whether the outcome of arguing for *ne exeat regno* in *Finnigan*'s case would have been the same as in 1937 when the Crown was seen (*Ridge's Constitutional Law* ed, Keith 383) as being powerless to prevent a group of churchmen investigating religious conditions in Spain still remains a moot point for New Zealand. Can a group of churchmen leaving Britain in 1937 to investigate religious conditions in Spain provide a precedent for an All Black Rugby tour from New Zealand to South Africa half a century later? In other words, how seriously do we equate sport with religion in New Zealand?

The fundamental freedom to be left forsaken

No doubt, article 11(3) of the proposed Bill of Rights can be seen to substantiate some of the reasoning of *Finnigan*'s case. But the drafting of the proposed Bill of Rights is naive when compared with articles 41 and 42 of Magna Carta. Can riding rough shod through eight centuries of our legal history avoid controversy? Considering the centuries of controversy over Magna Carta this seems unlikely. But instead of provoking litigiousness as one extreme response, it may only induce constitutional apathy as the other. The abstract legal right to leave this country is hardly relevant to those hundreds of New Zealand citizens who day by day depart these shores in fact. Many of them doubtless feel disillusioned by the nation's failure to "come alive".

"Everyone shall have the right to leave New Zealand" is exactly what article 11(3) of the proposed Bill of Rights provides. Taken and exercised by everyone literally, it leaves New Zealand as a land forsaken and desolate. How can this be good news even for the meek? How can this bind up the broken-hearted? Will this proclaim liberty to the captives and open prisons to them that are bound?

The problem with expressing the right to leave New Zealand as a fundamental freedom is the problem of deciding whether this is funny or tragic. Like Cabinet's response to the ANZUS withdrawal speech it could be either. We may presume that in something as serious as a Bill of Rights this fundamental freedom of movement is not just a token gesture. It is more than just the right to wriggle one's toes – although that, too, could be important when sitting in the stocks of some seventeenth century colony. Maintaining one's circulation could make all the difference in securing "the right not to be subjected to torture, or to cruel, degrading or disproportionately severe treatment or punishment" under article 20 of the Bill. If the different provisions of the Bill are to be accorded the status of articles, then the shoulder headings become rubrics instead of marginal notes. This is not just of formal concern. Unlike marginal notes which are subject to section 5(g) of the Acts Interpretation Act 1924, the rubrics to the proposed Bill of Rights have a substantive content without which the articles would themselves be less meaningful. For example, only article 11(1) speaks of freedom, and leaves the following paragraphs (2) to (4) to fend for themselves under the rubric. Nevertheless the persistence with which the Final Report of the Justice and Law Reform Committee does injustice to the Bill by referring to the Bill having marginal notes is now merely marginally noted.

Context

It is true that article 11(3) of the proposed Bill of Rights providing that everyone shall have the right to leave New Zealand appears not by itself but in the context of three other provisions under the same rubric relating to freedom of movement. Article 11(1) of the proposed Bill provides that "everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand". Article 11(2) provides that "every New Zealand citizen has the right to enter New Zealand". Article 11(4) provides that "no one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law". Perhaps these three provisions provide a context of construction to explain what article 11(3) means when it provides that "everyone has the right to leave New Zealand".

This hope is soon dashed by considering the complexities of New Zealand citizenship. At one extreme we have the so-called problem of Polynesian overstayers. The once startling decision of the Privy Council in *Lesa v Attorney-General* [1982] 1 NZLR 165 highlights the difficulty of being prematurely decisive in dealing with that category of New Zealand resident. "Overly resentful", as F M Brookfield ("New Zealand Citizenship," 1983, 5 Otago LR 368) says, "of the possibly embarrassing effects of the Privy Council's decision on immigration policy, the New Zealand Government moved rapidly to introduce countervailing legislation. The effect of the Citizenship (Western Samoa) Act

1982 on nearly all those having citizenship under the decision was to deprive them of it unless they were in New Zealand at any time on 14 September 1982". The bonny briar on which flowered the English rose of Blackstone's common law showed every sign of being overwhelmed by Llewellyn's bramble bush of legislative intervention.

Commensurate with, but less talked about than the problem of Polynesian overstayers, is the reciprocal problem of European overstayers. Recent controversy over voting and membership rights under the School Trustees Act 1989 shows how long-standing participants in local government may find themselves alarmingly discredited by lack of New Zealand citizenship. Somewhere in between both these extremes there is also a vast category of British subjects who came to New Zealand when the status of a British subject, whether in New Zealand or Britain, was one and the same. Many British subjects in New Zealand now find that, as a result of changes to New Zealand law culminating in the Citizenship Act of 1977, they no longer have the same right to remain and reside here they once had when they came as settlers. Encouraged to emigrate here perhaps seventy, fifty, or even less than forty years ago, and as British subjects coming here on an equal footing by way of allegiance to the Crown as those already here, their shock is great to find that they have overstayed their welcome.

Specific examples

Take the real-life case of Annie S, now eighty years of age and a resident of Dunedin. Her family came to New Zealand from Scotland in 1908 and settled near Winton in Southland. Annie milked the cows and ploughed the land on her father's farm. Her brothers fought in both World Wars. Later she married, brought up a family, and went out to work, washing clothes in a children's orphanage, driving a delivery van for a furniture firm, and cooking for a catering business. Until ten years ago she worked in the liquor store of the local pub. Now she is a widow with several great grandchildren — both Maori and pakeha.

With the breakup of the British Empire Annie S, one of New Zealand's oldest surviving settlers, lost her rights to remain in New Zealand. The reverse discrimination against those from the old country requires extensive documentation. It set in and intensified with legislation from 1948 onwards. It peaked around 1968 when amendments to the Land Settlement Promotion and Land Acquisition Act 1952 (admittedly more liberal than those first mooted) explicitly distinguished between New Zealand citizens and others in relation to their acquiring more than one acre of urban or more than five acres of rural land. Today, despite being a great-grandmother of seventy-five years residence in this country, the Local Elections and Polls Act 1976 declares Annie S ineligible to sit on a school board of trustees. Worse still, should she leave the country to visit relatives overseas she may not be allowed back unless she gets special permission before she leaves. But the Bill of Rights won't resolve this because it only allows New Zealand citizens a right of return.

Recent letters to the papers say remedies for such cases of reverse discrimination lie in the early settlers' own hands. Let them take out New Zealand citizenship if they want to sit on school boards and have a right of re-entry to New Zealand. This savours of youthful arrogance against the elderly and infirm, for who dares apply for New Zealand citizenship when there is a risk of being further singled out by being turned down?

Another case, this time of William Grundy, reported at length in the *Otago Daily Times* of 4 May 1989, will illustrate this risk of further rejection. Grundy came to New Zealand from Britain when he was four years old. His family settled on Mount Cargill, Dunedin, where he was educated at the Upper Junction and Mount Cargill schools. In 1938 he returned to Britain, and with 350 other New Zealanders who went to the High Commissioner's Office in London, enlisted in the 2nd New Zealand Expeditionary Force. Among the first colonial troops in uniform overseas, they had their own hats made to their own cost of ten shillings apiece. Grundy saw active service in France, Egypt and Greece, and served in the New Zealand forces for over six years. In 1945 he returned to New Zealand where he lived for 18 months with his wife and daughter. Rehabilitation training offered here in bricklaying or carpentry did not appeal to him but an offer of a chef's apprenticeship in London, and further training in France resulted in his career as a chef with the P & O Line. After 30 years at sea, his return to New Zealand conflicted with changes in our law of citizenship. His application to live with his five brothers and six sisters here in New Zealand was at first refused. The fact that he is overweight, suffers from slight diabetes, and has once had a heart attack means that he does not meet the required health standard for citizenship. What does Grundy, who has been given four months to leave the country, think about that? "It makes a mockery of being an Anzac", he replies. "I just want to spend the rest of my life with my family. Instead I'm being sent away like a prisoner. They're putting me in exile, but I'm not going to lower myself and grovel. I'm not going to appeal. Instead, I'll be on a plane for England."

The good news is that the case is being reconsidered. There is every likelihood of Grundy being allowed to stay. If so, then it is public support and newspaper publicity that has won the day. The support his cause had attracted had been "fantastic", Grundy said. "No other people in the world would have responded in the same way."
[The case was reconsidered and Grundy was granted New Zealand citizenship — Ed]

Granting of citizenship

By way of comparison, let's look at two vastly different cases where New Zealand citizenship has been granted. The first of these is the case of Baby Lyndsay Toews, born to Canadian parents Myles and Patty Toews who were visiting Dunedin on the international Christian missionary ship *Doulos*. Baby Toews was born in Queen Mary Maternity Hospital Dunedin in April 1989. Her sole connection with New Zealand is her place of birth. A few weeks earlier or later and her birth would have been elsewhere. Baby Toews has a sister Rachael, aged three, born in Senegal, a brother Justin, aged four, born in Aruba, and a sister Deanne, aged six, born in Germany. None of

these other children hold citizenship of the respective countries in which they were born. Only Baby Lyndsay can be a New Zealander. Of the whole family only she can hold a New Zealand passport. Baby Toews gains rights of entry, residence, and return to New Zealand just as, if not more fortuitously than Annie S and Grundy lose theirs.

Lastly, there is the case of Edward Errington McGuire, a Scottish immigrant and sickness beneficiary convicted of forgery in the Auckland District Court on 10 May 1989. For the purposes of obtaining citizenship and remaining permanently in New Zealand McGuire had obtained the birth certificate of a dead child who had been born in New Zealand, and by assuming the name and identity of the deceased had obtained a New Zealand passport which enabled him to travel overseas and return to this country. According to Press Association reports, McGuire "was granted permanent New Zealand residency [in 1988] after disclosing his true identity to immigration authorities".

Are these cases typical or atypical of freedom of movement in relation to New Zealand? In an essential sense every case of immigration or emigration is idiosyncratic. In that sense it is impossible to compare Grundy's case with that of McGuire, or the long-term residence of Annie S with the first few days of newborn Baby Toews. Nevertheless the question still remains a legal one — how does one enforce the law relating to freedom of movement as distinct from the responsibility for allegiance to New Zealand? Rights to freedom of movement, to residence, and to concomitant advantages of New Zealand citizenship are not to be given as imperial largesse, any more than they can be withheld from those who have been encouraged or allowed to shoulder the responsibilities of civic allegiance.

How the earliest settlers turn out to be the longest overstayers

In the widest sense, everyone in New Zealand is some sort of overstayer. Those who have been longest here often turn out to be the greatest overstayers of all. Even the Maori is an immigrant. If once there were Moriori, they too are now *mutu a moa*. What this means is that the word indigenous, when applied to the New Zealand social setting, is but a term of convenience. We are all exotics, whether we like it or not.

Complicating the emigre mentality of a massively mobile nation are family and tribal histories of a migratory ebb and flow. Kupe returned to Hawaiki from Hokianga in somewhat the same way as the writer's own great-great-grandmother returned from New Zealand to Scotland on the same ship she set out on, leaving it for subsequent generations to reassert their antipodean destiny. By 1919 the Undesirable Immigrants Exclusion Act had been passed to effect a faster turnaround for those found "disaffected or disloyal". This remained in force until the Immigration Act 1987.

The widely suggested solution for all these problems relating to freedom of movement under the Bill of Rights is for every overstayer to apply for New Zealand citizenship. This is the popular solution advocated by those born here who have never experienced the cross currents provoked by this freedom of choice. Yet these cross currents, both Polynesian as well as European have continued through the several centuries of settlement in New Zealand. They are part of our national heritage. This rhythmic *ingang an ootgang* is the mark of not just a cross cultural but an oceanic society. It differs from the magnetic drift, either eastwards or westwards, northwards or southwards that makes people migrate more uniformly within a land mass.

In the face of our oceanic response to the fierce tidal race of conflicting immigration policies that have beset these shores, what is our legal yardstick or standard, our plimsoll line by which we can recognise that these islands are not overly or underly laden? Nothing less than that will be our turangawaewae, for the man who stands firm upon his native heath, whether he be Hereward the Wake, Robin Hood, Te Kooti or Rob Roy MacGregor, is committed by his stance. He is no longer open to the ebb and flow of counter argument. Let Lanfranc advise William what he will, let London lawyers enjoin with those in Nottingham, Kororareka, or Edinburgh, the footing holds firm — whether taken by the last of the English in 1071 or what were thought to be the last of the Maori in 1872. Landfall is not just made but held, as the Maori proved to Europe by pushing off Tasman for more than a century before welcoming Cook to share the same landfall.

What it takes to be the last of one's race, whether Mohican, English or Maori, is destined to devolve on the strongest surviving individual. What this last remnant of the tangata whenua means in physical terms to the lone survivor is translated into the spiritual realm for the entire tangata whenua he represents. Will maintaining his own life be more or less relevant to the lone survivor than the need to make a last stand on behalf of the apparently lost cause of his departed tangata whenua? If so, then the tradition of being the last of the English lives on through Winston Churchill no less than Hereward Leofricsson and Robin Hood. As Maitland so clearly explains in *Doomsday Book and Beyond*, this is because legal history is not just a history of events, but a history of ideas.

This is legal history writ large indeed. It is a legal history of not only physical but also mental, moral, and spiritual values. Who but the prophets could have foreseen that Hebraic values would imbue Gentile Christendom to carry the good news, first of spiritual salvation and eternal life, then of worldly law and order, across to Aotearoa? If this became a promised land for Ringatu and Ratana no less than Catholic or Presbyterian, then our sense of identity is more spiritual than physical. Who then are the last of our own old ones, the tupuna of bygone times equivalent to Abraham and Moses, who have set the stage for the resurgence of Maori values in Aotearoa today? Whenever we refer to tupuna, whether Moses or Maui, we accept that first here have final say in what happens next. In the same way Britanii eventually become Great Britons.

Who will have the last word over what constitutes the prevailing people of these isles is a hard question beyond the scope of this paper and the ability of its author to answer, but it has a lot to do with settling the law of citizenship for the present time. Maui and Kupe are

demigods of discovery and landfall. Being themselves of a wandering nature, they don't resolve the difficulty of deciding whether to go or stay. This accounts for the freedom of movement we value so much in Aotearoa. With one eye on Hawaikii and the other on more northern shores, however, we are likely to become as the lost tribe, forever wandering. But the paradox of action remains: true freedom of movement is forged by a commitment to stay, to stand one's ground eventually in the face of a craven desire to leave New Zealand by running away.

For a start, the modern Maori appears to be in a privileged position so far as his nationality is concerned. New Zealand is his native heath, for the Maori arrived here first before any European, and so is tangata whenua de facto. He also has the best of both worlds, for no matter how much the concept of nationality has changed from owing allegiance, through enjoying rights, to exercising freedom of movement, his national status was also the first to be given de jure expression in New Zealand. His turangawaewae as a British subject is secured by Te Tiriti. Article 3 imparts to him all the rights and privileges of a British subject. This was the consideration for his ceding sovereignty under article 1 and transferring the allodium of Aotearoa to the Crown under article 2.

That the Maori had the status to cede sovereignty and transfer the allodium of Aotearoa to Britain had already been confirmed by the Declaration of Independence of New Zealand executed by the Confederation of Maori Tribes in 1835. This is not the time and place to consider the Declaration as a put-up job any more than to consider the Treaty as a blanket-bought missionary Magna Carta. The only point now being made is the need to recognise the preliminary documentation of the often overlooked Declaration as a prerequisite to establishing the status of Te Tiriti.

Whether the Maori could lose the fundamental rights and privileges of being a British subject emanating from Te Tiriti is a moot point. Some authorities on colonial law view these treaty rights as being purely personal. This makes the British nationality of indigenous people under imperial treaties a merely domestic issue. The rights and privileges of indigenous people are thus open to being amended by subsequent statute law. See Parry on *Nationality and Citizenship Laws* p 70 for this point.

Contemporary controversy between the Maori and the Crown does not deal with nationality. It centres solely on land rights. Even the Maori activist still slumbers over the loss of his rights and privileges as a British subject. Presumably, in keeping with Welsh, Irish and Scots nationalists, the Maori activist does not really want such rights. Too forceful a claim too early might also awaken charges of treason against many who fought against the Crown in the New Zealand Wars. Since the reign of Edward I (1272-1307), Scots had been hung, drawn and quartered as traitors for much less than happened here. The place where this was done still gives the name to Scotland Yard.

To England's credit, the same hard line has never been taken in New Zealand. Executions for treason and wholesale butchery of men, women and children never took place here by way of English reprisal for the New Zealand wars. In 1296 Edward I invaded Scotland to put down Baliol's rebellion, or so he liked to call it. In doing so he slaughtered all 17,000 citizens, men, women, children and babes in arms so that not a living soul remained in the previously thriving sea town of Berwick. In 1746, less than a century before Te Tiriti, the Duke of Cumberland acquired his nickname of the Bloody Butcher by committing similar atrocities throughout the Scottish Highlands. Accordingly, it was no accident that many early settlers were the most vociferous opponents of British rule in New Zealand. As one cynic said, "God would never allow the sun to set on the British Empire because he could never trust Englishmen in the dark". That the sun has finally set on the Empire carries with it the blessing that we can now trust Englishmen.

The Statute of Westminster

Perhaps the same continuing opposition to British rule explains the Statute of Westminster Adoption Act 1947. This statute marks the beginning of the loss of British nationality in New Zealand. It implemented the Statute of Westminster 1931 (UK) and so gave effect to resolutions passed by the Conferences of 1926 and 1930.

Popular opinion in New Zealand was all against adopting the Statute of Westminster 1931, but academic arguments won the day. To convince the populace that they had nothing to lose, university academics chaired by the historian J C Beaglehole produced a book *New Zealand and the Statue of Westminster.* This was the fruit of five public lectures given at the Victoria University College of Wellington in 1944 — still rather a luxury in the closing years of the Second World War. The book makes no mention of the fundamental compact between the Confederation of Maori Tribes and the Crown whereby the natives of New Zealand were accorded all the rights and privileges of British subjects. Indeed, it doesn't anywhere mention the Treaty. The New Zealand Wars and the threat of treason arising from allegations of rebellion had driven all talk of the Treaty underground for over fifty years. It would take the demise of the Crown through the creation of state-owned enterprises in constitutional law to resurrect the topic of the Treaty, but not for another fifty years.

Against the unequivocal extension of Royal protection and the imparting of British nationality to native New Zealanders by article 3 of Te Tiriti, we can only pity the poor pakeha. All he had as evidence of his nationality in 1840 was the common law. The nearest to Te Tiriti then as a pukapuka for the British pakeha was Blackstone. By virtue of a series of Naturalisation Ordinances 1844-1848 even aliens had more explicit evidence of being "natural born subjects of Her Majesty".

For the most part Blackstone travelled well. He travelled the wild west where having a copy was enough to constitute the credentials for being a lawman. See Dennis Nolan's study of "Sir William Blackstone and the New Republic: A Study of Intellectual Impact" (1976, *Pol Sc Rev* 283) to substantiate the slogan of *Have Blackstone — Will Travel.* What Blackstone wrote was merely *Commentaries,* however, and so didn't have the status at common law of even a contract with the Crown.

British nationality

It was not until the outbreak of the First World War in 1914 that British nationality received statutory recognition. A series of imperial statutes known as the British Nationality and Status of Aliens Acts, 1914-1922 were passed in the United Kingdom. Subsequently, several provisions of these statutes were re-enacted as part of the British Nationality and Status of Aliens (in New Zealand) Acts of 1923 and 1928 in New Zealand. The effect was to deem any person born within Her Majesty's dominions and allegiance to be natural-born British subjects. This lasted until after the end of the Second World War when the British Nationality Act 1948 (UK) introduced a new scheme whereby each member of the Commonwealth could define its own citizens differently while maintaining a common status from which all aliens would be distinguishable. In New Zealand this gave rise to the British Nationality and New Zealand Citizenship Act 1948.

The new scheme introduced in 1948 began to work strange consequences in a strongly settled colony. It drew a distinction between those British who were born here and those who had been born elsewhere. With one stroke of the legislative pen it reversed the roles and subverted the status of expatriate British and colonial or Dominion born New Zealanders.

Early settlers, born in Britain but who had spent their entire working lives here, suddenly found themselves disadvantaged as to citizenship by babes in arms. The concept of the New Zealand birthright had been born.

Under the 1948 legislation early British settlers could register as New Zealand citizens. Some found this undignified. You had to go around cadging testimonials as to your good character from folk who smiled sweetly as they held you in their power. Anyhow in those days, a lot of the folk you knew – apart from the youngsters – were not themselves New Zealand born, and so were not eligible to testify. Besides, the whole process cost time and money, and, at the time of its inception, no practical consequence of obtaining New Zealand citizenship looked likely to ensue. And if, as an already British subject you did apply, you found on New Zealand citizenship being granted, you were certified as being a British subject only from the date of certification. In that sense you lost your birthright as a British subject.

Polynesian immigration

Perhaps the situation of these early settlers was seen to be ephemeral. Of course this is the first principle of bureaucratic in action – that all governmental problems will, when left alone, disappear. Who could have foreseen that early settlers would still go on being succeeded by later settlers, and that the early settlers, like old soldiers, would never die, but take their own time to fade away. Besides, the issue was not left alone. The Land Settlement Promotion and Land Acquisition Amendment Act 1968 drew distinctions between British subjects and New Zealand citizens relating to the ownership of land. The worst fears of British subjects provoked by policy pronouncements on the Bill were happily left unrealised, but many saw the issue as prophetic of events to follow. The Citizenship Act 1977 and the Immigration Act 1984 were much postponed but took away the early settler's right of re-entry, after going overseas, back into New Zealand. At the same time, paradoxically, the demography of New Zealand was becoming more and more Polynesian. This came about largely as a result of extensive immigration from Samoa, as often illegal but subsequently ratified under governmental amnesty, as legal.

By 1982 a train traveller from Wellington to Taita or to Paraparaumu could find himself the only English speaking person in a carriage where none else spoke Maori either. By 1988 the intake of Western Samoans into New Zealand exceeded the immigration quota by almost four times.

Pity the poor pakeha, sitting on the train to Tawa. It wouldn't even make any diference were he a Maori. Picture him, left over from a lost world of gumdiggers, cow-cockies, scrub-cutters, miners, fencers, shearers, donko-boys, tally-boys, gangers, rabbiters, stickers, stokers, sea-gulls, and wharfies. Apart from the odd Hereward the Wake, his day had gone.

An interesting corollary of such pakeha end times is that none can convincingly explain what brought about the social malaise, general apathy, and sometimes violent racial hostility by which the earliest settler now finds himself in the position of being the longest overstayer on someone else's land? Could it be that the pakeha brought his own curse with him – the curse of the law?

Contracting for citizenship — a new status

If the old adage of Sir Henry Maine is still right that social progress has hitherto been from status to contract, there cannot be any problem with contracting for the new status of New Zealand citizenship. The trouble is that in his *Ancient Law* Sir Henry wrote about ancient societies.

New Zealand society is by no means ancient. These are modern times. But Sir Joshua Williams wrote in 1903 (NZPC Cases, 1840-1932 Appendix, p 752) that

> fifty years in New Zealand mean much more than fifty years in England. The changes, political, social and material that have taken place in New Zealand during the latter half of the nineteenth century are greater than those that have taken place in England from the time of the Tudors to the present day.

Accordingly, time is relative, especially in antipodean New Zealand – the Aotearoa both ancient and modern. On the balance of probabilities, therefore, one can contract for a new status of citizenship without reversing the formula from status to contract because of the way in which time is telescoped.

This is what the writer has done – contract a new status of citizenship. Otherwise he would always require a re-entry permit to return to his New Zealand-born wife and family from an academic conference overseas. So why not do the obvious, even if it means forgetting one's birthright as a British subject? Blood, after all, is thicker than water, and whatever certificates of citizenship might mean to bureaucrats in Wellington, it is impossible to fudge such issues on the marae. "No hea koe?" the pakeha is challenged. He might have lived here since 1952 and spent some

of his time in government service, but his canoe will always be the Shaw Savill run *Tamaroa* not the Hawaikian run *Tainui*. "No Otakou ahau" is quite unacceptable even for a ratepayer of Dunedin. It has to be "No Kotehana tarata ahau".

The writer took out citizenship in 1975, so the old issue of conveyancing declarations under the Land Settlement Promotion and Land Acquisition Amendment Act 1968 ceased to apply, and the new issue of eligibility to be a school trustee never related to him. But if the writer's experience means anything at all, being pressured into citizenship by recovering the right to return to one's family is completely counterproductive. The enforced comparison between kinship and country gives rise to strange results, and to decide in favour of one's family to renounce the land of one's birth either ends in divorce or else alienates oneself from the land of one's choice. Like bachelorhood, the emigre personality never fully manifests itself until all opportunities for expressing it are past.

In the writer's case, no sooner had he paid his registration fee (now four times more expensive for Scots than Samoans) than he wanted to get out of the country as fast as he could. This he did by accepting an appointment to Otago rather than Sydney, as being more remote from New Zealand the way everyone else seemed to want it. Nevertheless the emigre personality dies hard, for even fifteen years later he is still irked by his own purchase of citizenship, by the fact that the certificate denies his birthright by making him a British subject only from the date of registration, by the misspelling of his occupation on the face of the certificate, and by the fact that he is now identifiable as citizen no. 235/251.

Despite all these disadvantages, however, even whinging poms are basically grateful. Like William and Mary acceding to the English throne "we thankfully accept what you have offered us". This paradox of appearing thankful for a deepfelt loss is part of the perpetual perplexity underlying the emigre personality. It persists for as long as the emigre goes on trying to reconcile two world views, after which it lapses into the customary level of apathetic oblivion by which everyone takes their own country for granted. Before this happens, however, the newly accepted citizen begins to recognise that he is better off than anyone merely born here.

The recently registered New Zealander has an immense advantage over his New Zealand born wife and children. Whereas he has direct documentary proof of his citizenship theirs can be proved only referentially from birth certificates. As frequently in the case of those born in New Zealand, their birth certificates also show one or both of their parents to have been born overseas. The family is really no closer than it ever was for the fact of registration. Indeed should the father ever get so fed up with New Zealand as to tear up his certificate and renounce his citizenship, in the game of one-upmanship they have nothing with which to compete. This is something which those born here must find harder to express without having anything tangible to act upon. Tearing up one's certificate of citizenship may or may not be of any legal effect but as an emotive outlet it must be an advantage over those who can only infarct inwardly against the constant governmental repudiation of the traditional way of New Zealand life.

Island-hopping and continent crashing — a sign of the latter days

What is meant by everyone having the right to leave New Zealand obviously means different things to different people. Legally speaking, however, what does it mean for everyone on whose behalf the right is proclaimed? For several years Radio New Zealand introduced its early morning news service with incidental music very suggestive of the entire population running down and taking off from the beaches in some lemming-like urge to leave New Zealand. The emigration statistics for those years indicate this music had considerable effect. In 1985, New Zealand suffered a total population loss of 486. That year saw 12,896 more emigrants leaving New Zealand than immigrants arriving. For the years 1977-81 the imbalance of people leaving the country over those arriving was 102,493. And even though more arrivals than departures took place to give a net immigration gain of 2955 during 1982-86, the figures for these years are very precariously poised. In 1983, 1.082 million arrivals offset 1.067 million departures. In 1984, 1.144 million arrivals were needed to offset 1.140 million departures. A net migration loss of 12,896 permanent or long-term emigrants occurred in 1985. Between April 1985 and April 1989, New Zealand's net migration loss climbed to 86,000. Last year the number of those who left New Zealand permanently leapt by 46%.

Even allowing for tourism, in a nation of only 3.3 million inhabitants, New Zealand has a massively mobile population. More than 1 in 3 already exercise their right every year to leave the country. Maybe that is why New Zealand's birthrate is also falling. It fell from 1.8% for 1960-61, to 1.4% for 1969-70, and down to a mere 0.8% for 1983-85. Overseas travel obviously reduces the procreative urge — a fact the Victorians knew when they sent their daughters on ocean cruises.

Is it too far fetched to wonder whether governments might manipulate migration? Stalin dispersed the Tartars. Hitler gathered up the Jews. Britain pushed the Boers to begin their Great Trek to Transvaal. Earlier this century, New Zealand purposely kept White Russian immigrant families apart — but instead of achieving the sought-for assimilation, this had the reverse effect of making most of them leave New Zealand.

Could a government encourage emigration as a means of reducing family benefits, subsidies and superannuation? This is possible, but like most think-big examples of social engineering, such policies do not just fail but rather reap the reverse of what was first intended. Yet some see the present policy of encouraging wealthy immigrants with entrepreneurial skills into New Zealand as one way of dispossessing the indigenous society, some of whom will leave and others conform to the more servile tasks required of them. The interesting thing about such a critical confrontation of indigenous and exotic values among a small and already massively mobile population in New Zealand is that almost all the facts as well as all the values about buying one's way into New Zealand from overseas are hidden within the executive arm of government. How

the government administers its immigration policy rarely surfaces in law. Yet who comes into any country has more bearing than anything else on who leaves, and on how the country is run for those who remain.

Economic development and demography

Our present policies of economic development take account of demography. There are cases of New Zealand families whose attempts to allow the immigration of an aged parent from Britain have been persistently refused even when financially guaranteed, while at the same time big business and trading interests are agog at the prospect of constructing retirement towns in the North Island for superannuated Japanese.

At the other end of the country even that most ancient and parochial of Scots institutions, the University of Otago, seeks to spread its provincial resources by soliciting foreign fee paying students from Vietnam, Thailand, and Japan. This is done despite New Zealanders being refused entry into their own law schools by reasons of lack of facilities, and despite the University of Otago being constituted only for Commonwealth citizens. The Preamble to the University's Provincial Ordinance of 1869 is specific in declaring it "open to all classes and denominations of Her Majesty's subjects". Whether one is prepared to put up with reverse discrimination for some higher cause of international comity or not, those credentials for entry are not held by Vietnamese or Japanese students. Indeed, United States citizens who have graduated in law from Otago might like to consider as part of their last legal learning assignment whether the degrees they hold are valid.

Surely this account of the right to leave New Zealand is all too far fetched for any serious consideration of the Bill of Rights? Even if it were only arguable *ad absurdum*, however, whoever comes into the country shares the same right to leave. How can you keep wealthy Europeans and Asiatics here once it becomes unprofitable for them to remain? Today's policies are but tomorrow's problems of demography for New Zealand in a nutshell.

The demographic response to economic boom and bust has always been a problem for stable settlement in New Zealand. Instead of resolving this problem, at least by buffering the quick turnaround of hopeful immigration to despairing emigration, the New Zealand legal system always seems to accentuate it. The Treaty of Waitangi did that by providing some sort of fulcrum for swiftly changing values in 1840. Even today the Treaty still provides the same pivotal point: Maori who with one voice claim privileged residence as tangata whenua in New Zealand also claim the fundamental freedom to leave this country with privileged rights of entry into Australia as an ethnic minority in preference to pakeha.

The voice of the prophet foretold a tremendous amount of travelling across the surface of the earth as a sign of the end times. Our proposed Bill of Rights gives legal expression to this freedom of movement.

Town and country

Of course this has all happened before. Foretastes of the latter days are frequent in legal history. The demographic issue is an old one in economic jurisprudence. The rural sector is usually milked dry by the towns before the towns are milked dry by the rulers themselves. Once urban economy fails it reverts to its only surviving remembrance of a rural economy. It milks the country dry and is encouraged to do so by those who will milk out the urban economy in turn.

This is no new idea. In medieval economy, governments recognised the importance of the "king's sponge". While the Jews soaked up wealth under the king's protection they were invincible, but then later they were wrung out to fill the royal coffers no less than various classes of society serve the same governmental purpose today. Once Telecom, Postbank, Agfish, and Nosdam run at a profit, they run the risk of being nationalised so as to square the same circle all over again.

What we witness by an immigration policy that competes with other countries for the free movement of the rich and wealthy into New Zealand is part of the process of mopping up the earth's last remaining resources. If economic jurisprudence supports this, that does not dissociate us from being medieval spongers. On the contrary it prepares the way for the same process being applied to ourselves. We run the risk of being wrung dry and our land termed desolate and left forsaken, because those who let us sponge and mop up now maintain jurisdiction over the final outcome.

This is the level at which everyone's right to leave New Zealand assumes continental proportions. The right already extends to huge commercial enterprises. Many of our biggest companies have already emigrated or moved off-shore either in fact or law. Leaving New Zealand means island-hopping at least, but some of the biggest commercial enterprises that were once New Zealand names are now no longer national, international, nor even transnational but supranational commercial combines. They have more clout in consequence than the government of any single nation. Their forcefulness in commercial law is continental.

Conclusion

So what will it mean in the present social and economic climate to enact the right of everyone to leave New Zealand? As a proposition of substantive law construed in a common law context enforcing the right will have tragi-comic consequences. It may stop the former director of Kinetic Investments being brought back from Melbourne to answer fraud charges after a hunt through several Australian states. It will empty the jails because who will want to stay in prison when one has a fundamental right to leave the country. It will provide free overseas travel for everyone who wishes to leave New Zealand, for fundamental rights are not the privilege of the rich. Lastly, every citizen will be entitled to a passport free of charge because none should be hindered in the exercise of so fundamental a right as to leave the country by being unable to afford the means of exercising it. Of course *ne exeat regno* shall be subject to *cur adv vult*. In the end as with most continental legal systems, however, the outcome will depend on imperial *fiat*, by which time the common law in New Zealand will *requiescat in pace*.

□

The law is right to value reputation more than life or limb

By A O Ferrers, formerly an Auckland practitioner, but now of Queensland, Australia

This article is a jeu d'esprit resulting from some discussion in the pages of The Times *about the substantial jury awards in recent English defamation cases.*

Sobered by the sight of blood spilled, Cassio lamented in his misery:

> Reputation, reputation, reputation! Oh! I have lost my reputation. I have lost the immortal part of myself and what remains is bestial. My reputation, Iago, my reputation!

It was a sparkling occasion. The glitterati were all there. Cameras flashed. So did the expensive dental work. It was just one big smile-along. The women were glamorous; the men handsome. The gowns were magnificent as were the coiffures. Even the tuxedos were of the very best cut to match the male wearers' hair styles. It was a theatrical outing *par excellence*. All attending had their reputations to uphold for their fans, for their living.

In the world of show business publicity is the *sine qua non*. It lights the reputation; it may even enhance it. But it is axiomatic that for actors and actresses almost any publicity is good publicity.

Star quality is the indefinable quiddity of the star. To say "Denning" or "Olivier" is alone sufficient to identify its existence. It is at the very soul of a person be they a lawyer, an actor or anything else. They are able to cultivate it and nurture it. Their publicity will illumine it and from it their reputation will blossom to be "the purest treasure mortal times afford", as Norfolk says to King Richard II. The fans and their mail will multiply as a result. How the producers' bankers will be pleased! Without their reputation stars would be a nothing, they would have no following, they may as well not exist.

We are all stars to a greater or less degree. Mrs Thatcher was undoubtedly the star of the first parliamentary telecast. Her dynamic magnetism exuded from the screen. The member for Eastbourne grabbed his moment of glory to enhance his standing with his constituents. His reputation soared.

The Dame in the country parish pantomime is hardly less a star in his village society. Such a well-known character (perhaps the vicar) is the wonder of his milieu too. When old friends meet, especially after years of separation, they will joyfully recall the exploits of the other which made his or her name distinguished and one of honour.

For some reputation means the stardust of the stage or screen, for others the unsullied integrity of trustworthiness in business or politics. We are taught to be careful in this. What sort of reputation does a secondhand car dealer enjoy or suffer? Or a barrister? Or a . . .? Without their reputation, good, bad or indifferent, these persons would be mere chimeras — just another nonentity.

Isn't that life? Isn't that how the public perceives the order of things? Most of us try to swing on a star, as the song says, try to be somebody who has worth; somebody who has standing; somebody who has reputation.

Small wonder then that the law in its own inimitable way seeks to protect us all in this regard. It is common sense and the Common Law follows in its train. Indeed, writing in 1987, Professor J G Fleming, that doyen of present day tort writers, terms "reputation" as "the most dearly prized attribute of civilised man". The law must needs do its best to hold it inviolate.

We can mange without a limb. We cannot survive without a reputation. Life once gone is a loss to our dependants; reputation once gone is our own alone: a loss which may be immeasurable. No reputation and we have descended into floccinaucinihilipilification.□

Law and Life

If law were about law and not (as it is) about life, there would be some sense in the technologically-minded lawyer's rejection of legal history and biography as a subject of study, but the practical lawyer must deal with human beings all the time — clients, witnesses, clerks, counsel, judges — and it is vital for him to learn how to set about that. His predecessors have much to teach him, for, while human circumstances may change radically from generation to generation, human nature changes hardly at all.

Richard Roe
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