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Snails and ginger beer

As everyone knows, the modern law of negligence, of the duty of care arising out of the "neighbour principle", is to be traced to the speech of Lord Atkin in *Donoghue v Stevenson* [1932] A C 562. Now that the House of Lords has put the brakes on the too casual development and extension of the duty of care in *Murphy v Brentwood District Council* [1990] 2 All ER 908, and *Department of the Environment v Thomas Bates and Sons Limited* [1990] 2 All ER 943, which have recently overuled *Anns* (see [1990] NZLJ 257), it is interesting to recall one of the mysteries of *Donoghue v Stevenson* — was there or was there not a snail in the bottle of ginger beer? Indeed was there ever a bottle of ginger beer? Or for that matter was there ever a Mrs Donoghue? These are all questions about which doubt has been expressed over the years.

In Megarry's *Miscellany-at-Law* p 80 he quotes McKinnon LJ, extrajudicially in 1942, as saying

> To be quite candid, I detest that snail . . . . When the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts. And at the trial it was found that there never was a snail in the bottle at all! That intruding gasteropod was as much a legal fiction as the Casual Ejector.

Probably on the strength of that comment, Jenkins LJ in *Adler v Dickson* [1954] 1 WLR 1482 spoke to the same effect.

Megarry however, expressed some doubt. He states that he had learned that the action was compromised with some payment having been made to Mrs Donoghue. For myself that was the extent of my knowledge of the facts until just recently when I received the June 29 issue of the Canadian publication *The Lawyers Weekly*.

The front page article in the paper recounts some detective work by the University of British Columbia Law School class of 1962, and more particularly one of its members Justice Martin Taylor of the Court of Appeal of British Columbia.

Justice Taylor took his Sherlock Holmes role so seriously as to visit the scene of the crime, to make a pilgrimage to Paisley, which is the small town in Scotland where the whole saga began. The investigators located the son of the solicitor who had acted for Mrs Donoghue. He confirmed that the case had been settled. There was a payment of £200 — probably not a small sum at all in a little Scottish town during the depression years of the early thirties. The payment was made from the estate of Mr Stevenson, the bottler of the ginger beer. Mr Stevenson died shortly after the case was determined in the House of Lords, and the bottling business has been long since closed down. But Justice Taylor did obtain an original Stevenson ginger beer bottle. There is a colour photograph of the Judge and the bottle in *The Lawyers Weekly*. The bottle is not clear glass. It looks black, and certainly must have been so opaque that a purchaser would not have been able to see any lurking snail before the bottle was opened and the snail, as it were poured out.

The situation, as it appears from the pleadings and speeches of their Lordships and subsequent inquiries, is described in the article as follows:

> We do know that Mrs Donoghue and a friend went to Francis Minchella's cafe in Paisley, a Glasgow suburb.
>
> The friend, who has never been identified, ordered ginger beer and ice cream for Mrs Donoghue. Mr Minchella poured some of the beverage from an opaque bottle into a glass and Mrs Donoghue took a drink. The friend topped up the glass and out fell the rotten snail.
>
> Mrs Donoghue was sick and ended up in the hospital. She wanted to sue but her friend was the one who had bought the drink. Consequently, she had no contractual relationship with the cafe proprietor and her only hope was a negligence claim against Mr Stevenson, the ginger beer maker . . .
>
> We now know that Mrs Donoghue's mysterious friend ordered "a pear and Ice" for herself and that they were at the Wellmeadow Cafe at 8:50 pm on Sunday, Aug 26, 1928.
>
> The plaintiff, or "pursuer" in Scots law, is identified as a shop assistant who lived at 49 Kent St, Glasgow. According to her, Mr Stevenson's bottling plant was a less than hygienic place where "snails and the slimy trails of snails were frequently found".

She claimed the contaminated drink gave her gastroenteritis and that three weeks later she was still so sick she needed emergency treatment at the Glasgow Royal Infirmary.

Mr Stevenson, described as an "aerated-water manufacturer" lived next door to his business. He denied all of Mrs Donoghue's claims and offered as his defence that his factory was "the best known in the trade, and no bottle of ginger beer ever passed out therefrom containing a snail."

This case was not one that involved two wealthy litigants. Mr Stevenson had only a small bottling business in a small town. A copy of the affidavit sworn by Mrs Donoghue in support of her application to bring her proceedings in the House of Lords *in forma pauperis* stated expressly that she was very poor and was "not worth £5 in all the world".

In speaking of his investigation into the background of the case and his trip to Paisley Mr Justice Taylor is reported as having emphasised the importance of the actual events as illustrating the way in which the law develops from apparently mundane commonplace situations. He is quoted as saying that the case is

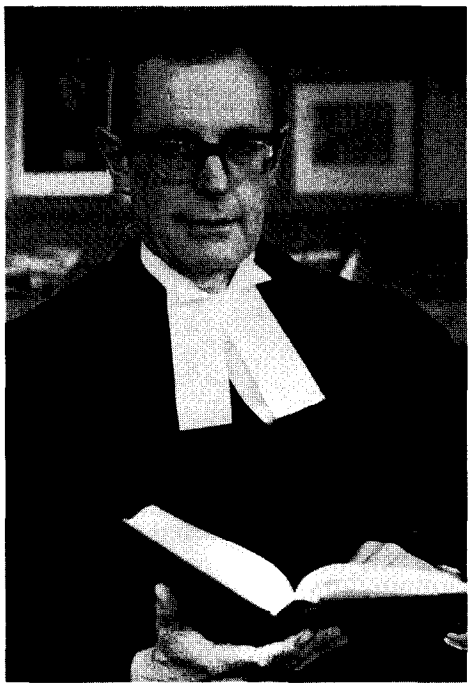
> a reminder to one that the origins of our law are not the halls of any place of academic learning, nor are they laid down in advance of any lawgiver. They arise out of events that involve the daily lives of real people.
>
> Here is a case which has been the cause of how many hundreds of millions of dollars changing hands and it involved a very poor person in a very real, human situation.
>
> It brings us down to earth and it reminds us what the origins of our law are.

P J Downey

Editor-in-Chief for *The Laws of New Zealand* project.

Sir Robin Cooke, President of the Court of Appeal has agreed to become Editor-in-Chief of the proposed multi-volume work *The Laws of New Zealand*. Sir Robin Cooke's role will not be an honorary or merely nominal one.

It has been agreed that one of the Editor-in-Chief's functions will be the final determination of the topics to be included in the various chapters of the work. Sir Robin's other functions will include the selection of authors for the various topics, and an overall perusal and approval of the final form of the text before it is printed. Butterworths is very appreciative of Sir Robin Cooke's agreeing to undertake this task which will ensure that *The Laws of New Zealand* will be an authoritative statement, in concise form, of the law in New Zealand.



The General Editor of the work will be Mr P J Downey, Editor of *The New Zealand Law Journal* and Legal Publishing Director of Butterworths. His primary responsibility will be on the publishing side, and his activities will include commissioning authors, encouraging them to keep to deadlines, employing technical publishing staff, and seeing that the necessary editorial and publishing processes proceed promptly.

Further announcements are expected to be made shortly about other aspects of the editorial and publishing structure for *The Laws of New Zealand*. There will then be an inevitable lengthy interregnum of some months while the authors are engaged on their manuscripts and the text is finalised, before it can be checked, typeset and printed. □

Case and Comment

Jurisdiction and responsibility for nominee directors: The Privy Council speaks

In *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* (PC App No 40/1989, 21 May 1990) the Privy Council reversed the decision of the Court of Appeal (reported at (1989) 1 PRNZ 356) dismissing the defendant's appearance in protest to jurisdiction under High Court r 131. In reaching its conclusion, the Privy Council also made a number of observations on the procedure relating to forum non conveniens objections.

The facts

National Mutual Life Nominees Ltd, the plaintiff, had suffered considerable losses resulting from its position as trustee for depositors in AIC Securities Ltd ("AICS"). It sought to recover these from various persons, including two directors of AICS, House and August. These directors were both employees of and appointed by the Kuwait Asia Bank, who was a large shareholder in AICS. The plaintiff accordingly sought to join the Bank as a party to the proceeding.

The Bank had no place of business in New Zealand and was served overseas on the basis of r 219(a) and (h), the substance of the plaintiff's alternative contentions being that the Bank was vicariously liable for the acts of House and August; that House and August had acted as the Bank's agents and the Bank was liable as principal; that the Bank as substantial shareholder had breached a duty owed to the plaintiff; and that the Bank was by definition a director of AICS and therefore liable for the acts of House and August. The Bank entered an appearance under r 131, claiming that the Court had no jurisdiction to hear the matter. (It is of interest to note that, under the substantially similar provisions in New South Wales, a similar conclusion was reached by Rogers CJ in *Pendal Nominees Pty Ltd v M & A Investments Pty Ltd* (1989) 18 NSWLR 383 at 394.)

The Court of Appeal held that the question of jurisdiction was inextricably bound up with the merits of the case against the Bank and that it was not proper to resort to a full scale trial of the issue on an interlocutory process. Nevertheless, given the substantial connection of the matter with New Zealand, a good arguable case against the Bank would be sufficient to satisfy the requirements of both r 219(a) and (h) and vest the Court with jurisdiction to hear the matter. The Court found that a good arguable case had been made out. The Bank appealed to the Privy Council.

The speech of the Privy Council was delivered by Lord Lowry (the other members present were Lords Keith of Kinkel, Brandon of Oakbrook, Templeman and Goff of Chieveley). He stated that the plaintiff had failed to make out any cause of action against the Bank and that the appeal therefore had to succeed. While expressing a reluctance to pronounce on procedural matters for New Zealand his Lordship nevertheless felt that it would be useful to make some comments on the r 131 procedure (at p 13). These comments are obiter, but coming from the highest Court require some consideration.

Rule 131 procedure

The Privy Council began by observing that r 131 expressly deals with jurisdiction and nothing else, yet both the High Court and Court of Appeal had considered the strength of the plaintiff's case and the reluctance of Courts to subject foreigners to their jurisdiction: matters not related to the existence of jurisdiction at all. Their Lordships agreed with the discretionary approach and considered that, despite the ostensibly narrow ground of objection specified in r 131, the Court's discretion to set aside service on the principles applying to r 48 of the Code of Civil Procedure had not been curtailed (15); the inherent jurisdiction to decline jurisdiction has not been abrogated by rr 131 and 219(21).

In discussing this matter, the Privy Council appears to have conflated the issues of discretion to grant leave and forum conveniens. In England they arise together under Ord 11; under r 219, however, the leave question becomes one of whether a statutory requirement has been satisfied and forum conveniens is a separate issue. The Privy Council did not decide on the appropriate test for compliance with r 219, which was the main point in the Court of Appeal decision. The pronouncements on forum conveniens complicate the judgment considerably.

This was not the issue before the Court, because the case fell squarely within the ambit of r 131; it was a case of jurisdiction or no jurisdiction, not whether the matter might be better litigated elsewhere. Their Lordships nevertheless stated that a forum conveniens objection can be raised using the r 131 procedure, although it is ultimately for the New Zealand Courts to decide what procedure ought to be followed (21). The Privy Council's view is contrary to that which was reached in the two New Zealand decisions where the matter has been judicially considered (*Wendell v Club Mediterranee NZ* (unreported, Auckland CP 1425/86, 25 March 1987, Hillyer J) and *Kingsway Industries Ltd v John Holland Engineering Pty Ltd* (1986) 1 PRNZ 286) and there is little doubt that the rule strictly read cannot be interpreted so as to include forum non conveniens matters (see Beck "Forum conveniens and service overseas" [1988] NZLJ 296; Paterson "forum non conveniens in New Zealand" (1989) 13 NZULR 337).

The two reasons relied on by their Lordships as support for this conclusion were first by analogy with Ord 12 r 8, and secondly by analogy with the approach adopted by the Courts to a comparable provison in Ontario. Neither of these analogies is entirely appropriate.

Order 12 r 8 provides defendants with the opportunity to dispute the jurisdiction of the English Courts. However, it has to be borne in mind that in England service outside the country is by leave of the Court under Ord 11; and objection to jurisdiction is, in substance, a claim that leave should not have been granted and the onus remains on the plaintiff, as it would in the case of any ex parte application. The New Zealand situation is very different: r 131 caters for the situation where the requirements of r 219 or r 220 have not been met. Rule 220 requires leave and the position is much the same as in England; once the requirements of r 219 have been satisfied, however, there is an automatic right to serve, and establishment of jurisdiction on service. It cannot be claimed that something should not have been done by the Court; any invocation of the Court's discretion to decline jurisdiction has to be on some basis other than rr 219 or 131. The Privy Council felt justified in drawing the analogy because it had been relied on by Cooke P in the Court of Appeal and in *McGechan on Procedure*. It must be pointed out, however, that Cooke P referred to Ord 12 r 8 chiefly to show how it differed from the New Zealand provision (at 358); the statement in *McGechan* (taken from p 3-247) is made in the context of service with leave under r 220 and cannot be relied on as a general comment on r 131 (as the commentary on p 3-152 makes very plain).

The analogous procedure in Ontario was considered in *Singh v Howden Petroleum Ltd* (1979) 100 DLR (3d) 121. There the Ontario Court of Appeal held that a provision similar to r 219 did not prevent the Court from setting aside service on the grounds of forum non conveniens, even where the case fell within the ambit of the rule permitting service without leave. This is a conclusion which has not been doubted in any New Zealand decision.The judgment in *Singh*, however, sheds no light on whether it is permissible to raise forum conveniens matters under r 131 (the Ontario rule contained a specific provison allowing for an application to set aside service).

The net result of this analysis is very unsatisfactory. The main point which is made is that the Court retains its discretion to decline jurisdiction even where there has been service as of right. The New Zealand Courts have been shown to be right in their attitude, but the obiter pronouncements based on different rules in other jurisdictions can only muddy the waters of the proper ambit of r 131. What is highlighted, however, is the need for amendment to the rule. As a model, the British Columbia rule (cited by the Privy Council at 17) would provide a good starting point. This permits a defendant in an appearance to claim that the Court should decline jurisdiction and to apply for a declaration to that effect.

The liability of the Bank

The Court of Appeal thought that major and possibly difficult questions of company law were involved. Cooke P found it to be seriously arguable that the Bank would be liable as principal if Home and August had acted in breach of a duty of care to the plaintiff and that the Bank could be liable as an employer if its nominee directors had committed a tort (361). The Court also considered that the whole question could only be properly decided in a trial and that there was a sufficient case to permit such a trial in New Zealand (362).

The Privy Council found no difficulty in disposing of these matters as so clear cut that they justified a striking out of the proceeding against the Bank (30). The duty of care owed by House and August to the plaintiff could only be based on the trust deed (which required the furnishing of quarterly certificates: 24). The Court was satisfied that an arguable case had been made out against House and August because these certificates were furnished on behalf of all of the directors (25). however, the Bank was not responsible for a breach of duties by House and August; they acted as individuals and not emloyees of the Bank (27). Secondly, responsibility for the certificates was accepted by House and August as directors of AICS, not as agents of the Bank (28). As a shareholder nominating directors, the Bank owed no duty to the company, or to anyone else (28-29). Finally, concerning the definition of "director" in the Companies Act 1955, as "a person in accordance with whose directions or instructions the persons occupying the position of director of a company are accustomed to act", the Privy Council held that House and August were only two of five directors and there was no allegation (and it was inherently unlikely) that the directors in these circumstances were accustomed to act in such a way (29).

This analysis is breathtaking in its simplicity. There are, however, a few troubling aspects. The Privy Council appeared to consider that the only arguable claim against House and August arose in negligence out of the duty with regard to the quarterly certificates. This is too simplistic a view: the plaintiff's case was also pleaded on the basis of the statutory duties expressed in ss 319 and 320 of the Companies Act 1955. The important point about these duties is that they apply to all officers of the company, including anyone who falls within the definition of "director" in s 2. Under both sections a creditor may apply to Court for an order declaring that a person who has breached the section is personally liable for part or all of the company's debts. Furthermore, s 321 permits any creditor to apply to Court to compel an officer who is guilty of a breach of duty to the company to make an appropriate payment.

Under s 319, where a company has failed to keep proper records and been wound up, the Court may declare an officer personally liable. Although the Courts have ordinarily looked for a causal link between the conduct of the officer and the failure of the company (see *Maloc Construction Ltd (in liq) v Chadwick* (1986) 3 NZCLC 99,794) no direct link is required. While there are defences based on reasonable steps or reliance on others (s 319(2)) it would be difficult to establish these at an interlocutory hearing.

Under s 320, officers may be declared personally liable if they

were knowingly party to the carrying on of business in a reckless manner or the contracting of debts by the company without honestly believing on reasonable grounds that the company would be able to pay its debts as they fell due. Even an adviser to the company can fall within the definition (*Thompson v Innes* (1985) 2 NZCLC 99,463 at 99,470). It is difficult to see how it could have been conclusively determined at such an early stage of the proceedings that the Bank clearly did not fall under the section.

A prerequisite for liability in both cases is that the Bank come within the definition of "officer"; this includes a director, as defined above. Although this point was summarily dismissed by the Privy Council, who even thought it "inherently unlikely" that House and August would have acted on instructions from the Bank (29), it seems that the definition was designed precisely to catch persons who act through nominee directors. There is no mention of any denial that House and August were accustomed to act in accordance with the directions of the Bank, nor is there any relevance in the fact that they were only two of the five directors. The particular circumstances are unimportant: if a director is generally accustomed to act in accordance with the directions or instructions of someone else, that person is a director for the purposes of the Act. Although there was apparently no specific allegation that, in relation to the certificates. House and August were accustomed to act in accordance with the directions of the Bank (29), that is not the point. It was seriously arguable that the Bank was a director for the purposes of the Act, and that brings into play the question of liability under ss 319 and 320.

Leaving aside the question of statutory liability, the Privy Council paid no attention to the expanded notions of responsibility which have been placed on directors in recent years. In *Hilton International Ltd (in liq) v Hilton* (1988) 4 NZCLC 64,721, the Court held that directors were required to be sufficiently acquainted with the affairs of the company to know whether it was possible to pay a dividend. There directors were held liable without any mention of the "gross negligence" required by the Privy Council (27). Their liability arose from the fact that they had failed to act as "reasonable company directors in their shoes" would have done (64,751). *Hilton* also stresses the responsibility to take account of creditors' interests where the company is in a financially unsound state; this too, is arguably a matter which would have been actionable at the suit of the plaintiff under s 321.

As far as the Bank's liability as a shareholder is concerned, the Privy Council held that shareholders as such do not owe any duties to anybody (21). This approach takes no account of the way in which shareholders have been viewed as having responsibilities in certain circumstances to take the interests of others into account (see Farrar "The Duties of Controlling Shareholders" in *Contemporary Issues in Company Law* (1987) 185). While this approach may not have rendered the Bank liable on the facts, is must be noted that the Bank was beneficially interested in some 40% of the shares of AICS and had the right to appoint 40% of the board. There is at least a question as to whether there may have been an abuse of power in this situation.

In short, the Privy Council's dismissal of the causes of action against the Bank as "so clearly untenable that they cannot succeed" (30) does not bear close scrutiny. There are several matters which are left unresolved by the striking out of the claim, and which needed to be investigated at a trial. The way in which the Court of Appeal approached the question seems to be far more appropriate, even though it may involve inconvenience to a foreign litigant.

Conclusions

On reading the Privy Council's decision, one cannot help but feel somewhat cheated, both on the procedural and substantive fronts. The statements relating to r 131 seem to amount to an unwarranted interference in a matter which is inevitably best assessed by Courts of first instance; they also leave the law in a more uncertain state than it was before. The point which was of vital concern to the Court of Appeal — how to deal with the matter of jurisdiction that is inextricably bound up with the merits — was not dealt with at all.

With regard to matters of company law, the approach of the Privy Council is very disappointing. No account was taken of New Zealand statutes or the developments which have taken place in New Zealand company law in recent years. The result can only serve to confuse, by resurrecting outdated ideas of directors' responsibilities. Although the Privy Council struck out the matter as disclosing no reasonable cause of action against the Bank, there is still a possibility that the claim could be differently pleaded so as to succeed. That would give rise to a very undesirable situation where separate litigation would have to be conducted against the Bank, raising many of the same issues again.

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Words

The brave impetus towards plain English in the law appears to have slackened. Most business leases, for example, are still unrepentantly prolix. Nor, with honourable exceptions, does the High Court set an example of conciseness in expression.

No doubt some readers of judgments find a quaint old-world charm in the perpetual respect which Judges and Masters avow when presuming to follow an earlier judgment (even one delivered at lower than Court of Appeal level); and admire the coy self-deprecation implied in avoiding the first person singular in favour of "this Court". Others will regard these as examples of an outmoded servility. The following passage from a recent judgment is entirely typical of the phraseology regularly adopted by some High Court Judges and Masters:

> "In the light of these authorities, this Court, again with respect, is reinforced in its view that . . ."

Would it be unbearably brusque to have written:

"These authorities reinforce my view that . . ."?

Peter Haig

Parliamentary Law Making

By J F Burrows, Professor of Law, and P A Joseph, Senior Lecturer in Law, at the University of Canterbury

The authors examine recent practices for passing legislation through the House of Representatives and point to what they consider to be several disturbing trends for short-cutting established parliamentary procedures. A shorter version of this article was published in the Christchurch Press *on July 2 and 3, 1990.*

Introduction

In his book *Unbridled Power* first published in 1979, Prime Minister Geoffrey Palmer described law-making as a "solemn and deliberate business"[1] Law making, he wrote, should allow time for "reflection and sober second thought".[2] Far too seldom is this good advice heeded; the way some legislation is being passed in New Zealand these days gives cause for concern.

In part the system is to blame, for there are too few controls. In our single House of Parliament (and its committees) the government has an absolute majority; and with the very rare exception of the conscience vote government members are expected to vote with the Government on all issues. Bluntly put, this means that when a matter is put to the vote the government will win. But even if the system is fragile, the government must share the blame for some of the things that happen by allowing itself, in its haste to handle its enormous legislative load, to fall into the temptation of taking short cuts.

Everyone knows the standard procedure for passing bills into law. They are prepared by professional draftsmen, introduced into the House and read a first time; they are then referred to a select committee which hears public submissions;[3] the select committee reports back to the House, normally recommending amendments; the bill incorporating the amendments is then read in the House a second time; it is referred to the House in committee which goes through it clause by clause and may make further detailed amendments; it is finally read a third time, at which stage it is said to have "passed the House". The Governor-General assents, and the bill becomes an Act of Parliament. At every stage in the House there are public debates, and (with the exception of the committee stage) these debates are published in *Hansard*.

It was over many centuries that the Westminster Parliament settled upon those procedures for ensuring proper consideration of bills. They have normally worked well. But when pressures of time and quantity begin to exert themselves, the procedure becomes (with our unicameral legislature) much less satisfactory. Here are some of the things that can happen.

The Bill in the House

First, a government anxious to get a measure through may "take urgency". This means, under the Standing Orders, that the bill "may be proceeded with, and proceedings thereon completed at the same sitting of the House".[4] If urgency is taken for several stages of a bill, the House will continue sitting until all those stages have been completed. When urgency is taken what appears in *Hansard* as one parliamentary day may in fact be two or more actual sitting days; nevertheless the haste urgency frequently engenders is unseemly. Here are some examples. The Transport Amendment Bill (No 4) 1989 was a controversial measure for allowing traffic officers to enter on private property. It was introduced on the sitting day 5 December (8 December in real time), referred briefly to a Select Committee and passed through all its remaining stages on 12 December (16 December in real time).[5] The Broadcasting Bill 1989 made far-reaching changes in our broadcasting structure. This passed through second reading, committee, and third reading stages at a single sitting on 16 May 1989.[6] The School Trustees Bill 1988 was introduced for restructuring the management of our schools; it was reported back from Select Committee on 2 March, and went through all its remaining stages on 7 March 1989.[7] The Superannuation Schemes Bill 1988 went one better by going through select committee reporting-back stage and all remaining stages on 14 March 1989.[8] There are many more such examples.

Resort to urgency used to be common enough in the sitting days just before Christmas (itself a practice of questionable justification), but it is disturbing to find it now so frequently taken. Originally intended as an exceptional measure, urgency has acquired the semblance of normality. For example, in the first half of last year the House sat under urgency for approximately one third of total sitting time.[9] This brings a related danger: if a bill is hurried back from select committee and urgency taken, there may not be sufficient time for properly printed copies of it — or indeed any copies at all — to be available for members for at least part of the ensuing debates. The Public Finance Bill 1989, said by the Auditor-General to make "the most fundamental changes in the financial management practices seen in New Zealand's history",[10] suffered that indignity: the second reading was commenced under urgency with members debating a bill the current

version of which most of them had not seen.[11] The same fate befell the controversial Radiocommunications Bill 1989. When this was reported back by the select committee and debated by the House under urgency, the Opposition objected that "the Bill now has 18 amended clauses, 52 new clauses, 28 deleted clauses, a whole new part, and no one has seen it".[12]

Secondly, speed may be achieved by taking a bill at its committee stage, not clause by clause as is standard practice, but part by part. A part may contain a large number of clauses which are thus dealt with together in one motion. If debate is protracted, the government may move a closure motion curtailing further consideration of the part. One questions whether the recurrent resort to part by part deliberation at committee stage is not abuse of procedure. Consider the Ministry of Energy Amendment Bill (No 2) 1989 which contained twelve clauses. During its passage, clause 12 was divided off as a separate Part II simply for moving the bill in committee part by part.[13]

Thirdly, in recent years a new class of bill, the Law Reform (Miscellaneous Provisions) Bill, has appeared on the scene. It dates from the early 1980s. It lumps together a large number of miscellaneous, quite unconnected, reforms and deals with them in one bill. In the past an omnibus measure, the Statutes Amendment Bill, was well enough known, but by convention that type of bill was confined to minor, non-controversial amendments promoted by agreement of both sides of the House.[14] No such constraints apply to the Law Reform (Miscellaneous Provisions) Bill. The one passed in 1989[15] amended 55 Acts of Parliament and contained such important measures as the repeal of s 9A of the Race Relations Act 1971 (which had permitted complaints to the Race Relations Office about published statements of a racist nature); an increase in the jurisdiction of the District Court; and a provision allowing minors' evidence to be given in Court by video. It is objectionable to promote such substantial reforms in this way.

Fourthly, the government, realising there is simply no time to prepare and pass the whole of a new reform in time, may pluck out certain particularly urgent parts and push them through ahead of the rest. That was done in the case of the School Trustees Bill 1988, which implemented only part of the reform of our schools;[16] the rest of the package followed some months later.[17] It happened also with the tertiary education reforms. The Education Amendment Bill 1989[18] and the State Services Restructuring Bill 1989[19] implemented small (albeit important) parts of a much larger package, the rest of which still awaits completion. It was said during debates in the House that even the important Public Finance Act 1989 was not the whole reform: that there is more to come.[20] There are obvious dangers of reforming items piecemeal and out of context, without a proper overview of the whole reform structure (which may not even have been completely worked out).

The above examples are a stark admission that debate in the House in our system has lost much of its force. It is (and for a long time has been) the case that the debates do not usually influence the way members vote. That is predetermined before the debate commences. But it is another thing to treat them with the disdain which is currently sometimes shown. The continual legislative rush does nothing to restore waning public confidence in the system. With inadequate time for reflection, the quality of debate must suffer (and the public record of those debates is the public's only record of the reasons for and against the measure); and there is the risk that in the frantic rush the quality of the legislation will suffer, and that those responsible for the bill will make mistakes.

The consultative process

Some generous souls may be prepared to forgive some of this if there is proper, democratic and effective consultation with affected interests at the pre-introduction and select committee stages. Far more bills are now referred to select committees than was once the case. Those committees certainly do hear many public submissions — in increasing thousands every year — and those who appear before them are often impressed with the courteous and careful consideration given their submissions. Often bills come back from select committee substantially changed. Striking examples in recent years are the remarkable Dentists Bill 1987 with its breathtaking initial proposal to deregulate the practice of dentistry;[21] the Transport Law Reform Bill (No 2) 1989 which had initially contained draconian retrospective provisions applying to the transport industry;[22] and the Maori Fisheries Bill 1988.[23] The committee system does work, and it is pleasing to see the Government prepared to back down from unsatisfactory policies, even though it may set one wondering how much consultation took place in the preparation stages, and how carefully the consequences were thought through.

Select committees are a crucial bastion of democracy in our legislative process. Practices which interfere with the integrity of those committees' work should cause the gravest concern. Regrettably there are such practices.

First, time is sometimes simply not left for adequate consultation at select committee stage. Copies of bills are often not immediately available in many parts of the country[24] (sometimes supplies simply run out), and this may exacerbate the difficulties interested organisations have in preparing their submissions. Sometimes the deadline for submissions is desperately short. The four weeks allowed for such important measures as the Public Finance Bill 1989[25] and the Education Amendment Bill 1990 (which restructures tertiary education)[26] was simply inadequate, as is the three weeks in respect of the Smoke-free Environments Bill 1990.[27] The four days allowed in respect of the Transport Amendment Bill (No 4) 1989[28] speaks for itself. Sometimes, too, a select committee is itself placed under unrealistic time constraints in considering the submissions. The Committee considering the School Trustees Bill 1988 had 15 days to consider 200 submissions;[29] an opposition member noted in debate that some of those who wished to appear in person were told they had two minutes each to give further evidence.[30] The departmental report on the submissions complained that even the departmental officials had not had time to assimilate the submissions properly: they "had to pick out issues as best they could".[31]

So exacting are the time requirements that select committees sometimes have to be given permission to meet while the House is sitting; their members are thus taken from the business of the House. Three instances occurred recently with the School Trustees Bill 1988, the Transport Amendment Bill (No 4) 1989 and the Taxation Reform Bill (No 7) 1989.[32] During the debates on the last-mentioned measure, the Opposition opposed the motion to allow the select committee to sit concurrently as this practice had become standard procedure.

Secondly, sometimes the government itself pre-empts the select committee by announcing during the hearing of submissions, or even before that time, that it has had second thoughts and will be making changes to the bill. That happened with the State Sector Bill 1987 and the Maori Fisheries Bill 1988, and it happened again in respect of the Education Amendment Bill 1990 where the Minister announced at least 11 important changes to the Bill. It is good that governments can be induced to think again, but to effect substantial changes in this way pre-empts the select committee process. Members of the public making submissions on a bill find themselves speaking to a measure they know to be partly obsolete without quite knowing what its new form will be.

Thirdly, there is the quite remarkable instance of the Taxation Reform Bill (No 7) 1989. This was before a select committee which was hearing submissions on it. The government deemed speed to be of the essence, so rather than allow the select committee to complete its deliberations it lifted a number of the bill's provisions and transferred them to a new bill, the Taxation Reform Bill 1990, and introduced and passed it through all stages in one day (20 March 1990) without reference to a select committee.[33] The select committee thus found itself in the extraordinary position of having to report back on a bill some of whose provisions had already been enacted.

The *fourth* matter is potentially the most serious. Amendments to bills are often proposed by Supplementary Order Papers circulated by the Minister to members. As Supplementary Order Papers are normally prepared after select committee stage, the amendments they propose are read into the bill at committee-of-the-whole stage. Some such procedure is, of course, necessary to attend to errors detected after select committee stage, and also, perhaps, to enable those affected by a bill to persuade the government to make some last-minute changes to it. But of more concern are Supplementary Order Papers which contain important new substantive provisions only remotely related to the original purposes of a bill. When tacked on at committee-of-the-whole stage, they can be passed as law without having had a first or second reading and without having been the subject of public submissions at select committee. This is to circumvent most of the normal legislative procedure. An amendment to the Broadcasting Act 1989 regulating the amount of free time broadcasters must give the government for election programmes was achieved by a Supplementary Order Paper at committee-of-the-whole stage. This was tacked on to the Electoral Law Reform Bill 1989.[34] Similarly, the Law Reform (Miscellaneous Provisions) Bill was amended by a Supplementary Order Paper in 1989 adding amendments (admittedly minor) to five additional Acts of Parliament;[35] here were, in essence, five statutes enacted by pro forma third reading in the House and token signification of the Govenor-General's assent. Sometimes a special resolution of the House is necessary to authorise its own committee-of-the-whole to accept substantial amendments by Supplementary Order Paper. Ordinarily under the Standing Orders of the House, amendments in committee must be relevant to the purposes of a bill as originally introduced.[36]

Conclusion

All of this is of concern to those who prize democratic law-making. The ability to cut corners in the present system places great temptation in the way of governments with heavy reform programmes. Hurried law-making can have many ill effects. Legislation passed without "sober second thought"[37] may result in law which is less than satisfactory. The public deserves better.

Substantial changes in the law can be difficult for citizens and their advisers to assimilate, let alone understand and accept. When such changes are made on the run, and in quantity, this effect is exacerbated. Moreover if law is passed in a hurry there is every chance it will contain drafting imperfections — obscurities, contradictions, even gaps. Parliamentary counsel who draft our bills are better than most in the world, but the pressure they are currently under must affect their product. The Court of Appeal commented last year that recent Acts corporatising government enterprises "appear to have been prepared with a degree of haste and have confronted the Courts with some major problems of interpretation."[38] Some Acts require almost immediate amendment to remove mistakes or reformulate principle. The Rating Powers Amendment Act (No 2) 1989 contains a melancholy section 2, headed "Correcting Drafting Errors", for righting mistakes in the principal Act passed just the previous year. Of the 31 sections in the Telecommunications Act 1987, 21 were substantially amended the following year and 14 new sections added.[39]

Such legislative patchwork wastes time. It also calls to mind the words of an eminent English Judge and jurist, Lord Radcliffe:

> The respect for law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted.[40]

Hasty legislation and unrealistic deadlines also lead to inefficient implementation. Many who have felt the impact of recent legislative reforms will have experienced the uncertainty and ill-preparedness of those charged with their administration. A little slowing down would do us all good.

It is heartening to note that in the recent debates on proportional representation Members of Parliament seem themselves to realise that something needs to be done. Proportional representation may be one answer; an upper house may be another. But another is

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Books

Torture: The Role of Ideology in the French Algerian War

By Rita Maran
Praeger 1989 ISBN o-275-93248-6

Reviewed by Dr J B Elkind, Associate Professor of Law, University of Auckland

Ms Maran is a steadfast opponent of torture. She has devoted her life to combating torture with an organisation called Human Rights Advocates in San Francisco, California; an organisation which she played a significant part in founding. It is therefore no surprise that her first book should bear the stark name "Torture". One would expect it to be a general and worldwide analysis of the subject. There are many countries with appalling human rights records in which torture is regularly practised.

But the reader will find that the focus of the book is much narrower than that. Its subtitle reveals its content, "The Role of Ideology in the French-Algerian War". It is specifically about torture practised by French forces during the French-Algerian War. As one reads the book a very serious and significant purpose emerges.

France is a country which is regarded by itself and the rest of the world as a standard bearer for civilisation. French tradition and French history are about the assertion of the dignity and rights of the individual over the power of the state. Both the French Declaration of the Rights of Man and of the Citizen and the Constitution which followed it prohibited torture. Yet, in Algeria, in the 1950s, torture was regarded by many French military officials as an essential tool for prosecuting a war. Ms Maran's book looks at the role of ideology in legitimising the use of torture in Algeria.

During the 1950s the proponents and the opponents of torture accepted one ideological given: this is the notion of France's unique civilising mission in the world (*la mission civilisatrice*), the transmission of French culture, the French language and French values through colonisation. In 1990, this point of view might seem imperialistic and outmoded, but in the 1950s it constituted a belief fervently held by most French people. The torture committed during the French-Algerian War was committed with the connivance of the French State. The contradiction which Ms Maran identifies is that simultaneously the ideology of *mission civilisatrice* committed France to propagation of its doctrines of human rights. "There is no clearer example of the contradiction between theory and practice" says Ms Maran, "than between the 'rights of man' doctrine of the civilising mission and its application through the prohibited act of torture". What is most significant and most frightening about Ms Maran's book is that it demonstrates to us that even in a country like France with a strong human rights tradition, we cannot rely on traditions of human rights "to protect individuals against state directed violence".

Although Ms Maran does not specifically say this, the debate is really an ancient debate about whether the end justifies the means. In the eyes of the proponents of torture, France, in bringing the benefits of its civilisation to "the backward peoples of the world" such as the Algerians is bestowing a great boon. Furthermore defeat of the civilising mission in Algeria was seen by some as equivalent to the defeat of French civilisation in its entirety. How could one argue with the use of torture, if the end was the preservation of French civilisation. To the opponents of torture, the conduct of France must be beyond reproach. The means chosen corrupt the end. Ms Maran studies both sides of the debate, examining in turn the discourse of the French military and the discourse of the intellectuals. She also examines the views of French Government officials.

However what is too frequently left out of such debates is reference to the law. International human rights law may constitute the individual's only safeguard. France is a member of the United Nations and bound by its Charter. That Charter, in no less than six articles commits the organisation and its members to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. France became a member state in October 1945 and has since been bound by the Charter which has the force of an international treaty. One of the first acts of the United Nations Human Rights Commission created under Article 68 of the Charter was to draft an international bill of rights. Article 5 of the Universal Declaration of Human Rights for which France voted says: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The Declaration is a resolution of the United Nations General Assembly and, as such, is not regarded as having direct legal force. However, in the opinion of some legal scholars, it has found its way into the corpus of customary international law. Law or not, the Universal Declaration must be regarded as the most important human rights doctrine of our time and in the trials of the Argentine Generals and Jean Bedel Bokassa, their violations of the Universal Declaration were cited against them.

In times of war, the four Geneva Conventions of 1949 apply. These conventions were developed to protect the victims of armed conflict. They provide for amelioration of conditions for military personnel, prisoners of war and civilians in times of war. The

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Compensation for latent building defects

By John Smillie, Professor of Law, University of Otago

Latent defects in construction are obviously a matter of concern to property owners. In this article, Professor Smillie looks at some of the implications, including the possible development of the law in the light of the recent decision of the House of Lords in Murphy v Brentwood District Council *discussed in an editorial at [1990] NZLJ 257. Professor Smillie concludes that the present New Zealand law is not adequate and that, while the decision in* Murphy *should be followed in respect of commercial buildings, this should not be so in respect of residential premises. For residential premises, he suggests that there should be compulsory first party insurance against latent defects. In effect, this would relieve the present situation where the burden for latent defects almost inevitably falls on ratepayers.*

1 Introduction

In New Zealand builders, professional consultants and territorial local authorities presently owe a common law duty in negligence to protect property owners from loss due to latent defects in construction. In practice, the burden of compensating building owners for this loss falls mainly on the local authorities charged with enforcing compliance with building bylaws. Ultimately, of course, the cost is borne by ratepayers and the community at large. Many regard the present regime as unsatisfactory, and recently it has come under attack from two different quarters.

First, the Building Industry Commission in its report on *Reform of Building Controls* (January 1990) recommends significant changes to both the nature and the administration of building controls in this country in an attempt to shift the primary burden of legal responsibility for latent defects to original building owners and their advisers.

More recently, in *Murphy v Brentwood District Council* [1990] 3 WLR 414; [1990] 2 All ER 908 the House of Lords overruled *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 and reversed its own previous decision in *Anns v Merton London Borough Council* [1978] AC 728, holding that the cost of remedying a latent defect in a building is purely economic loss which is not recoverable by the owner in an action for negligence against either the builder or the controlling local authority. While decisions of the House of Lords are not formally binding on New Zealand Courts, the decision in *Murphy* is obviously of very strong persuasive value and it is clear that the Court of Appeal will soon be called upon to reconsider its position.

In order to assess these recent developments it is first necessary to trace the development of the present legal regime in New Zealand and examine the premises on which it is based. It is also instructive to inquire why the House of Lords, after providing much of the initial impetus for expansion of liability for building defects, soon became concerned to limit the practical consequences of the *Anns* decision and has now finally overruled it. Against this background the Building Industry Commission's recommendations can be assessed and some alternative proposals for reform advanced.

2 Development of the present legal regime in New Zealand

Until relatively recently the law afforded the purchaser of a completed building very little protection against loss resulting from defects in construction. While building contractors, engineers and architects owed contractual duties to their immediate employers, the strict *caveat emptor* doctrine applied to sales of completed buildings. (Compare Sale of Goods Act 1908, s 16 which implies conditions as to quality and fitness for purposes in contracts for the sale of chattels.) Although builders owed a general duty of care in tort, their liability in respect of negligently created defects was confined to personal injury losses and damage to external property. Damage to the defective building itself was viewed as purely economic loss which was not recoverable in an action for negligence. Developers who built on their own land and then sold or leased the premises enjoyed a complete immunity from all tortious liability. (*Bottomley v Bannister* [1932] 1 KB 458) It was also assumed that local authorities were immune from liability for negligent failure to enforce compliance with building bylaws.

Then in 1972 the English Court of Appeal in *Dutton v Bognor Regis UDC* [1972] 1 QB 373 held that damage to the structure of a building caused by a latent defect in construction is physical damage to property for which the negligent builder may be held liable in tort to a subsequent purchaser, and that a local authority is also liable to the owner for negligently approving work which fails to comply with its building bylaws. This decision was substantially endorsed by the House of Lords in the *Anns* case and taken further in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520. These decisions were greeted with enthusiasm by the New Zealand Courts and triggered a process of progressive expansion of the liability of those involved in building construction. On every contentious legal issue the Court of Appeal had taken a position favourable to the plaintiff.

New Zealand developments

New Zealand Courts have refused to place any limits on the heads of damage for which those involved in the construction process may be

held liable. In *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 the Court of Appeal held that builders, architects and engineers are liable to subsequent owners of a building for the cost of remedying a negligently created latent defect which causes or threatens damage to the structure of the building itself. The fact that the defendant may have discharged his contractual duties to the original owner does not necessarily protect him from liability in tort to subsequent purchasers of the premises. Since the repair costs are classified as physical damage to property, plaintiffs can also recover foreseeable consequential economic losses consisting of depreciation in the market value of the building after all practicable repairs have been effected, the cost of alternative accommodation while repairs are carried out, and in the case of commercial premises loss of rent or business profits. Liability has since been extended to defects of quality which present no threat of damage either to external property or to other parts of the defective structure itself, but merely reduce the value of the property. (*Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 575-576; *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163, 188-189; *Stieller v Porirua City Council* [1986] 1 NZLR 84,94 (CA) (local authority)) The owner may also recover general damages for inconvenience, frustration, discomfort and annoyance. (*Stieller v Porirua City Council* ibid 97; *Young v Tomlinson* [1979] 2 NZLR 441, 461-462; *Warren & Mahoney v Dynes*, CA 49/88, 26 October 1988) Consequently defendants are exposed to a potential liability which may far exceed the contract price of their work.

Instead of enjoying a complete immunity from tort liability, developers who build houses on their own land for immediate sale now owe a "Non-delegable duty" to ensure that the building work is performed with proper skill and care, and they cannot avoid legal responsibility by employing apparently competent independent contractors. (*Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA))

The Court of Appeal chose not to confine the scope of the duty owed by local authorities to safeguarding occupants of buildings against defective conditions which threaten their health or safety. The local authority's duty extends to protecting owners against the risk of acquiring a substandard building, and it is liable for the cost of remedying defects which pose no threat to health or safety or to the integrity of other parts of the structure but simply reduce the value of the premises. (*Stieller v Porirua City Council* supra, at 84, 94; *Brown v Heathcote County Council* [1986] 1 NZLR 76, 80) Nor is the liability of the local authority confined to active misfeasance in negligently approving plans or work that does not conform with its bylaws. It seems that councils owe a positive duty to take all reasonable steps to ensure that buildings comply with their bylaws, and in order to discharge this duty they are required to undertake inspections at appropriate stages of construction. (*Stieller v Porirua City Council*, ibid) It remains uncertain whether a council can discharge its duty by engaging independent professional consultants and following their advice.[2]

Finally, those involved in the construction process remain exposed to the risk of liability for a very long period of time. The Court of Appeal has held that the cause of action in negligence does not arise, and therefore the six year limitation period within which proceedings must be commenced does not begin to run, until the defect becomes "apparent or manifest" in the sense that it is discovered or ought to have been discovered. (*Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, 239; *Askin v Knox* [1989] 1 NZLR 248, 254-255) Furthermore, successive owners of a building enjoy separate causes of action in respect of "distinct" damage which occurs during their respective periods of ownership, even though caused by the same latent defect (*Mount Albert Borough Council v Johnson* ibid, 239-240) While recognising the need for legislative introduction of a "longstop" cut-off provision to limit liability in building cases,[3] the Court of Appeal nevertheless maintains that the availability of a defence where a defendant had a reasonable expectation of an adequate intermediate inspection provides builders and local authorities with sufficient protection against a series of claims arising from a single defect. (*Askin v Knox*, supra, 255)

In practice, however, this requirement is applied very liberally in favour of plaintiffs. At least in the case of reasonably new residential premises, it is clear that a prospective purchaser is required to undertake no more than a very cursory inspection sufficient to reveal only the most glaring patent defects.[4] Nor can the negligent builder shelter behind an expectation that the local authority's building inspector will carry out an inspection sufficient to discover the defect.[5] So in the space of only 14 years the New Zealand Courts have moved from one extreme position to another: from denying any legal protection at all to the interest of building purchasers in preserving the security of their investments, the Courts are now highly protective of that interest.

Two assumptions

This dramatic expansion of liability for latent building defects seems to have been founded on two assumptions which are most clearly articulated in the judgment of Woodhouse J in *Bowen's* case. First, that the innocent purchaser of defective premises is faced with an intolerable financial burden against which he is powerless to protect himself since first part insurance against latent building defects is not available to owners. Secondly, that third party insurance against liability for latent defects is readily available to builders. Imposition of tort liability was therefore justified in order to shift the loss from vulnerable plaintiffs to defendants who are strategically placed to spread the loss over a wide section of the community through liability insurance. Woodhouse J observed that:

> By the conventional use of insurance it becomes possible for the losses to be widely spread and thereby a double social purpose is served. On the one hand, the serious strains that can arise if the random losses were left to lie where they fall is removed for the unfortunate and innocent victims. On the other, the opportunity for their wide distribution through insurance

> encourages savings in the form of premium reserves which can be used for the important purpose of supporting the economy generally. ([1977] 1 NZLR at 419)

Recognition of a legal duty in local authorities to ensure compliance with building regulations for the benefit of purchasers was viewed as serving very much a "backstop" function which would be invoked only in rare cases where the builder had disappeared or gone out of business. So in *Dutton v Bognor Regis UDC* [1972] 1 QB 373, 398 Lord Denning MR dismissed the argument that councils would be exposed to a flood of claims for large sums of damages, explaining that:

> In nearly every case the builder will be primarily liable. He will be insured and his insurance company will pay the damages. It will be very rarely that the council will be sued or found liable. If it is, much the greater responsibility will fall on the builder and little on the council . . . The insurance person will always have his claim against the builder. He will rarely allege — and still less be able to prove — a case against the council.

Insurance cover

Unfortunately, the critical assumptions on which these decisions were based proved to be unfounded. In New Zealand it is highly unlikely that a builder will hold liability insurance cover in repect of latent construction defects. Builders commonly carry two forms of insurance cover. First, a "Contractors' All Risks" or "Contract Works Material Damage" policy under which the insurer indemnifies the builder for damage to the building while it is under construction, but cover expires as soon as the work is taken over by the owner or put into service. Secondly, many builders carry a general "Public Liability" policy which covers the insured against liability for personal injury (now largely unnecessary as a result of the Accident Compensation Act 1982) and for property damage occurring during the term of the policy. However public liability policies limit the cover in respect of "property damage" to liability for damage to property *other than* the property constructed by the insured, leaving the builder uninsured against the cost of repairing or replacing his own defective work.

Nor do standard liability policies of this kind cover liability for errors in design, specification or advice. A builder or manufacturer may be able to take out specific cover against liability costs incurred in repairing or replacing a defective product or structure under a "Products Liability" policy. However insurers are reluctant to accept this risk. They see their role as being to insure against the consequences of discrete fortuitous events and they are reluctant to assume the much more uncertain risk associated with provision of a long term guarantee of the quality of an insured's work. Consequently products liability insurance is not always obtainable, and where it is available the premium cost is high and cover is usually subject to a high deductible. As a result, this form of insurance is not commonly held and it would be most unusual for an ordinary building contractor to have such protection. Architects and engineers carry Professional Indemnity insurance to protect them against liability. However professional consultants routinely limit their contractual liability to their clients and tend to accept a corresponding limit on their professional indemnity insurance cover. And of course professional consultants are not engaged in respect of many residential buildings.

So in practice the burden of compensating owners of defective buildings falls largely on local authorities. The negligent council or its successor is always available to be sued, and it will normally carry professional indemnity insurance sufficient to meet a judgment. Any attempt by a council to expressly disclaim liability in respect of its statutory functions is likely to be ineffective. (See *Burke v Forbes Shire Council* (1987) 63 LGRA 1, 19-20 (SC of NSW).) While the council has a legal right to substantial contribution from the negligent builder, in practice it is often worthless, and the plaintiff's own professional consultants are effectively insulated from contribution claims by the *McLaren Maycroft* rule.[6] Furthermore, the nature of the building controls presently in force in New Zealand is such that the council's duty to take all reasonable steps to ensure compliance carries a heavy burden of legal responsibility. All local authorities have adopted (subject to minor local variation) the Standard Model Building Bylaw NZS 1900 drafted by the Standards Association of New Zealand. This Bylaw is a detailed prescriptive code incorporating a vast body of complex standards and specifications which prescribe every detail of complying building systems, components and methods. It is not surprising that the purpose of this code is perceived not merely in terms of preserving health and safety, but rather as ensuring a minimum standard of quality in construction work.

Unsatisfactory consequences

The practical consequences of this present regime are highly unsatisfactory. The builders responsible for creating latent defects are usually uninsured and are therefore effectively insulated against substantial liability costs. Consequently they have little incentive to improve their standards of work; in fact "jerry-builders" may enjoy a competitive advantage at the lower end of the market. A heavy burden is placed on councils and ratepayers. The cost to local authorities of professional indemnity insurance cover is already high and is likely to increase substantially in the near future.[7]

Administration and enforcement of the present system of building control involves significant social costs. The detailed prescriptive nature of existing building requirements, combined with an understandable reluctance by councils to expose themselves to liability, results in delays in approving applications for building permits and an inflexible approach to interpretation which tends to inhibit the use of new materials and innovative techniques. (Building Industry Commission Report on *Reform of Building Controls* (1990) Vol I, paras 2.10, 2.11, 2.36.) It has been estimated that the direct and indirect costs of the present control system adds up to 10% ($405 million in 1989) to the cost of building in New Zealand (ibid, paras 2.33, 2.1).

Finally, a regime of fault-based

liability backed by third party insurance is a very inefficient way of compensating losses. The innocent victim's access to the compensation fund is dependent upon proof of negligence on the part of the local authority, and even then recovery is usually subject to long delay. At the same time, approximately 40% of liability insurance premium revenue is absorbed by legal costs and experts' fees.

Ironically, the rapid expansion of tort liability for latent construction defects may have contributed to the failure of the government sponsored indemnity scheme introduced by the Building Performance Guarantee Corporation Act 1977. The Act created a public corporation empowered to issue indemnities in respect of new residential buildings which would compensate homeowners for the cost of remedying defects in materials and construction. The scheme did have some shortcomings. The term of coverage provided by the indemnity was limited (18 months cover for minor defects, three years for defects in materials, and six years for major defects which render the building unsafe, uninhabitable or unusable), and claims had to be made within 90 days of the date on which the owner discovered or ought to have discovered the defective condition. In the event, this voluntary scheme did not attract wide support.[8] The Act was repealed in December 1987 and the Guarantee Corporation's responsibilities transferred to the Housing Corporation. (Finance Act 1987, s 2) The Housing Corporation continues to issue indemnities in similar terms under its own BuildGuard guarantee scheme.

3 Developments in England

Developments in England have followed a different course and the costs of remedying latent construction defects are now allocated in a manner very different from New Zealand.

The seminal expansionary decisions in *Dutton, Anns* and *Junior Books* were followed by a period of retrenchment in which the higher Courts attempted to confine the application of those cases. The liability of local authorities was confined to remedying defective conditions which presented an imminent threat to the health or safety of occupiers other than the original building owner.[9] The House of Lords attempted to limit the period of time over which a defendant was exposed to potential liability by insisting that the cause of action in negligence accrues once and for all, and the six year limitation period begins to run, as soon as a defect actually causes some damage to the structure of the building even though that damage was not capable of being detected at the time.[10] With regard to builders, the House of Lords in *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 confined *Junior Books* to its own special facts and attempted to explain *Anns* in terms of an unworkable distinction between "simple" and "complex" structures. The notion that developers owe a "non-delegable" duty of care was summarily rejected. Finally, in *Murphy v Brentwood District Council* [1990] 3 WLR 414; [1990] 2 All ER 908, their Lordships overruled *Dutton* and *Anns* and restored the law to its pre-1973 position. By this view, the cost of remedying a defect in the structure of a building or chattel is purely economic loss which is not recoverable from either the builder or the local authority in an action for negligence under the principle in *Donoghue v Stevenson* [1932] AC 562. While the decision in *Murphy* is not entirely free from difficulty,[11] it is clear that in England builders and professional consultants have been relieved of liability in tort to non-contracting parties in all but the most exceptional circumstances, and that local authorities are free from liability in the ordinary performance of their building control functions.

From one point of view, the decision in *Murphy* seems to reflect an obsession with doctrinal purity at the expense of innocent homeowners faced with crippling losses. Certainly the judgments are dominated by sterile discussions of the proper classification of the loss suffered, and rigid insistence on return to the "true" principle of liability established in *Donoghue v Stevenson*. As exercises in analytical jurisprudence the judgments are far from convincing. But at a functional level, it seems clear that the House of Lords was satisfied that adequate alternative forms of protection were available to owners of buildings in Britain and that imposition of a general common law duty to avoid latent construction defects was unnecessary. In both *Murphy* and *D & F Estates* their Lordships emphasised that the Defective Premises Act 1972 (UK) imposes a strict statutory duty on all persons who "take on work" in connection with a residential dwelling to ensure that the work is performed in a workmanlike manner with proper materials and that the house is fit for habitation. The duty is owed to all persons who may acquire an interest in the dwelling and the cause of action runs for six years from the date of completion. Since Parliament had specifically addressed the question of the extent to which those involved in the construction process should be held liable for latent defects, their Lordships considered it inappropriate for the Courts unilaterally to impose different and more far-reaching obligations.

Warranty for new houses

Although the Defective Premises Act was criticised as being obscure and poorly drafted;[12] it has given rise to very little litigation. The reason for this is that the Act itself was largely unnecessary. Long before Parliament and the Courts finally intervened to safeguard purchasers of defective housing, the private building industry had taken the initiative. For many years the National House-Building Council has provided an insurance-backed 10 year warranty in respect of new houses constructed by builders and developers registered with the Council. The warranty protects successive owners of the house against all defects in materials and workmanship notified within a two year period and also covers the cost of remedying major structural defects which appear between the third and tenth years of the building's life.[13] Since the insurer's risk is limited in both time and amount the cost of this protection is relatively low — approximately 0.3% of the construction cost. Builders have a strong incentive to meet the Council's standards of workmanship; those with poor claims records face financial penalties and ultimate deregistration.

The NHBC warranty proved attractive to the building societies

which provide most of the home mortgage finance in Britain, and they insist on coverage as a condition of loan approval in respect of new homes. By 1970 almost all new houses were covered by the scheme. (Law Commission Report No 40, para 23) Parliament also recognised the worth of the NHBC scheme by expressly exempting houses subject to an "approved scheme" from the statutory duties imposed by s 4 of the Defective Premises Act 1972. More recently, the NHBC has been authorised to supervise housing construction for compliance with building regulations in place of local authorities. (Pursuant to Building Act 1984, s 17 (UK) and the Building (Approved Inspectors) Regulations 1985, SI 1985/1066) The NHBC's certificate of compliance with the regulations is backed by an insurance plan that provides the owner of the building with 10 year no fault cover of the cost of repairing defects which contravene the regulations and threaten health or safety, and also provides the NHBC with 15 year cover against liability for negligence. The NHBC now offers the building owner a comprehensive system of building control and insurance protection at low cost.

So in England homeowners have long received prompt compensation for most of their repair costs directly from the NHBC insurers and legal actions against local authorities were mainly subrogation claims by first party insurers seeking to recover their outlays. In *Murphy* Lord Keith was able to conclude that "most litigation involving [*Anns*] consisted in contests between insurance companies", and the decision reflects the view that there is no good reason to incur the substantial social costs involved in litigation which serves merely to shift loss from first party insurers (and ultimately all homeowners to third party insurers (and ultimately all ratepayers).

In my view, the House of Lords is correct in its belief that in Britain imposition of a general common law duty is not necessary in order to provide building owners with adequate protection against loss from latent defects. Almost all owners of reasonably new residential premises are covered by the NHBC warranty scheme, and the remaining few have a right of action against the builder pursuant to the Defective Premises Act. Purchasers of older houses are afforded some protection by the decision of the House of Lords in *Smith v Bush* [1989] 2 WLR 790 by which valuers employed by home mortgage lenders own a non-disclaimable duty to purchasers to take reasonable care in assessing the value and structural soundness of houses. The combined effect of NHBC supervision and continuing exposure to tort liability for personal injuries and damage to external property provides builders with strong incentives to meet adequate standards of workmanship.

Commercial buildings

With regard to commercial buildings, it seems that the House of Lords believes that informed businessmen have adequate opportunity to protect themselves from the risk of loss from latent defects by one or more of the following means: assignable "collateral warranties" and "duty of care agreements" from contractors and consultants; employment of independent surveyors and valuers prior to purchase; and purchase of first party "Property Protection" or "Latent Defects" insurance. First party cover against major construction defects is now readily available on the British insurance market. For example, since 1978 the Norman Insurance Co has offered a 10 year cover in respect of inherent structural defects which cause damage to the premises or threaten the collapse of the building. The premium cost is approximately 1% of the value of the building. Coverage of consequential losses such as loss of rent is available as an optional extra. In order to minimise the risk to which it is exposed, the insurer insists that design plans and site works are monitored by independent consultants and so provides an important additional control on the quality of work. Even before the decision in *Murphy* some insurers were prepared to waive subrogation rights under these policies, thereby avoiding unnecessary litigation and double coverage of the same risks. Demand by commercial building owners for this form of cover is growing rapidly.

So viewed as a total package, the present English system of allocating the costs associated with latent construction defects can be expected to operate reasonably efficiently and fairly.

4 The future for New Zealand

What action should we in New Zealand take to overcome the deficiencies apparent in our present sytem of allocating the costs of latent building defects? While it is open to the Courts to make some worthwhile improvements through modification of existing liability rules, more far-reaching changes are dependent on legislative action and private initiatives.

(a) The Courts

It will be open to the Court of Appeal to refuse to follow the decision of the House of Lords in *Murphy* on the ground that different social conditions prevail in New Zealand. Given the Court's insistence upon following its own course in the area of negligence (see eg *Brown v Heathcote County Council* [1986] 1 NZLR 76, 79, 80 per Cooke P, 83 per Richardson J and Sir Clifford Richmond), it seems unlikely to pass up this opportunity. The Court of Appeal will be able to point to three significant differences between English and New Zealand conditions. First, in relation to the liability of local authorities, the Court has already taken the view that the New Zealand statutes which authorise regulation of building work have a wider legislative purpose than their English counterparts, extending beyond protection of health and safety to preservation of living standards and property values. (See *Brown v Heathcote County Council* supra, 80, *Stieller v Porirua City Council* [1986] 1 NZLR 84, 93-94.) Secondly, New Zealand homeowners enjoy no statutory protection equivalent to that provided by the English Defective Premises Act. Thirdly, no universal system of private first party insurance equivalent to the NHBC warranty scheme is presently in place in New Zealand. The Housing Corporation's BuildGuard scheme provides inadequate coverage and is not widely held. It would therefore be unfair to abolish the common law duty presently

owed by builders and local authorities to residential homeowners before an adequate alternative system of compensation for latent defects is made available.

However one cannot feel confident that the Privy Council would accept these circumstances as justifying a different approach in New Zealand in respect of residential buildings. With regard to the scope of the duty owned by local authorities, in *Murphy* Lord Bridge considered that while the various statutes authorising building regulations in Commonwealth jurisdictions differ in detail, they share a "general structure and operation". At the more general level, the Privy Council has already indicated that it regards the law of negligence as a core element of the common law in respect of which "no sensible distinction can be drawn between the various [Commonwealth] countries and the social conditions existing in them". (*Rowling v Takaro Properties Ltd* [1988] AC 473, 501) Their Lordships gave the leading New Zealand cases full consideration in *Murphy*, and the final decision was justified as marking a return to the "true" principle established in *Donoghue v Stevenson.*

But with regard to commercial buildings, the case for preserving common law liability in New Zealand is much weaker. Owners of commercial buildings in New Zealand have the same opportunities to allocate and spread the risk of loss from latent defects as their British counterparts. While it has taken the New Zealand insurance market rather longer to respond to the need for latent defects insurance, one company already offers such a policy and another is preparing to enter the market in the near future. The new entrant will offer 10 year cover of the cost of remedying defects which cause damage rendering the building unstable, or present a threat of imminent collapse. The premium rate will be less than 1% of the value of the building.

Abolition of liability for negligence in respect of commercial buildings could be expected to stimulate demand for this form of cover and produce a quick response from the insurance industry. There seems no good reason to continue to expose local authorities to the risk of liability to commercial owners for very large sums of damages (which may include substantial awards for consequential business losses) many years after the building was completed. When the Court of Appeal is presented with the opportunity to reconsider its present position, it could take a major step in the right direction by applying the *Murphy* decision to commercial buildings. The liability risk to which local authorities are presently exposed would be significantly reduced, and owners of commercial buildings would be given a strong incentive to employ the alternative means of protection available to them.

This leaves the question of what reforms should be introduced in New Zealand to achieve a fairer and more efficent allocation of the costs of remedying latent defects in *residential* premises.

(b) The Building Industry Commission's proposed Building Code

The Building Industry Commission is concerned to relieve local authorities of some of the burden of responsibility they presently carry in respect of building work, and two means are employed to this end. First, a uniform national Building Code would substitute broad performance-based standards for the highly specific prescriptive requirements of the present local authority bylaws. The Code comprises 34 provisions which set out the mandatory requirements which must be satisfied in respect of different aspects of a building. Each provision consists of three levels of regulation expressed in terms of very broad "statements" describing the social objectives behind the provision, the functional standards the building must meet in order to discharge those objectives, and the way a building must perform in order to fulfil the functional requirements.

The Code does not attempt to prescribe any particular technical means of satisfying the broad mandatory requirements. Information and guidance on technical matters would be provided in documents approved by a central "Building Industry Authority" which set out methods of verification and examples of technical solutions that would satisfy the Code requirements. This move away from detailed mandatory requirements is intended to place greater responsibility for selection of designs, methods, and materials on building owners and their advisers. The Commission hopes that greater freedom of choice will encourage the use of new technology and innovative methods that will reduce building costs. Further, the incidence of local authorities being fixed with liability may be reduced since compliance with the Code would be assessed by reference to broad functional and performance standards rather than detailed technical specifications.

Proposals unlikely to succeed

It seems unlikely that the Commission's proposals would achieve these objectives. First, the examples of verification methods and acceptable solutions already drafted by the Commission adopt in large part the detailed specifications prepared by the Standards Institute and incorporated in existing bylaws. While local authorities would not be obliged to insist on compliance with these non-mandatory standards, in practice they will almost always do so since this is the only certain way to ensure that the very broad mandatory requirements of the Code are met.

Secondly, the social purposes to which the broad provisions of the draft Code are directed are so wide-ranging that its adoption is unlikely to achieve any reduction in the incidence or ambit of the liability to which local authorities are presently subject. The new legislation could make it clear that its purpose is confined to protecting health, safety and external property, and that it is not intended to protect owners from the risk of purchasing a safe but substandard building. The liability of New Zealand local authorities would then be limited to the same extent as was achieved in England by the decision in the *Peabody* case [1985] AC 210. But although cl 2(1) of the draft Building Act seems to confine the purposes of the legislation in this way, in the body of its Report the Commission concludes that the "national interest" requires recognition of "unequal bargaining power" and that some controls are necessary to ensure that buildings meet the "reasonable expectations" of

disadvantaged groups. (*Report*, Vol I, paras 3.12, 3.15) As a result, some of the particular provisions of the draft Code are clearly intended to protect owners' expectations of a building meeting minimum standards of quality, as opposed to safety. (eg, Draft Building Code Regulations B1.1(b), B1.3.1(a), B2.1, B2.2. E2.1(b), E3.1(a).)

The main thrust of the Commission's concern to provide some relief for local authorities lies in its attempt to shift a substantial share of the burden of legal responsibility for non-compliance with building requirements from councils to independent "certifiers". The draft Building Act provides for approval of independent professionals as certifiers authorised to certify that a building complies with some or all provisions of the new Building Code.[14] Local authorities would be required to accept the certificate of an approved certifier as establishing compliance with the Code provisions to which it relates, and the council would be immune from liability in the event of non-compliance.

Limited effectiveness

A number of factors are likely to limit the effectiveness of this proposal. First, it is left to the building owner to decide whether to employ independent certifiers or rely on the council to supervise the project — there is no provision for a council to insist that an owner obtain independent certification before issuing a building permit or occupancy consent. So whether the local authority carries all, part or none of the risk of non-compliance with the Code is left entirely in the hands of the original building owner.

Secondly, the success of the proposal depends on adequate professional indemnity insurance being made available to certifiers at reasonable cost. Unless adequate liability cover is available few professionals will enter the field, and their service will not attract owners who will prefer to retain access to the "deep pockets" of local authorities. The draft Building Act requires certifiers to hold liability cover under an approved "scheme of insurance", and the Commission suggests that 10 years forward cover of $200,000 for small buildings, including housing, and $400,000 for "other buildings" would be acceptable. (*Report*, Vol I, para 6.30) This seems inadequate[15] Secondly, the 10 year term of forward cover clearly provides inadequate protection under the present limitation law, and while the Commission anticipates legislative enactment of a longstop cut-off provision, the term favoured by the Law Commission is 15 years. (Law Commission Report No 6, *Limitation Defences in Civil Proceedings* (1988) In fact it is by no means certain that insurers will be prepared to guarantee certifiers cover against liability for even 10 years from the date of certification. Professional indemnity insurance has always been written on a "claims made" basis: ie the policy is renewed annually and the insured is covered only in respect of claims notified during the term of the policy. If insurers adhere to this position, some separate provision would have to be made (presumably by the Building Industry Authority) to meet claims within the 10 year period against certifiers whose policies have lapsed.

(c) Compulsory first party insurance of building defects

The Building Industry Commission did consider the possibility of making first party insurance of new residential accommodation compulsory. It proposes "for further consideration" a compulsory guarantee scheme administered by a statutory authority which would compensate homeowners for the cost of work required to make their houses comply with the Building Code. (*Report*, Vol I, para 2.50 and Appendix 7) The scheme would be funded by flat-rate annual registration fees from approved builders, and standard one-off payments by owners collected by local authorities prior to the issue of a building permit.

The Commission's proposal would offer one major advantage over the Housing Corporation's BuildGuard scheme — the term of the guarantee would conform with the limitation period within which actions for negligence must be commenced, and would therefore provide owners with significantly longer protection than BuildGuard. However in other respects the Commission's scheme is less attractive than BuildGuard. First, the protection offered by the guarantee is narrower in scope, being limited to the cost of bringing the house into conformity with the Building Code. The BuildGuard indemnity guarantees performance of the builder's contractual obligations, and therefore provides short term cover in respect of the cost of repairing minor defects in workmanship or materials that may not infringe the Code requirements. Secondly, it seems that the compensation payable under the guarantee would be subject to a low maximum ceiling. While the Commission does not settle on any particular maximum limit on compensation, it refers with apparent approval to the $40,000 limit imposed under a similar Victorian guarantee scheme. Such a limit compares unfavourably with the BuildGuard scheme which covers the full contract price of the house up to a limit of $200,000. Nor would the guarantee cover minor work worth less than $1,500, whereas the BuildGuard indemnity is subject only to a modest $200 deductible.

Finally, the Commission's proposal does not provide sufficient incentive for builders to meet proper standards. All builders would be entitled to initial "approval" for the purposes of the scheme regardless of their work records, and would pay a standard annual fee. Suspension or cancellation of approved status or increase in the annual fee could be imposed only by order of the District Court on application by the guarantor. The only real sanction on the careless builder would be the guarantor's right to pursue a subrogation claim, but this course is always costly and, since builders are seldom insured against latent defect damage, often futile.

So the Commission's guarantee proposal does not provide an adequate alternative to the tort action for damages and is unlikely to win acceptance. The BuildGuard scheme already provides a better level of cover, and it may be better to build on the experience gained during its 12 years of operation. The Building Performance Guarantee Corporation could be revived to administer the scheme, purchase of indemnities in respect of all new houses made compulsory, and the

term of cover in respect of major defects extended to at least 10 years.

Alternative insurance proposal

A simpler alternative would be to require building owners of new residential accommodation to take out a prescribed minimum level of first party insurance cover against building defects as a condition of the grant of a building permit. The potential for a competitive market for latent defects insurance already exists. The BuildGuard scheme is well established, the NZ Master Builders' Federation intends to offer a similar indemnity in respect of buildings erected by their members, and 10 year cover in respect of major structural defects is presently available on the private market. Competition between insurers can be expected to result in wider cover being offered at reasonable cost.[16] Since private insurers refuse to insure buildings constructed by disreputable builders, and insist upon independent approval of designs and workmanship, builders would have a strong incentive to maintain proper standards.

Once all owners of relatively new homes were covered by compulsory first party insurance against building defects, there would remain no need for tortious liability. However there would obviously be a considerable lag-time after initial introduction of compulsory insurance during which the tort action must be retained for the protection of homeowners. In fact there would be no need to formally abolish the tortious duty owed in respect of residential premises. If the legislation requiring compulsory insurance also removed insurers' rights of subrogation under these policies, abolished the collateral source rule, and imposed an acceptable longstop limitation cut-off, the tort action would simply fall into desuetude.

5 Conclusions

1 The present law in New Zealad does not achieve a fair and efficient allocation of the cost of remedying latent building defects.

2 The decision of the House of Lords in *Murphy* should be followed in New Zealand in respect of commercial buildings. However different conditions prevail in New Zealand in respect of residential premises, and it would be unfair at present to deny homeowners a right of action in negligence.

3 The new Building Code proposed by the Building Industry Commission is unlikely to produce significant changes to the present system of allocating the cost of building defects.

4 Compulsory first party insurance of residential buildings against latent defects would provide adequate compensation to homeowners at reasonable cost, relieve local authorities of the burden of liability, and impose effective controls on builders. □

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1 In a companion decision handed down on the same day, *Murphy* was applied to exempt a builder from liability to a downstream lessee for the cost of rectifying a negligently created defect in the structure: *Department of the Environment v Thomas Bates and Son Ltd* [1990] 3 WLR 457; [1990] 2 All ER 943.

2 In *Murphy v Brentwood District Council* [1990] 3 WLR 944 the English Court of Appeal held that a council could not discharge its duty by following the advice of independent consulting engineers. On appeal, the House of Lords found it unnecessary to decide this question.

3 *Askin v Knox* [1990] 1 NZLR 248, 256. The Law Commission has recommended amendment of the Limitation Act 1950 to provide that a cause of action will expire 15 years after the act or omission complained of: Report No 6, *Limitation Defences in Civil Proceedings* (1988).

4 See eg *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 425-426; *Stieller v Porirua City Council* [1986] 1 NZLR 84, 95; *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 586-587.

5 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, 241: builder held 80% responsible for the loss and the council 20%.

6 In *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 the Court of Appeal held that the liability of a professional person to his client for damage caused by negligent performance of his professional duties lies in contract alone, so that the professional is not subject to a claim for contribution under the Law Reform Act 1936, s 17. The Court has indicated its willingness to reconsider the rule when a suitable case arises: *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 178; *Day v Mead* [1987] 2 NZLR 443.

7 The liability insurance market follows a strongly "cyclical" pattern. High interest rates encourage insurers to attract as much revenue as possible by offering low premium rates. Eventually excessive price cutting leads to underwriting losses followed by sharp increases in premium rates in order to restore current profitability and recover past losses. At present the New Zealand market is in a highly competitive phase with claims and overheads exceeding premium income. The "cycle" dictates an imminent withdrawal of less successful insurers from the market followed by a substantial increase in premium rates. The local New Zealand market is also strongly influenced by trends in the international reinsurance market. See generally Fleming, "The Insurance Crisis" (1990) 24 UBC Law Review 1, 3-5; Report to the Local Government Ministers of Australia and New Zealand on *The Liability of Local Authorities: Options for Reform* (Australian Govt. Publishing Service, Canberra, 1988) 342-345, 377-379.

8 Between 1978 and 1987 the Guarantee Corporation issued indemnities in respect of only 24% of new dwellings. Most of these were houses financed by the Housing Corporation which, from 1983, insisted upon the issue of an indemnity as a condition of a loan.

9 This was the combined effect of *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034 (CA) and *Richardson v West Lindsey District Council* [1990] 1 WLR 522 (CA).

10 *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1. The effect of this decision was overturned by the Latent Damage Act 1986 (UK) which requires an action in respect of latent damage to be commenced within three years from the date on which the damage was or should have been discovered, subject to an absolute "longstop" limit of 15 years from the date of the negligence.

11 While their Lordships rejected any general application of the "complex structure" exception floated in *D & F Estates*, a majority seemed to accept the narrower proposition that a contractor who is employed to instal one particular component of a building or its ancillary equipment (eg a central heating boiler or electrical wiring) may be liable if, due to his negligence, that component "malfunctions" and causes damage to other parts of the structure. This exception can be justified on the ground that contractors' public liability insurance policies will cover this risk as damage to third party property. Consulting engineers and architects would remain liable to their clients in tort under the principle in *Hedley Byrne v Heller* [1964] AC 465, as well as in contract. Exceptionally, a local authority may attract a duty under *Hedley Byrne* where it volunteers specific advice to a plaintiff knowing that it will probably be relied on.

12 Spencer, "The Defective Premises Act 1972 – Defective Law and Defective Law Reform" [1974] CLJ 307, 318-319.

13 See generally Spencer, ibid 313-316; Holyoak and Allen, *Civil Liability for Defective Premises* (1982) 92-106.

14 The draft Act provides for two categories of certifiers. "Approved Certifiers" would be approved by the Building Industry Authority to certify that particular aspects of construction within their special fields of expertise comply with the Code, while "Co-ordinating Certifiers" would be approved by the Minister of Internal Affairs to certify compliance with all provisions of the Code.

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Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

Sentencing: Current Issues

Mr Justice William Esson (Chief Justice of British Columbia)

Ladies and gentlemen, in opening this session I perhaps can just take a moment to comment on the nature of the subject which is being discussed today. It's one which to an almost unique degree yields little gratification and causes much torment to those who must deal with it. That is true of the legislators, the politicians who must lay down the basic rules. It is certainly true of Judges who must apply them and decide in a given case what the sentence should be. It's true of the lawyers who, in the given case, if there is a range of sentences, must seek to persuade the Court to temper the wind to the shorn lamb, and if there is no range, offer what comfort the lawyer can to his client. And it is equally a subject of frustration, I think, and torment at times to those who must administer the prisons and who are responsible for carrying out the sentence. And, of course, it is a subject that is almost unique in the extent to which, amongst legal issues, it is a matter of concern to the general public. There are a few who, perhaps, care about the significance of *Anns v Merton*, who care about the scope of judicial review, or even about the terms of substance of criminal law. But there are not very many outside the legal profession. Everyone has a view on how offenders should be dealt with, and that, of course, is part of the difficulty for the legislators, for the Judges, and is part of the complexity of the issue.

We are very fortunate today to have a panel who will bring to us each of the perspectives to which I have referred.

Sheriff Nicholson is a distinguished Judge and has also been very must interested in reform in this area. Mr Chan is a Prison Administrator of very long experience who has risen through the ranks and also has studied the subject in an academic way. Mr Karpal Singh is both a lawyer and Member of Parliament in his country, and so is Mr Paul East. So without taking up more time, then, I call upon Sheriff Nicholson to present his paper. I will add that because it is such a comprehensive study, Sheriff Nicholson will be granted 20 minutes which will not be granted to anyone else.

Sheriff Nicholson

Mr Chairman, ladies and gentlemen. Coming, as I do, from a very small but very old jurisdiction on the other side of the world, it is a very great honour for me to be able to address this Conference, and to do so on a subject in which, as you, Mr Chairman, have just observed, I have taken a particular interest in for many years.

About 200 years ago, a Scottish Judge, when passing sentence on an offender who had not committed a terribly serious crime, said, if you can understand the Scottish language: "He'll be non the wor' of a hangin' ". Now that was a very simple and direct approach to the matter of sentencing, and I suppose it's fair to say that until comparatively recently, most people might have said: Well, sentencing is not something which presents any particular difficulties. And it might have been hard to find a Conference such as this until, again, comparatively recently, which would have put the subject of sentencing on its agenda. Sentencing was very much a matter for the Courts to sort out for themselves, and any legislative intervention was likely to be limited to changing a maximum penalty here or there, or introducing a new disposal for the Courts to use.

During the last 20 years, however, there has been an upsurge of interest in sentencing reform around the world. And it is of particular note that only next week, Commonwealth Law Ministers will be addressing the problem of consistency in sentencing at their meeting in Christchurch here in New Zealand.

In the limited, albeit in the circumstances generous, time available to me today, I should like to suggest briefly why there should have been this wholly new interest in the subject of sentencing. I shall comment briefly on the main reform initiatives which have so far taken place in many jurisdictions, and finally, I shall offer some suggestions as to how the subject of sentencing might in future be addressed in those jurisdictions where either there has not, as yet, been any reform, or any reform that there has been is still at an early

This issue contains records of two more sessions from the Ninth Commonwealth Law Conference. As with the ones published last month, they have had minimal editing. Formal greetings and thanks have usually been deleted. Because there has been little editing, the reports of the sessions sometimes show that lack of grammatical nicety that is the normal hallmark of the spoken word, as distinct from the written article. Sometimes, too, the recording has not been completely clear. Where passages have been deleted or the odd word inserted for clarity, this has been marked appropriately in the text. Otherwise the sense of spontaneity, and idiomatic expression, has been retained.

stage of development. And needless to say, all of these matters are explored in greater detail in my paper.

I do not think that one can point to any single reason as having provoked the movement for reform. Rather, there has been an accumulation of factors which have all, in varying degrees, contributed to a desire for change. And perhaps I may simply and briefly list, in no particular order of importance, those which I think have played a major part in this.

First of all, and I say this aware as I am of what Mr Chan will be saying shortly about the experience in Hong Kong, but I believe that there has been growing uncertainty and disillusion about the aims of sentencing, and in particular, a lot of faith in rehabilitation as a realistic and achievable aim, especially in the context of custodial sentencing.

Second, there has been a growing concern about inconsistency and disparity in sentencing, coupled with the view that in many instances, disparity may be caused by uncertainty and lack of unanimity regarding the aims of sentencing.

Third, there has, I think, been an increasing acceptance in many countries of the view that the only fair and principled objective in sentencing is that of proportionality or just deserts.

Fourth, there has been growing concern about the operation of parole systems which, though administrative, rather than judicial decisions, may unfairly influence the real length of sentences pronounced by the Courts.

Fifth, there has been a growing emphasis on the needs of victims, and on the desirability of giving them some recognition in the sentencing process.

And sixth, there has been, in many countries, anxiety about ever-increasing prison populations, coupled with the view, in at least some countries, that many people are receiving prison sentences who could equally well be dealt with in some other way.

Well, where has all of this taken us during the last 20 years? The answer is that in many countries, it has taken us quite far, though not always in the same direction, and I would like to illustrate just a few of those directions.

So far as I am aware, the first major changes were introduced in the United States. Some States, such as California and Indiana, introduced new sentencing statutes which simply prescribed recommended, or even mandatory, sentences for various crimes. Other States, however, saw that kind of approach as being too inflexible and too open to changing political pressures. And they preferred, instead, to follow the suggestion which had been made by Marvin Frankel, an influential Judge, in 1973, and they entrusted the formulation of sentencing guidelines to a permanent Sentencing Commission. The State of Minnesota was, I think, the first to take this course in 1981, and since then, a broadly similar, though not identical, course has been followed by several other States and, most recently, at the Federal level as well.

As you are probably aware, the result in these cases has been a grid style guideline presentation with a number of seriousness ratings on one side of the grid, and a number of offender characteristic ratings along the top. Having determined the ratings appropriate to a given case, the Judge will then find in the box where the two lines meet, a recommended sentence, or sentence range, usually expressed as a number of months imprisonment, from which the Judge may depart if he so wishes, but only with good reason which, of course, may subsequently be scrutinised by the Appeal Court. This sort of approach is meant to give very precise guidance to Judges, while still leaving room for a degree of discretion in exceptional cases.

A very different approach to sentencing reform is to be found here in New Zealand, where the Criminal Justice Act of 1985 sets out general narrative guidance. In effect, and here I put it very shortly, that Act provides that imprisonment should be used for all save the least serious crimes of violence, and should not be used for any other than the most serious crimes against property. The Act goes on to direct that any sentences of imprisonment should be as short as is consonant with promoting the safety of the community, and it also requires a Court to order reparation to the victim in all cases where loss or injury has been caused unless the Court is satisfied that it would be inappropriate to do so.

A somewhat similar, though not identical, approach to reform has been taken in Europe by countries like Sweden and Finland. They have recently introduced legislation containing general principles to be followed by the Courts at the time of sentence. The expectation in these countries is that over a period of time, the Appeal Court will develop and explain these principles so as to create a coherent and consistent structure for sentencing.

Yet another approach, designed to impose some form of control or structure on the unfettered discretion of Courts of first instance, involves the laying down of guidelines by Appeal Courts. In recent years, this practice has developed in several countries, including in particular England and Wales, Canada and New Zealand, and in effect what happens is that the Appeal Courts will use a particular appeal against sentence as an opportunity to give general guidance on appropriate sentence levels for different manifestations of the offence in question. This sort of approach has the advantage that it requires no legislative intervention, and may be more acceptable to the judiciary for that reason. On the other hand, it is a form of guidance which can only extend to a very small number of offences, and moreover, it may not be easy to construct any coherent sentencing policy or philosophy out of the judgments which are given.

In several other countries, sentencing reform is very much under consideration but, as yet, has not produced new legislation or new forms of guidance. In Canada, the Sentencing Commission produced an extensive and impressive report in 1987, but so far as I know, its recommendations are still under consideration. Likewise, in Australia the Law Reform Commission produced a voluminous and imaginative report in 1988, but again in so far as I know, it remains unimplemented. I understand, however, that some reform initiatives on sentencing are currently underway in individual Australian states.

In the United Kingdom, radical reforms of the parole system have been recommended recently, both

for Scotland, and for England and Wales. And at least so far as England and Wales is concerned, it looks as if those reforms may soon be implemented. Since the date when I wrote my paper for this Conference, the Home Office in London has produced a White Paper which makes many proposals for change, including implementation of the proposed reforms of the parole system. Most significantly, that White Paper promises a new legislative framework for sentencing based on the seriousness of the offence or just deserts. And interestingly, the Paper goes on to say, and I quote:

> That to achieve a more coherent and comprehensive consistency of approach in sentencing, a new framework is needed for the use of custodial, community and financial penalties.

Personally, I welcome not only the general approach of the White Paper, but also its promise that new legislation will deal with non-custodial as well as custodial sentences.

I suppose that all the initiatives that I have just been mentioning, different as they are, share one thing in common. They all attempt to make the sentencing of offenders more coherent, more consistent and more principled. Inevitably, perhaps, they can all be criticised in one way or another. Some of the American grid systems, for example, can be criticised for offering little or no guidance in relation to non-custodial disposal. They are also open to the criticism that by making sentences more predictable, they increase to an undesirable extent the power of prosecutors engaged in plea or charge bargaining. On the other hand, they do produce a carefully thought out structure of relative seriousness and proportionality. More general sentencing guidance of the kind now found in New Zealand can, I believe, be criticised for not offering guidance on sentence levels, and for saying nothing about the aims and objectives which sentencers should be pursuing. On the other hand, the New Zealand statute still leaves to Judges what many would regard as a highly desirable degree of individual discretion.

There are, then, a great many options available for consideration by those who seek to bring some kind of structure into sentencing practice. But, one may ask, is there any need to impose any kind of structure at all in those jurisdictions where none exists at present? What is wrong, one might ask, with a free and untrammelled judicial discretion? Well, I have already listed the many considerations which have led many countries to make, or at least to consider, reforms, and I am personally in no doubt that they point clearly to a need for some kind of structuring. After all, in most other instances where Judges exercise discretionary powers, they do so within a recognised and accepted framework of principles or guidelines. And I can see no good reason why the sentencing process, which, as you, Chairman, reminded us at the outset, affects potentially every member of the community, should be any different.

The detail of any reform must, of course, be a matter for individual jurisdiction. What is right for one may be quite wrong for another. But I would suggest that there are three essentials which ought to be addressed in all jurisdictions.

First, I suggest that there is a need for clarity and unanimity about the general objectives of sentencing. It really is no good if individual Judges are each pursuing their own aims and objectives with no uniformity of approach whatsoever.

Second, I believe that there is a need to achieve some uniformity of thinking in relation to the relative seriousness of different kinds of offending. It is easy enough to say, well, of course deliberate homicide is much more serious than shoplifting, but which is to be the more serious, in general terms, for example, as between rape and armed robbery? It is at that sort of level, I think, that there is a need for some consistency of approach.

And third, there is, I believe, a need to address the relationship which should exist between custodial and non-custodial sentences, and the circumstances in which, as a general rule, one should be preferred to the other.

I believe that if agreement can be reached on these matters, the basis of a sound and principled structure for sentencing will have been achieved. But, who is to bring all this about? I believe that at the end of the day, general principles ought to be enshrined in legislation. I am not convinced, however, that legislators, or even Government departments, are the best people to work out what those principles ought to be. That is not intended to be any criticism of their abilities. It is simply that they have neither the time, nor the experience, to undertake the very considerable task of framing a workable and acceptable system. A wholly unstructured and unprincipled sentencing system may be undesirable, but I would suggest that hasty and ill-considered reforms would be even worse.

Personally, I believe that the solution is to have the scheme worked out by a specialist body, such as perhaps the permanent Law Reform Commission, as was the case in Australia, or a specially appointed Committee, as was the case in Canada. I do not suggest that that body should effectively have legislative powers, as has been the case in the United States. And although in that country these quasi-legislative powers have been held not to be unconstitutional by the Supreme Court, I would not be confident that the same result would be reached in other jurisdictions. But I do believe that the kind of body which I am suggesting should play a prominent part and have a major and continuing advisory role, in so far as the working out of general principles and guidance is concerned.

Those countries which have not, as yet, sought to introduce a reformed system of sentencing are, I think, now singularly well placed to learn from the experience of others, and from the large volume of sentencing literature which has come into existence in the last 20 years. It is my hope, ladies and gentlemen, that those countries will grasp that opportunity.

Mr Justice William Esson

Thank you, Sheriff Nicholson. The next speaker will be Mr Chan Wa Shek, who comes to us from Hong Kong. His paper is in the published papers at page 319. He is a person who has been involved with corrections for almost 40 years, starting as a Warder and working up

through the ranks to become Commissioner of Correctional Services in Hong Kong about five years ago. He will speak to us about the Hong Kong approach, and especially as it relates to young offenders. Mr Chan.

Chan Wa Shek (Hong Kong)
Thank you, Mr Chairman. When I was first asked to prepare a paper about corrections in Hong Kong, I could not find anybody in Hong Kong to tell me exactly what it was for, and how I was supposed to fit in. Having arrived in this wonderful country, and having read the Conference programme and agenda, then I realised why I am here. Now, having been once a student of law, I fully appreciate the bad practice of not preparing your case before you appear before a panel of Judges, and here you are. Nevertheless, I do not regret it. In fact, particularly after having heard His Honour, the Principal Sheriff Nicholson, give a thorough introduction to sentencing reforms in a number of countries around the world, I welcome the opportunity to bring up to you a particularly important aspect to sentencing reform. In fact, I would like to put it to you that no reform in sentencing structures would be successful unless due regard is given to how sentences are to be carried out; how efficient the correctional programmes are.

It is no good sending a boy to a young offenders' institution for training if training exists only in name. And it is likewise futile to believe that an adult offender will be rehabilitated if you are merely sending him to perhaps 7 years voluntary or involuntary languishing in some hole somewhere, interspersed only, perhaps, by the excitement of an occasional beating by the guards or fellow prisoners. And even for a sentencing system with some degree of flexibility so that offenders can be shifted from one type of treatment to another will not work if none of the alternatives will do what they are supposed to do. And therefore, I put it to you further, that those who are interested in sentencing reforms and those whose duty it is to pass sentence should be fairly familiar with your correctional programmes; what is actually happening and not happening in these programmes in your correction institutions; who is doing what in these programmes; and how offenders are receiving and reacting to what is being done to them.

Here you would perhaps realise that I have shifted slightly the focus of my paper, but I consider this very important. If I may follow up on Sheriff Nicholson, who has already brought up the relevance of corrections to sentencing, and has also brought up the topic of a rehabilitative versus a just desert model in corrections.

The idea of rehabilitation is not new, and to students in criminology, that would mean that it probably had its beginning in the 1560s when Bridewell Prison in London was converted into a partly reform-oriented prison, and then in 1576, Queen Elizabeth I required by law the establishment of houses of correction in the English Counties. In 1696, the Dutch operated the first institution for males; and then the first institution for females followed very closely.

The St Michael House of Correction for Boys commenced operation in 1704 in Rome, and then in the United States in 1787, the Pennsylvania Quakers conceived the idea of the penitentiary system which, of course, completely failed. The penitentiaries closed in 1835 replaced by the New York State Prison at Oakburn which emphasised discipline and enforced rehabilitation, and systems which are similar to the Oakburn regime can still be seen around various places in the world today.

And so the idea of rehabilitation was well supported from the 1880s to the 1960s. However, following that, rehabilitation received its very serious challenge in the 1970s when Lipton, Martinson and Wilkes published their research results culminating in a "nothing works" mentality. Add to that the cries from the public to call for penal institutions to be more secure for the public and safer for the offenders; and also for a reaffirmation of the objective of punishment.

Now rehabilitation, of course, brought with it the indeterminate sentence where the Court would merely sentence offenders sometimes to a maximum term with latitude for the maximum to be reduced in some of the jurisdictions. In others, there was a minimum and a maximum, and in general, the emphasis was on more individualised sentence and treatment and the impetus of the model was based on a medical model of treating the sick offender. The position of the staff was more therapist with a lot of input from professionals.

Rehabilitation, of course, saw the introduction of a lot of professional services like education, counselling, social work, psychological services, and a lot of the conduct and ways of thinking of the offenders were treated as symptoms to be discussed between the professional staff and the offender.

Unfortunately, of course, the rehabilitation era, particularly in the 60s and 70s saw quite a number of strikes, riots and escapes from penal institutions in western countries. Hence the cry for more secure and safer penal institutions. And the rehabilitative model, for a while, was almost replaced by the introduction of what was called a justice model or just desert model in which there is a re-emphasis on security, on control — not necessarily doing away with things like education, work, counselling, but a more honest admission of what these measures can and cannot do. However, do not let me give you the impression here that rehabilitation is dead. It is not. The true models are still very much in contention and in fact there are some views that the justice model is already on its wane. If I may quote Barbara Hudson, she said that

> There are signs that the justice model is already past its zenith. Its star is waning, its glitter is dimmed. Concepts such as fairness, desert, proportionality, terminacy and even justice itself no longer beckon as fixed points by which we can navigate towards a less totalitarian, less pervasive social control universe.

So it is that we in corrections must find our own way in this very contentious area where sentencing and correction are both trying to look for something better, to look for the ultimate solution. And here is where I would suggest to those of you who are interested in sentencing

reforms, and those whose duty it is to pass sentence, to perhaps invest a bit of your time to find out what your correctional system is doing – whether it is doing all the things it is supposed to do, and in what way the objectives are being achieved.

In my paper, I gave a very brief description of the Hong Kong system, the type of sentence we have in Hong Kong, and also a very brief description of the different types of correctional programmes we have, ranging from the standard imprisonment for adult and young offenders, to the treatment regime for those who are found guilty but are addicted to a dangerous drug, and also to the systems available for young offenders.

My paper also describes to you how the programmes work, why we have things like a short induction programme at the beginning, why we thoroughly analyse offenders at the beginning of a sentence, why we get in touch with the offender's family at that point in time; and it also touches upon the importance of categorisation, of dividing the offender population according to not only the seriousness of their offence and the degree of security they require, but also, as far as possible, to separate the sheep from the wolves, to separate them by age, sex, to have different types of regimes for the different types of people, who they are, and the importance of keeping them usefully engaged and employed. In the case of adults in Hong Kong, they are all part of a very rigorous industrial system in which we produce something like $170 million worth of goods and services last year, and I have intended that it should produce something like $220 million. Fortunately, we do not have the same problem that they are having in the Federal system in the United States where you have very strong opposition from the various industries in the community. In Hong Kong we do not have that problem, and therefore correctional service industries are able to compete freely with outside contractors for both Government as well as private sector job orders in a number of trades.

I have gone on in my paper to describe life in an institution; the kind of firm, fair discipline which permeates throughout the offender's periods of incarceration, and the kind of sanction and control that is being exercised, even after incarceration in humility centered programmes.

I have also, of course, gone on to talk about the various innovations we have introduced in the last five years, including the much more refined categorisation of dividing offenders into various psychological tanks, each perhaps with somewhat different needs in terms of treatment, and the fact that we spend something like three years to completely revamp the education for young offenders, throwing away the standard textbooks which are for little kiddies and replacing them with textbooks which we compile ourselves and completely change the system of presentation requiring the much more sophisticated young offenders to do projects, to present materials themselves, and then to encourage them to attend public examinations. We have found that our efforts in the last three years paid off very handsomely in that those who have sat and have competed in the public examinations have a much higher non-reconviction rate than the ordinary young offenders. We have also gone into various types of research. For example, those charged with the offence of robbery. In fact there are at least four or five broad categories of people who are charged with robbery ranging from the big-time robbers all the way to those little kiddies who hang around the street corners and mug fellow little kiddies of something like $3 or $4. And, of course, the treatment needed by these different kinds of people are all quite different.

We have also gone into the physiological aspects. For example, we have found in our initial research that the content of iron in the offender's hair is different. The violent offenders have a significantly higher content of iron in their hair, compared with a massed group of non-violent offenders and this is a follow up of Walter Walsh's study in America in which he also found a higher content of trace metal, not necessarily iron in the American population, in the hair of the offenders compared with the normal population. We have gone into some of these researches in our attempt to look for better solutions and better ways to deal with offenders.

And of course we have our own problems, too. Over-crowding, is a quite universal problem in corrections. In the correction administrators' conference between the Commonwealth states which was held in the UK in October last year, we discovered that most of us had an overcrowding problem. And, of course, we also have a problem with chronic recidivism which is also pretty universal all around the world. We have also found that the effect of treatment on drug addicts is perhaps less long-lasting than we believed it would be. And we have also found that since we have exhausted the Government market in our industrial products, our entry into the private sector market is fraught with problems, not the least of which is the very much heavier responsibility that I have to shoulder as a businessman, not so much as a government official, competing with outside business for business.

Very shortly, ladies and gentlemen, I believe that it is worth my while to come here and I thank you very much for your attention.

Mr Justice William Esson
Thank you, Mr Chan. I am sure we all agree it was worthwhile.

The next speaker will be Mr Paul East, who is a practising lawyer in New Zealand and a Member of Parliament. He is the Justice spokesman for the opposition party. He has not been asked to prepare a paper, but he will comment on the two papers which you have heard spoken to. Mr East.

Mr Paul East (New Zealand)
Mr Chairman, ladies and gentlemen. First, may I thank the Conference organisers for allowing me to participate in this discussion with such a distinguished group of panellists, and may I also say it is a particular pleasure to see Karpal Singh back in New Zealand. He takes a very personal interest in penal reform because, unlike opposition Members of Parliament in New Zealand, at least yet, he is from time to time required to campaign from a prison cell.

We are fortunate to have two excellent and quite distinctly different papers to comment on today: the first dealing with the

subject of sentencing policy, and the second with the equally important topic of the role of the prison system.

Dealing first with sentencing. We must face the fact that this topic has only become a subject of discussion in New Zealand because of growing dissatisfaction with the penalties imposed by the Courts. That is not because sentences are more lenient these days; on the contrary, serious offenders, particularly where violence is involved, are receiving heavier sentences than a few years ago. Rather, it is a reflection of the growing amount of crime in our society, and the resulting public fear and apprehension.

Most criticism suggests that the punishment does not fit the crime, or that there is wide disparity in sentencing between different Courts. A good deal of this criticism overlooks the role of the appeal system. In New Zealand, both the prosecution and defence may appeal against sentence, and they frequently do so. In fact, the active role of the Court of Appeal in this area is such that it has been the subject of some criticism.

Sheriff Nicholson in his paper states, and I quote:

> Given the apparent willingness of the New Zealand Court of Appeal to express views on general sentencing principles and to enunciate numerical guideline sentences, it may be that in time a coherent, consistent and structured system of sentencing will develop.

Well, I'm not sure that that is a view shared by all our Judges. But in any event, I think there already is a fair measure of coherency and consistency in New Zealand sentencing, and I am not at all sure that we want our system to be too structured . . . .

This paper [of Sheriff Nicholson] clearly sets out the options available for the reform of our sentencing system. Alternatives include sentencing guidelines, guiding principles as we have in New Zealand Statute Law, or a Sentencing Commission. Often the reform is a reaction to what is already in place. Some States in the United States actually specify the minimum sentence to be imposed for an offence. This is a reaction to a period of open-ended sentencing which resulted in wide variations in sentencing patterns. Until recent years, many of these States allowed the Parole Board to actually determine the sentence that was served. The Court would impose a virtually indeterminate sentence, and the Parole Board would decide if the offender was likely to be rehabilitated. This system led to extreme variation in the length of sentences served for similar offending. This is not a problem we face in New Zealand, and therefore we do not have the same need to abandon the judicial discretion we enjoy and to start sentencing by computer.

However, there is, in many jurisdictions, a need to question the role of parole. Whenever the Parole Board has the ability to release offenders, there will be disparity, and the effect of the offence takes second place to the character of the offender, and the likelihood of re-offending. Some offenders, guilty of similar offences, will serve much longer terms in prison than others. For this reason, it is time we reviewed the sentence of life imprisonment in New Zealand. A prisoner sentenced to life imprisonment in New Zealand is eligible for parole after 10 years. By that time, the facts of the offence have faded, and the character of the offender carries greater weight with the Parole Board. Murder is an offence that can vary markedly in degrees of culpability. It is time that we considered amending our own law in this area to allow for greater judicial involvement. The Courts should be empowered to set a specific term of imprisonment before parole can be considered so that the sentence served will reflect the gravity of the offence.

Sheriff Nicholson highlights the conflict between the necessity for consistency and the desirability of flexibility. No two cases are the same, and no two offenders are the same. Our prisons, for a variety of reasons, fail to rehabilitate. In some cases, they are likely to further entrench criminal behaviour. All practising lawyers will know that sometimes it is worth taking a risk in keeping a young person out of prison, giving them a real opportunity to make a real start. A grid system of sentencing denies the Court that opportunity.

Sentencing is a matter of public policy. It is right that the people, through their elected representatives, should play a major role. The important question is, where does that role end and the role of the Court begin? Wherever the line is drawn, we must allow our Courts the freedom to deal with each offender individually, to do what is best for the offender and society in each particular case. I remain unconvinced that disparity in sentencing in New Zealand is such a problem that radical reform is required. Ours is a small country. Judges are well acquainted with the sentences their colleagues are imposing, and regular judicial conferences on sentencing are convened. Our news media has a preoccupation with crime, and considerable publicity is given to Court proceedings. Any variation in sentencing brings immediate reaction. We have a system of legal aid, and an Appeal Court structure which also leads to uniformity.

Mr Chan, in his paper, has provided a clear and interesting description of the Hong Kong prison system. I noted that inmates must work an 8 hour day, 6 days a week, and young offenders must pass periodic tests at educational and vocational classes. This is very different to the New Zealand prison system, where it is a frequent criticism that we demand nothing from our prisoners other than their physical presence in the institution. Sadly, with our economic and unemployment problems, we face difficulty in providing worthwhile work for prison inmates, but I am sure much more could be done.

Recently I publicly suggested making certain changes to the prison system. One new development worth considering is a system where each inmate is assessed by a team of custodial officers and professionals within a short time of his arrival in prison. The inmate is forced to come to terms with his shortcomings, and consider possible solutions. He then enters an agreement in which he records the need to improve some area of his lifestyle. It might be learning to read or write, kicking a drug habit, obtaining School Certificate, or acquiring a trade skill. Each inmate is then monitored regularly to ensure progress is being made upon the goals agreed upon.

Inmates who honour these agreements receive extra privileges, such as access to television, or extra time for sport and recreation. They are rewarded for their efforts to make themselves better citizens. Their efforts are also taken into account in determining remission of sentence. Inmates are also much better equipped to cope with the challenges the outside world will place upon them when they are released.

After reading the paper prepared by Mr Chan, I am left with impression that Hong Kong provides far more by way of after-care supervision than many other countries. I know in New Zealand that little is done to support a recently released inmate. The Prisoners Aid and Rehabilitation Society are to be commended for their efforts. It is now time to place this, or some alternative body, on a more professional basis and provide them with the resources necessary to provide care, and assistance and counselling for recently released inmates. It is little wonder that so many inmates reoffend within such a short time of leaving prison when they are pushed through the prison doors with a few dollars in their pocket, and no job, no home, and no friends.

My curiosity was aroused by mention in Mr Chan's paper of research that is underway in Hong Kong to see if there is a link between trace metal contents in the hair and a propensity towards violence. In New Zealand, I suspect that criminal offending is far more often the result of parental neglect. We must strive to return to the days when parents truly took responsibility for the upbringing of their children.

Too many young children go off the rails while theoretically under the care of their parents. In the majority of cases, when a young person stands in the criminal dock, there has been a major breakdown in that person's family life. Often parents do not want to cope, or are unable to cope. New policies are needed to ensure that parents take responsibility for the actions of their children. Why should benefits continue to be paid when children are sleeping out at night as street kids, or fail to go to school for weeks on end?

Programmes are also necessary to provide the skills needed to bring up children in today's society. We must break the vicious cycle of neglected and abused children growing up and having children which they, in turn, neglect and abuse. Such policies, combined with an education system that provides young people with the skills they need in a modern society, and an employment policy that does not leave tens of thousands of young people to wander the streets with nothing to do, will do more to reduce crime in our society than a new sentencing policy or prison reform.

If I may express one disappointment, I am sorry there has not been time to discuss alternative sentences other than imprisonment. Periodic detention and community service have played an important role in New Zealand. There are other alternatives that deserve serious consideration. Suspended sentences, and the penalty of electronic detention, are certainly worthy of further study.

Putting that to one side, I would like to offer my congratulations to Sheriff Nicholson and Mr Chan for their thoughtful and stimulating papers. Thank you.

Mr Justice William Esson

Thank you, Mr East. Our next speaker will be Mr Karpal Singh of Malaysia. He is a practising lawyer there, having practised for over twenty years, and I am told is better known in New Zealand than most New Zealand lawyers for his part in defending two New Zealanders who faced the death penalty in Malaysia. He is also a Member of Parliament in his country. His paper arrived too late to be included in the printed papers, but was distributed at the door today, and he will now speak to that paper which deals with the Malaysian experience in respect of capital and corporal punishment. Mr Karpal Singh.

Mr Karpal Singh (Malaysia)

Thank you Mr Chairman, ladies and gentlemen. I am very happy to be here this afternoon. I thought the Prime Minister might not let me out of the country, but I understand he is quite happy that I am out of the country and not in the country.

The subject of sentencing. The current issues which confront us, in Malaysia are quite different, quite different from the issues which might confront you in your own countries. Ladies and gentlemen, the aims of sentencing and sentencers has always been the retributive, the deterrent and the rehabilitative aim. The *locus classicus* on sentencing, of course, are the judicial pronouncements of Justice Hilbery with which I am sure all of you are familiar. That it is the public interest which must be taken into account when sentencing and also the interest of the individual who is to be sentenced. There is, by law a fixed maximum, and from the minimum which can be also binding right up to the maximum, there is a range of punishments in the form of fines or a custodial sentence. And the Judge is given the discretion to impose, having regard to the mitigating factors in each case, the appropriate sentence.

We in Malaysia in certain spheres in sentencing, the Judges in particular, do not have that discretion. The mandatory death penalty — we have had the mandatory death penalty in our country from the time that the British were there. The mandatory death penalty is for murder, for treason and a number of other offences under the penal code. In 1983, for drug trafficking, the mandatory death sentence was brought into force in fact, on 14 April 1983.

Until 1980, no one had been sentenced to death for drug trafficking since 1975. Apart from death, there had been the option of life imprisonment with whipping. But from 1983, 14th April to be precise, the discretion which Judges had in drug trafficking cases to impose the alternative was taken away. From then, and up till now Judges have no discretion in the matter, no alternative, no option but to impose upon conviction the mandatory death penalty.

Ladies and gentlemen, that is one defect, and a very serious and substantial defect, in our system. In the last analysis, judicial power must include the discretion in a Judge to impose in any particular case a sentence which befits the crime — a mandatory death sentence takes away from the Judge that discretion, and that is something about which I hope other Commonwealth governments will

make our Government change its mind.

In 1988, March 1988 (at that time, of course, I happened to be under detention under the Internal Security Act – not that it would have made any difference in view of the brute majority which the ruling party has in Parliament in Malaysia) [there was] judicial power. This had always been there from the time the constitution makers, the framers of the constitution, gave it to Malaysia on its independence. Then we worked on the doctrine of separation of powers, up to 1988 with what is known as judicial power. In the constitution in the form of Article 121 in 1988 in March as I said earlier, that power was taken away. There is no more judicial power as it was understood before. That article was amended to include a provision that the judicial power of the country would be such as was determined by Federal law. Which means, and must mean, the residual power which must always be there in a Judge when sentencing, that has been taken away, and in the form of mandatory sentences which are being dished out now, I do not know, I do not know where we will ultimately land.

Recently, ladies and gentlemen, Malaysia was made the butt of a very unfair joke. In fact an announcer at a concert said: "We could not go live in Malaysia, because the band got hung at the airport". These are jokes, of course, which you will be aware of if Malaysia goes on as it is doing now.

There is no doubt, that the drug trafficking menace is a very serious one, and one which must be stamped out, not only in Malaysia but in every other country. It is a menace worse than perhaps even AIDS, a menace which ought to be stamped out. But in our zeal to stamp out the menace which drug trafficking has brought about, we must not and should not forget elementary rules of natural justice and fair play.

Westerners have suffered, have in fact been put to death in Malaysia for drug trafficking. The first two westerners were Barlow and Chambers. That was followed by a Briton, Derek Gregory. Fortunately, in the case of the Cohens, the two New Zealanders, they escaped the hangman in Malaysia. And in that case, if I may, ladies and gentlemen, [I would] highlight one aspect of sentencing. In the case of Aaron Cohen, he was found by the trial Judge to be an addict and, as you know, in Malaysia if one is found with more than 15 grams of heroin, more than 200 grams of cannabis, under the law a presumption arises that one is trafficking. In a landmark decision in this case itself, in the case of the Cohens, the Supreme Court ruled that such a presumption can be rebutted if one can show that what he had was for his own use. In the case of the boy, he was found to be an addict and as a result of that, he was sentenced to life imprisonment because . . . the Judge in fact amended the charge to one of possession under Section 39A.

Section 39A provides for imprisonment between five years and life imprisonment within Malaysia which, in Malaysia is 20 years. But it provides for, and still provides for, a mandatory six strokes of the rotan. A rotan, is a fine cane which is dipped overnight in horse urine before it is used on one who is ordered by Court to be caned. Be that as it may, in the case of the boy, since the law said that it had to be six strokes and the law had been brought in at a time when we did not have the benefit of the Supreme Court ruling – a very significant one – because had this ruling been there, Parliament would not have legislated Section 39A. If one is found to be by the Court a drug addict, then how could he be whipped? It militates against all aims of punishment, all concepts of rationale behind the idea of punishment.

But there it is, ladies and gentlemen. The Court had no alternative but to say six strokes of the rotan. Now I took up that matter, in fact, with the Pardons Board. And my argument was this. Parliament could not have intended that drug addicts be whipped. We have got this ruling now. I know the rigour of the law must, at least in the form of sentence, remain, but executive clemency is there, the Pardons Board has very wide powers. It could exempt this boy from whipping. And this is a boy, a frail one, a drug addict, found so by the High Court and the Supreme Court, how could he be whipped?

But unfortunately this argument did not prevail upon the Pardons Board. There was no right of representation for the boy, either in person or through Counsel . . . I have made an application to the High Court in Penang. The application is asking for certain declarations that the proceedings before the Board were null and void for the reason that this boy had not been given a right to be represented. In our system, at the Pardons Board proceedings, the Public Prosecutor, who in fact demands any penalty through his deputy Public Prosecutor in any trial, sits as a member of the Board, like an executioner sitting in judgment. But then after that he puts up a written report which must be considered by the Pardons Board which advises the Government. And with his report there (which is never made available to an accused person), proceedings are held. That matter is still pending, ladies and gentlemen. I hope that the High Court will intervene this time.

I took up a similar application in the case of Barlow and Chambers under the same circumstances. Of course in their case it was the death penalty. . . . There were proceedings of the hearing of the petition. I had, in the course of my submissions, laid before the Court the reasons why one ought to be represented. The Attorney-General stands up then (and this was over a period of two or three days), in opposition and gave his reasons for saying that the Constitution provided for a matter of this nature in point of procedure; [there is] constitutional silence as to representation of an accused person. Although I must add very hastily that it must be implied in the Article that one should have the right to representation, but what is very surprising and shocking – it was at the time, and still is – the Attorney-General stands up, while continuing his submissions on a particular day, and he tells the Judge: My Lord, the death warrants have been signed. I stand up and say these proceedings have not terminated. The judicial process has terminated, but there is this executive clemency [before the Pardons Board], and now we have this petition in Court. How could you in the course of submission when the matter has not been concluded turn up and say that the warrants have been signed. And [the Attorney-General] would have been

party to signing of the warrants, he has to be.

The Judge adjourned the proceedings. In the meanwhile, both the Australians were hanged. Ladies and gentlemen, I have always thought that was the gravest form of a miscarriage of justice – hanging someone at a time when the legal process had not, in fact, concluded. I hope in this particular case, I would perhaps prevail to the authorities in New Zealand. Not that I would want the New Zealand Government to interfere in domestic affairs. Although of course our Prime Minister and the Government would probably say that. But there are methods whereby approaches, not approaches in the form of intimidating the government to do anything about it, but the Law Society [for instance] should take up this matter with the Attorney-General to ensure that this boy is not in a position to be whipped. And the whipping being of a very serious kind. It has been said to be the pain one would get if one is branded with a red hot iron. That is the extent of the pain, a pain which will cause other damage, psychological and otherwise. Then I hope there will be a certain amount of – not pressure – I won't put it that way, certain amount of approaches by the right avenues made to avert what would otherwise be certainly a miscarriage of justice, because Parliament never intended there could be a situation where one who is found to be an addict should be whipped.

Apart from that, we have in Malaysia what is known as imprisonment for the duration of one's natural life. Natural life entails one staying behind bars until he dies. This is one form of punishment, a punishment which is cruel and unjust punishment – it must be. I had occasion in Parliament to stand up and say how can we have in our statute books such a punishment? What I said was brushed aside a number of times, but recently the Government has had a change of heart. It is reviewing that policy, and I understand there are about 20 people, most of them between the ages of 20 and 30 lingering on there in prison in Malaysia under such a sentence.

Life imprisonment otherwise in Malaysia is 20 years. Twenty years means, with remission, 13 years; and 13 years itself is a long time. In the case of the Cohens, they have another 8 years to go. I agree what was done was against the law in Malaysia.

Those who go to Malaysia must be prepared to suffer the consequences, but on the other hand, justice must come into play, there must be sentences which can stand the test of scrutiny, sentences which are reasonable, sentences which do not militate against common sense and rules of natural justice.

That happened in 1977 when I had occasion to defend a 14-year-old boy. We have what is known as the Essential Security Cases Regulations, and under the Regulations, a person, irrespective of age, irrespective of the Human Rights Act, which fixes anybody under 18 as one who is a juvenile – irrespective of that Act, a person could be charged under the Internal Security Act for possession of a firearm. This boy was charged with possession of a Browning, and 20 rounds of ammunition. He was sentenced to death. . . . In cases tried under the Essential Securities Regulations, a draconian piece of legislation because under that legislation you can have hooded witnesses, evidence can be given in the absence of an accused or his Counsel, and I think that is going more than too far. That boy had to be found guilty. In fact, at the time when he commited the offence, he was just 13 years and 11 months. Found guilty, sentenced to death, and I remember when I went up to him, he caught hold of me and he said, Sir, are they going to kill me, are they going to hang me? And I told the boy, Take heart. We will do all that is necessary to ensure that you will not die. And the matter went up to the Federal Court then. The Federal Court had no alternative. The law had to be applied. That is what Parliament ordained. Judges being required by the oath to apply the law, had no alternative but to do so. This appeal was dismissed.

With the timely intervention of the King, the boy was spared. He was sent to a Boys' Home until he reached the age of 21, then he was released. He could have been 81, had there been other considerations, but be that as it may, we have such statutes in our law, we have that position. Capital punishment has never been a deterrent. Statistics have shown that all over the world. In fact, this was highlighted, brought into very sharp focus when I stood up in Parliament one year ago and asked this question: With the bringing into force of the mandatory death penalty on 14 April 1983, I asked the Minister, has there been a decrease (I didn't say a decrease or increase, I said decrease because I thought that would be the answer) – has there been a decrease in drug trafficking cases? Ladies and gentlemen, to my surprise and shock the answer was no, there has been an increase, quite clearly showing that the death penalty is not a deterrent. It will never be.

It is in the end social considerations which must be given emphasis. What we should do is ensure that one does not get into crime, to ensure that one does not become a victim of drugs. Good parentage at home – we do not have these problems in the past in, for example, drugs. Before 1960 addiction was practically unknown. In fact in British times in Malaya, opium was legalised. One could have a licence and smoke opium, not as much as they pleased . . .

Mr Justice William Esson
Mr Singh, I think at this point I must exercise the power of the chair and ask you to conclude, so there will be a few minutes for others.

Mr Karpal Singh
I am sorry, Mr Chairman. I have gone beyond Mr Chairman's patience, and I apologise for that and I thank you ladies and gentlemen for having been patient enough to hear me.

Mr Justice William Esson
In the time we have remaining, may I invite anyone who has a question or a comment to make to come to the microphone and do so. Please give your name and the name of the country from which you come. Please, in all cases, try to confine your question or your comment to two minutes because we really have very little time.

Anonymous (? Mr Sanghi) (India)
I stand up only to point out

something very significant in the Indian sentencing situation. We, under the Constitution, have a special right to protection to life – right to life, as it is called, is a fundamental right. On the basis of that, a question was argued in the Supreme Court as to the validity of the death sentence being awarded for any crime whatsoever. The debate was based on human rights, right to life, and the possibility of error. And the fact that while sentencing, you should not forget the fact that they have no power to give life and if you have not power to give life, you have no power to take life. And I am happy to say that in the Indian Supreme Court, while they did not agree with the extreme argument, they took the view that that sentence ought to be confined to the rarest of the rare cases, and it should not normally be given unless the offence is too heinous and for which retribution would necessarily require that punishment.

In India, apart from this, there has been an old tradition, right from the days of Manu, that sentence ought to be reasonably proportionate to the gravity of offence, because if that is not so, the kingdom must ultimately fall – that is the dictate of Manu.

Another method adopted in India by Courts, and [there is] a large extent of discretion in Courts there, is to temper justice with mercy, by for example, providing that a person who agreed, and it was done particularly during the term of one particular Judge in India, Justice Krishnaya, that he would award a lesser sentence if one agreed to undergo transcendental meditation which, it was scientifically proved, had very beneficial effects in improving a person's personality.

In matters involving lawyers, the Supreme Court in some cases said that if you agree to give legal aid to serve as a lawyer purely for legal aid purposes, we will give you some kind of a concession.

So these are some of the matters adopted to temper justice with mercy, and to see that rehabilitation or reformation takes place through sentencing.

Benjamin Nichols (Birmingham, England)
I have a question for the panel which perhaps highlights the difference in perspective between sentencing considerations in Britain and those in India that we have heard about.

The British Criminal Justice Act 1988 reinforces the statutory restrictions [against] the imposition of custodial sentences on persons under 21. It also contains the provision which enables the Attorney-General to refer to the Court of Appeal any sentence which he considers to be unduly lenient, and also empowers the Court of Appeal, certainly in England and Wales – I'm not sure about the position in Scotland, Sheriff – to increase sentence to the extent of converting a non-custodial sentence into a custodial one. I ask the panel is this a reform, or is it a retrograde and repressive step?

Sheriff Nicholson
Can I deal first of all with the factual issue which Mr Nichols raised. And that is, of course, that although he, no doubt inadvertently, described the 1988 Criminal Justice Act as a British Criminal Justice Act, it is, of course, an Act which applies only in England and Wales and the provisions about referring allegedly lenient sentences to the Court of Appeal do not apply in Scotland.

I can only express a personal view on this. I personally regret the fact that these provisions do not apply in Scotland, because I take the view, and it will be interesting to see if English experience bears this out, that one is liable to get a rather one-sided view of sentencing in an Appeal Court if the only cases they are dealing with are cases where the sentence is allegedly too high. And believing, as I do, that a greater degree of consistency in sentencing than exists at present is desirable, I take the view that if one has cases brought from the bottom, as it were, as well as from the top, then this may, in fact, produce this desirable result.

Mr Justice William Esson
Perhaps I could add, just to give the perspective from Canada, which, like New Zealand, has Crown Appeals which, of course, accomplishes the same end in a somewhat more formal way, perhaps, that the essential notion is that this makes for further consistency and fairness. Now whether it does or not is perhaps open to debate, but that is certainly the accepted wisdom on the subject. Whether it is retrograde overall, I think, we will have to leave for another day. Perhaps then I could pass on and invite anyone else . . .

Mr Hussan (Pakistan)
I was very much interested in the drug laws that Mr Singh talked about in Malaysia. In my country, drugs are one of the fundamental problems since the beginning of the Afghan war. In the year 1977, or 1978, there were hardly any drug addicts in Pakistan. Today there are more than two million. And we are told that the drug magnates in Pakistan earn more money per year than the legal exports of the country. That is, while we earn about five billion dollars a year by exporting the products of Pakistan, the drug magnates earn more than six billion dollars in their drug trade. We have tried many methods. Of course, we have not provided for the death sentence. It is too horrid for ours susceptibilities to provide for the death sentence. What we are considering is the penalty of imposition of expropriation of the family property. What would be the view of the panel on this?

Mr Chan
We have always had a drug problem, so perhaps I should make some comment on that, because it is particularly because of drugs that we have Hong Kong.

We have recently introduced something which is relevant [to be] introduced in other countries, that is the appropriation of the proceeds which the drug trafficker cannot prove that he had derived from sources other than drug trafficking. Now no doubt lawyers may have different views on that, but this measure has already been introduced in the United States, in the United Kingdom, in Australia – I don't know about Canada – and this is still believed by people in a number of countries to be one of the most effective deterrents, apart from the actual sentence of the offender. I don't know whether that would help you, but certainly in Hong Kong we have had our first

case, and it has been a successful case, and at the moment a lot of people seem to be very happy with that.

Mr Justice Singh (Supreme Court, India)
I have been listening to the speeches made by the learned speakers and to the summation for enacting laws laying down guidelines for sentencing. Judge Nicholson has dealt with the matter at great length. I agree to a great extent, but I would suggest that if the Parliament or the legislature were to lay down laws and bind the discretion of the Judges, there might be injustice. As rightly pointed out by the other speaker, the Judges should be free to boldly relieve, having regard to the facts and circumstances of each case, especially the social, economic and the family circumstances.

We in India have a written constitution under which the High Court and Supreme Court have got power to strike down any laws made by the legislature if it is contrary to the fundamental rights, as my friend, Mr Sanghi, pointed out. The Supreme Court has taken the view that the death penalty should not be compulsory and it should be given only in the most heinous and gravest case in the rarest of rare cases and that, too, for recorded reasons. Not only that. Section 303 of the Indian Penal Code, which provided mandatory capital punishment, if murder is commited by a prisoner undergoing sentence for having committed murder earlier, the Supreme Court has struck down the section saying it is unconstitutional as it is contrary to Article 21 and Article 14. Article 21 guarantees right to life and Article 14 guarantees equality before the law.

So in our country, the Courts have power to strike down laws which are unreasonable and contrary to fundamental rights, but even in other cases where the Courts have not been able to strike down these provisions contained in the law, the Courts have molded the relief having regard to the facts of circumstances. The guidance may be there, laid down by Parliament, but it should not bind the Judges, the magistrates and the Courts in exercising their discretion. □

Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

Access to Justice

Mr Justice Smellie
Welcome everybody to this session, Access to Justice; the sub-title being the delivery of legal services to the poor and underprivileged, and the obligations of the legal profession.

We have four very well qualified speakers to hear from . They will each speak for 10-12 minutes, and then there will be discussion contributions from the floor.

Without further ado, I will call upon the first speaker. She is Mrs Justice Manohar of the Bombay High Court. The Judge has a Bachelor of Arts degree from Bombay University, and a Master of Arts degree from Oxford. She was called to the Bar in England, but then she practised in Bombay in the High Court prior to elevation, and she was the National President of the Indian Federation of Women Lawyers, a member of the Disciplinary Committee of the Maharashta Bar Council and the Standing Committee of the Bombay Bar Association. She also chaired the Legal Committee of the National Council of Women in India.

Mrs Justice Manohar
Mr Justice Smellie, Lord Chancellor, distinguished speakers on the dais, ladies and gentlemen. I consider it a great privilege to be invited to address you at this 9th Commonwealth Law Conference. We have been very touched by the warmth and friendliness of the people of New Zealand and I would like to express my thanks to the legal fraternity of New Zealand and the organisers of this Conference for giving me this privilege of being with you today.

Providing to ordinary men and women access to justice is a matter of great concern to all of us, Judges and lawyers alike. Because the ultimate test of the purpose of any legal system is whether it serves the needs of the community. Of course, justice has many facets. Apart from legal justice, you can talk about social justice, economic justice, political justice and so on. Well, I do not wish to travel to these other realms and I would like to concentrate on providing access to justice within the existing system that we have. Therefore I would like to make clear at the outset some of the basic assumptions that I am making.

First of all, the system must have a reasonably good constitutional and legal framework, because bad laws make for injustice. Secondly, there has to be an administration which is willing to view judicial decisions with respect. There should also be an independent and impartial judiciary which administers laws to all alike, and, most important of all, there should be speedy adjudication because heavy case lists and resulting delays in deciding cases do block access to justice. Undoubtedly, this is a problem of greater concern in some countries like mine than in others, but still the problem of delays has affected a large number of Courts in a large number of countries.

Within this framework, I would like to discuss how we can provide access to justice for the underprivileged. Now I would like to categorise the underprivileged under three heads.

First of all there are, of course, the poor and economically disadvantaged groups who cannot afford to resort to a Court of law. But apart from these, there are also socially disadvantaged groups, or victims of social prejudice over a period of time, such as the backward groups in my country; minorities, whether they are ethnic, religious or linguistic; there are tribal and other isolated groups; and I would like to put the women also in this category.

The third category is of those people who are otherwise handicapped, such as inmates of special institutions, [those] under trials in gaol, prisoners, destitute children, bonded labour and the like who require outside help to have access to the system.

Now obviously the problems of each of these groups are different and the reasons why they find it difficult to resort to a Court of law are also different. But there are certain common factors, and these are, in my view, especially in my country, first of all, a lack of knowledge of their rights. For example, we have improved the status of women over the last forty years very substantially, yet we understand that there are a number of women who do not know what their rights are and therefore cannot enforce them.

Secondly, our cultural ethos also often prevents resort to litigation. For example, there may be pressure on a group not to go to a Court of law. Sometimes a group which has been discriminated against for a long period of time develops a cynical attitude and feels that it will not get justice at the hands of the dominant group. So these people have to be persuaded to resort to the system.

Then there is also ignorance about how to approach the system, and sometimes it is difficult for them to approach the system. For example, as I told you, the handicapped category, it will not be possible for them on their own to approach the system. And of course, the major deterrent is the cost of litigation and lawyers' fees.

Now an obvious answer to most of these is multi-dimensional legal aid and services programmes. Unfortunately, these programmes are mostly supported by funding from the state, and therefore they have their inbuilt limitations. Apart from giving money and services to the poor, [that is] legal services free of cost, in my country we have also emphasised programmes of what we call legal literacy, giving people information about their rights. And of these, some of the more interesting programmes relate to para-legal education for different categories of non-legal people, such as social workers, labour welfare officers, police officials and the like. We have different courses designed for different groups.

Now sometimes legal aid work also requires that the agency works for getting better laws which provide for the welfare of these groups, and it also requires prodding the administration into implementing laws that are already there. Now a state funded legal aid programme would not like to embark on these ventures, and therefore this is an inbuilt limitation of legal aid programmes. Unlike the United States, where a lot of private funding is available for legal aid programmes, I think in most countries this is not available, and therefore this is a major handicap.

But the most effective remedy, which at least the Courts in my country have evolved, is the remedy of what we call, or what is generally known as, public interest litigation – PIL, if I may call it for short. Well, we have borrowed this concept from the United States, but it has taken root in Indian soil because I think there are several factors in my country which are conducive to its growth. There is of course, first of all, a group of people, deprived people, who need help. Then we have constitutional safeguards and laws which help these groups. Fortunately, we also have public spirited organisations and lawyers who are willing to take up their cause free of charge. And lastly, we have a receptive Court. So all these have added to promoting public interest litigation. And the major reason why Courts have encouraged, to some extent, this kind of litigation is because they find that in a number of cases, but for their intervention, handicapped people have no hope for redress of their grievances.

Now PIL falls into two categories: there can be litigation by a social organisation, or a group of people for the benefit of the general public, such as enforcement of pollution control, or implementation of town planning programmes; maybe an action to prevent setting up of a nuclear power plant, and things like that. Then we can also have class actions, or litigation on behalf of the very large number of people who have suffered a common harm, such as, for example the Bhopal Gas disaster victims, bonded labour, people or inmates of mental institutions and the like. Sometimes it is a representative action by the group itself, but this is rare. Usually, it is on their behalf by a public-spirited organisation.

Now because of the constitutional guarantees that we have of equality before the law, non-discrimination on the grounds of religion, race, caste, sex, or place of birth and protection of life and personal liberty, it is possible to entertain this kind of litigation. Personal liberty has been interpreted very widely to include leading a life of basic human dignity. So it leaves a wide scope open for this kind of litigation.

A major problem in such litigation is always the problem of local standards. And the Supreme Court of India has laid down two basic requirements. First, that the group which is making the application should not have any personal interest of its own in this litigation, and second, that people whose rights are sought to be enforced are not in the position to come to Court. So of course, this is a very broad basis, and many people have taken advantage of it. For example, in one case, a single woman journalist was allowed to sue on behalf of women in police lock-ups who had been ill-treated. Now the same lady later on filed a petition on behalf of children in a Children's Aid Society, an institute run by this society, and an interesting situation developed when she later on decided to withdraw from the petition. The Court said that the petition could not be withdrawn, although she could withdraw from it. So these are some of the interesting remedies we have.

Of course, public interest litigation has its limitations because we do not always have a suitable methodology for ascertaining the facts, and there will also be problems about implementation. To simplify procedures, we have also entertained letters and newspaper reports as petitions.

So these are some of the broad steps which we have developed, and I hope that the public interest litigation, which we have encouraged, will be of relevance to other Commonwealth countries who also face similar problems.

Mr Justice Smellie

Thank you, your Honour, for that very stimulating address. The robust and innovative approach to public interest litigation in a way which underprivileged groups can actually use is quite remarkable, I think.

Our next speaker is the Lord Chancellor. Some of you may not know that after completing his schooling in Edinburgh, he went first to Edinburgh University and studied mathematics and natural philosophy, and then lectured in mathematics at St Andrews, and did post-graduate work in mathematics at Trinity College, Cambridge, where he was awarded a Senior Scholarship. But he then turned to the law, and in 1955, became a Bachelor of Laws from Edinburgh University and it was that year that he became a member of the Faculty of Advocates. He was, after that, a standing Junior Counsel to the Queen's and Lord Treasurer's Remembrancer, the Scottish Home and Health Department, and the Commissioners of Inland Revenue. He took silk in 1965, and he was Sheriff Principal of Renfrew and Argyle from 1972 until 1974, Vice-Dean of the faculty of Advocates from 1973, until in 1976, he became the Dean. And then in 1979, he was appointed Lord Advocate, became a life peer and a Privy Councillor, and in 1985, a Lord of Appeal in Ordinary and, of course, as you all know, Lord Chancellor from October of 1987. He really needs no introduction to you in that capacity.

I understand, however, my Lord, that that has not always been the case. If there's any truth in the story that circulated in Auckland about 18 months ago, you went unannounced to some Court to see how they were working, and at one of them, somewhere north of London, you were met by a very conscientious security man who wouldn't let you in. And despite your remonstrations, he persisted. In the end you said "I feel obliged to point out that I'm Lord Mackay of Clashfern", to which this little man replied: "I don't care what firm you come from. If you haven't got a pass, you can't come in". But there are no such restrictions here, and I would like you to address us.

Lord Mackay

Thank you very much, Mr Chairman. It's obvious that Auckland is more enlightened because, as you can see, I came without my pass but I managed to get in here.

Thank you for these very kind introductory remarks. Introducing speakers can be rather hazardous. I've read that when David Lloyd George was a young man, he went to address a meeting in Flintshire. The Chairman introducing him said: "I have to present to you the member for Caernarvon Boroughs. He has come here to reply to what the Bishop of St Asaph said the other night about Welsh disestablishment. In my opinion, ladies and gentlemen", said the Chairman, "the Bishop of St Asaph is one of the biggest liars in creation. But yes, we have in Mr Lloyd George a match for him tonight."

Well the topic of access to justice must be central to any law conference, and it certainly is a most important one. The papers that have been prepared for this session show very clearly just how very diverse a subject this can be, and how the various elements in it relate to one another. I intend to make only a very few introductory remarks, always bearing in mind the fate of a British Government Minister some years ago who was called to address a large audience. The Minister took the precaution of calling out at the beginning, "Can you hear me at the back?" A voice answered, "Yes, but I am very willing to change places with anyone who can't."

The purpose of my paper was to try to set out a framework in consideration of the issues raised by the general heading "Access to Justice" so far as they affect the legal profession itself. What constitutes justice is, of course, a highly contentious issue in many areas. In particular, as our colleague has just been saying, the notions of social justice and economic justice are not easily dealt with by means of legal reasoning, although they are at the very foundation of politics and political science throughout the world.

Even in the more limited sphere occupied by the lawyer, I do not think that any of us labour under the delusion that the legally correct decision in a case is necessarily the just decision in a moral sense. All of us, no doubt, must have reservations about the wisdom and justice of laws which, from time to time, have been passed by our respective Parliaments, or have regretted a Parliamentary failure to deal with some rule of Judge-made law which, in some cases, perhaps in unforeseen circumstances, have given rise to injustice.

Nevertheless, we practise a craft which is engaged in a search for justice using rational means. We are citizens of countries ruled by democratic means, where human rights and the rule of law are respected. The problems which minorities, whether indigenous or immigrant in origin have experienced, have all too often demonstrated the extent to which our communites have not lived up to these great ideals. It would be unbearably conceited of a lawyer to believe that the legal profession alone can bring a society up to the mark in respect of the rights of all its people. The lawyer is a citizen too, and has to bear in mind that the legal system may only be able to point out the existence of an injustice, or show that the injustice is of such a kind that a solution has to be found outside the purely legal system. There is a careful course to be steered, here. We need to avoid the pitfall of thinking that lawyers have solutions for everything. On the other hand, we need to avoid the attitude that legal action changes nothing, an attitude which can be made to sound genuinely concerned, but which can easily become cynical and unscrupulous.

What I have sought to do in my paper is to set out some matters which ought to be of concern to all lawyers. All lawyers ought to be concerned about the existence of formal or practical barriers to access

to the Courts. Lawyers need to acknowledge that the proliferation of subsidiary and interlocutory issues in cases, for example, while these may help to resolve a particular case in a rigorously rational way, can serve also to put very real obstacles in the way of people who are seeking justice in the Courts. Lawyers may also fear that if procedures can be simplified and the law put into plain English, there may be less need for their services. It is sometimes suggested, for example, I know without any foundation, that Parliamentary Counsel deliberately make the matter complicated in order to keep them in business. I am sure that that is an entirely unjustified criticism.

I believe that, on the contrary, simplified procedure, and plainness in law, will in fact give rise to an increasing use of, and utilisation of, the skilled services of the lawyer. Instead of the skills being devoted uselessly to procedural matters, the substance can be directly addressed.

My paper also looks at the proposition that here are three types of barriers to the provision of effective legal services where these are really needed. The first is the formal barrier which restricts the right of a client to choose what type of lawyer can represent him or her. A second is the economic barrier. Improvement in access to the Courts can help to bring down economic barriers as well, but there is no escaping the fact that financial risks which can arise from involvement in litigation can be considerable. There are some hard choices to be made. For example, how do we as a community decide as between the relative merits of legal aid and similar expenditure on the one hand, and health care, education, social security and the rest on the other?

Finally, it seems to me to be important that lawyers should collectively and individually examine how far our own failures are putting up barriers between our profession and the people who really need our help. We need to consider just how competitive the profession is, and how good it is at communicating both with the Court and with the profession's clients. We need also to recognise that a profession which is dedicated to the rational pursuit of justice has to maintain the highest standards itself in terms of how it recruits and advances its members. I believe that these topics include great challenges to the profession, but I believe that these challenges are challenges which the profession throughout the Commonwealth, in quite varying different circumstances in our varying countries, are meeting and will continue to meet. And I believe that a gathering of this kind is of extreme value in stimulating fresh ideas, and also of perhaps giving us encouragement, as in other parts of the world problems that we face have also been faced, and solutions for them have at least sometimes been found.

Mr Justice Smellie

Thank you, Lord Mackay. I think it would be true to say that Court practitioners all around the world, and particularly in the Commonwealth, are waiting to see just how you do get on in your attempts to streamline the profession in the United Kingdom. In the Commonwealth, perhaps, in the past we have followed the pattern established in Britain a little slavishly, but you may yet give us a new pattern that we can learn something from.

Our next speaker comes from across the Tasman. He is the Honourable J H Muirhead, QC, Administrator of the Northern Territory of Australia. He holds a position which is not dissimilar to that of State Governor, save that the Administrator is appointed by the Governor-General [of Australia] with the duty of administrating and administering the Government of the Northern Territory.

Following his discharge from the army, he completed his Law Degree at the University of Adelaide and was admitted to the Bar in 1949 and took silk in 1967. He was appointed a Judge of the Local and District Criminal Court of South Australia in 1970, and an Acting Judge of the Supreme Court of Papua New Guinea in 1971. In 1972, as Acting Director, he set up the Australian Institute of Criminology in Canberra. In 1974, he was appointed Judge of the Supreme Court of the Northern Territory, and in 1977, Judge of the Federal Court of Australia. In 1987, he was appointed Commissioner of the Joint State Federal Royal Commission into Aboriginal Deaths in Custody from which he resigned in 1989 after the release of the Interim Report. The Commission continues with its work, but I think all who are aware of the Report and the work of Mr Muirhead know what a great contribution he made, especially in that Interim Report. And it is my pleasure now to ask him to address you.

Honourable James Muirhead

Mr Chairman, fellow speakers, ladies and gentlemen. I maintain the pious hope, rather than the confidence, that some of you may have read some parts of my paper because I wish only to summarise some matters. I wish to take perhaps an objective view which I think possibly is a public view of the law in Australia today, and, as I say in my paper, the ironic thing is that it is, I fear, a fact that many Australians consider existence under the Rule of Law not particularly safe, and I'm not just talking about Aboriginal Australians. There is some lack of public confidence in the efforts of the law to keep the peace in our streets and in our homes. So it is natural that the public say, well the Courts are pussy footing with criminals. We need more punishment, less emphasis on rehabilitation, less worry about people with socially deprived backgrounds, and this, of course, is a pretty old call.

But statutory remission of prison sentences, the operation of parole systems which enable people to be released for rehabilitative purposes before the expiration of the term of the head sentence, meet some cynicism, not only in public levels, but at some political levels. It is said, and is said often in our papers today, that if the Court sets a sentence of imprisonment to be served, let it be served. Let there be truth in sentencing. And, of course, the public really have little concept of the rather agonising competing considerations a sentencing Judge must apply.

But I believe today that Mr and Mrs Average Australian support pretty robust measures to battle violence, and there is a simplistic belief that if you send people to prison for longer, you solve the problems. Unfortunately, it is not that easy.

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common Article 3 in each of the four conventions contains an absolute prohibition of torture. France ratified the Geneva Conventions on 18 June 1951 and these conventions represented France's duties at the time of the French-Algerian war.

France participated in the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms which it signed on 4 November 1950. Article 3 of that Convention says that no one "shall be subjected to torture or to inhuman or degrading treatment or punishment." France did not ratify the Convention until 3 May 1974, 20 years after the outbreak of the French-Algerian War. So it was not formally a party to the European Convention at the time of the war. However Article 18 of the Vienna Convention on the Law of Treaties says:

> A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty.

So, even though France was not a party to the European Convention, it had a clear legal duty to refrain from acts such as torture which clearly defeated the object and purpose of Article 3 of the Convention.

The clear answer to the proponents of torture during the French-Algerian War is that such practices were quite simply illegal. It is our duty as lawyers to make that point and it is to our shame that Ms Maran, who is not herself a lawyer should have to point this out to us.

It is important for a lawyer, even in the midst of a busy practice, to pause and reflect on her or his role as a lawyer in protecting individuals and in protecting human rights. Ms Maran's book does precisely that. Furthermore, in a country which has only recently had the benefit of exposure to France's *mission civilisatrice* this book provides us with a fascinating insight into the French mind. □

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simply that governments should not get over-ambitious about the amount of wholesale change they can realistically accomplish in a given time. To quote again from *Unbridled Power*, "New Zealand passes too many laws, and it passes them too quickly".[41] □

1 See 2nd ed, published 1987, p 159.
2 Ibid.
3 Standing orders of the House of Representatives provide for the automatic referral of government bills to select committee, except in respect of money bills and where the government takes urgency (as to the frequency of which, see below).
4 SO 50.
5 *NZPD*, Vol 503 (1989), pp 14264-79 (1R); *NZPD*, Vol 504 (1989), p 14754-64 (3R).
6 *NZPD*, Vol 498 (1989), pp 10498-10518 (2R), pp 10518-21 (committee of the whole House), pp 10521-26 (3R).
7 *NZPD*, Vol 496 (1989), pp 9380-90 (1R), pp 9458-90 (2R), pp 9499-9516 (3R).
8 *NZPD*, Vol 496 (1989), pp 9610-26 (1R), pp 9643-84 (2R), pp 9687-88 (committee of the whole House), pp 9688-90 (3R).
9 For the period 21 February 1989 (when the House reconvened) until the end of July, it sat for 192 hours in normal session and 97 under urgency: see [1989] *NZPD*, No 59, p 12540. For the year ended 31 March 1989, the House sat for 480 hours in normal session and 159 under urgency (ie for one quarter of total sitting time): see *Report of the Clerk of the House of Representatives for the Period ended 31 March 1989, AJHR*, A8, p 5.
10 Quoted in *NZPD*, Vol 498 (1989), p 10691 during second reading debates on the bill.
11 Ibid, pp 10691-92. According to an Opposition member on the Finance and Expenditure committee which reported on the bill, the Government Whips announced at 9:30 am on the day the bill was reported back that the legislation would proceed through all stages that day, notwithstanding there were no printed copies for members incorporating the 53 pages of typed amendments made by the select committee. In the event there was a second reading under urgency that day while deferring the further stages.
12 [1989] *NZPD*, No 68, 14082.
13 See *NZPD*, Vol 498 (1989), pp 10756-57.
14 See D G McGee, *Parliamentary Practice in New Zealand* (1985), p 260.
15 For the introduction of the Law Reform (Miscellaneous Provisions) Bill 1989, see *NZPD*, Vol 495 (1988), pp 8931-8943 (1R).
16 For Government acknowledgement, see *NZPD*, Vol 495 (1988), p 8884.
17 See the Education Bill 1989. For the Bill's introduction, see *NZPD*, Vol 499 (1989), pp 11538-45, 11660-71.
18 See *NZPD*, Vol 502 (1989), pp 13234-52 (1R); *NZPD*, Vol 504 (1989), pp 14433-57 (2R), 14659-63 (committee of the whole House), pp 14664-76 (3R).
19 See *NZPD*, Vol 501 (1989), pp 12826-39 (1R); *NZPD*, Vol 503 (1989), pp 14140-65 (2R), pp 14282-93 (committee of the whole House), pp 14293-14313 (3R).
20 See *NZPD*, Vol 498 (1989), p 10693.
21 See *NZPD*, Vol 485 (1987), pp 1619-27 (1R); *NZPD*, Vol 493 (1988), pp 7461-65 (2R).
22 See *NZPD*, Vol 497 (1989), pp 10366-86 (1R); *NZPD*, Vol 501 (1989), pp 12503-12505 (select committee report), pp 12622-52 (2R).
23 See *NZPD*, Vol 495 (1988), pp 6892-94 (1R); *NZPD*, Vol 501 (1989), pp 12665-77 (interim select committee report); *NZPD*, Vol 504 (1989), pp 14406-16 (final select committee report), pp 14522-44 (2R).
24 See, eg, *NZPD*, Vol 496 (1989), p 9382 (School Trustees Bill 1988).
25 *Parliamentary Bulletin* (1989), Part 5, pp 8 and 25.
26 *Parliamentary Bulletin* (1990), Part 6, pp 7 and 10.
27 *Parliamentary Bulletin* (1990), Part 9, pp 7 and 9.
28 *NZPD*, Vol 503 (1989), pp 14278-79 (referred for submissions from selected organisations only).
29 *NZPD*, Vol 496 (1989), p 9380.
30 Ibid, p 9385.
31 Ibid, p 9383.
32 See respectively *NZPD*, Vol 496 (1989), p 9380; *NZPD*, Vol 503 (1989), p 14279; [1990] *NZPD*, No 5, p 881.
33 See [1990] *NZPD*, No 5, pp 881-882 (1R) and 897-900 (2R).
34 [1990] *NZPD*, No 3, pp 445-455 (particularly pp 452-453).
35 See *NZPD*, Vol 501 (1989), pp 12592-99.
36 See Standing Order 220.
37 G Palmer, *Unbridled Power* (2nd ed, 1987), p 159.
38 *Auckland Harbour Board v Auckland City Council*, unreported, CA, 28 April 1989.
39 See the Telecommunications Amendment Act 1988.
40 Lord Radcliffe (1950) 10 *CLJ*, 361, at 366.
41 Op cit, p 139.

continued from p 317

15 In England "Approved Inspectors" (in practice the NHBC) must carry insurance which provides owners with 10 year no fault cover in respect of any non-complying conditions which threaten health or safety, and covers inspectors against liability for negligence for 15 years up to a limit of twice the cost of the work approved.
16 In Britain two companies have recently introduced latent defects policies in respect of houses to compete with the NHBC warranty scheme. Municipal Mutual Insurance guarantees new houses against structural defects for 15 years, the premium rate varying according to the experience of the builder. The Lloyds broker Gibbs Hartley Cooper offers 10 year cover of structural defects in building up to a value of £500,000.

public fears in the sentencing process, but also to be strong and to exercise the discretions correctly without being swayed too much by the public perceptions of what you should do or should not do.

We have some problems in our jury jurisdictions of course, imposed by press saturation of events which preceded trials. I, myself, was the trial Judge in the trial of Mr and Mrs Chamberlain and I know what it is like to try and buy a toothbrush over a six or seven week period to be followed by television cameras all the way. It is pretty unpleasant, and it makes the control of Court proceedings even more difficult.

The balance of my paper ladies and gentlemen, is devoted to the predicament of our Aboriginal people in Australia. They are only 1.5% approximately of Australia's population, but their predicament is one that deserves and, I hope, obtains national concern. I make some reference to the Royal Commission which I set up some two or three years ago, and I have only just quoted extracts from the Interim Report and our recommendations, because, I ask you to bear in mind, they are all based on material gathered, and they themselves show how much there is to be done, and how worrying the situation has been. I believe the Interim Report has had a response, a reasonably good response from Government, but the problems with any Royal Commission is to ensure the recommendations are carried through and just not forgotten when it is politically viable to forget them.

I do not think there is very much I wish to say. I would just like to add one thing. In Australia, we have an Aboriginal Legal Aid service quite separate from the other government funded legal services. There have, over the recent years, been some talks about abolishing it. Why do we need one service for Aboriginal people, and one for the other citizens? Well there are a hundred reasons which I won't go into, but we must bear in mind that our Aboriginal community in Australia is, to use the words of Bill Clifford, who was, for many years, the Director of the Institute of Criminology, "the most imprisoned race on earth". We've got to do something about this. It's no good just continuing to hope the problem will go away, and I believe Australia has learnt a lot. My belief is that the final report of the Royal Commission, hopefully not to be interred in dusty shelves as a source of research material, may be a power for good, and may be a power for government action. But it is not so much the legal inequality which I believe the Aboriginal people suffer, it is a social inequality and there is a huge gap of misunderstanding which many are trying to bridge, but it's not any easy gap to effectively seal.

Mr Justice Smellie
Judges sometimes think that they labour in a difficult area, and you exposed some of the scars that you carry as a result of that. But I think all of us know that in this other area of trying to bring a recognition of the needs and attitudes in respect of the Aboriginal people, is even a more difficult field, and thank you for introducing it to us, and giving us an insight into it.

Our final speaker is Moana Jackson. He is of the Ngati Kahungunu and the Ngati Porou tribes. He is director of the Maori Legal Service. That is an independent service established to provide legal service and information for Maori people.

He was educated at Hastings Boys High School, and then graduated Bachelor of Laws and gained a Diploma of Criminology from Victoria University. He then completed post-graduate work at Columbia and Arizona State Universities in America. In 1986, he was commissioned by the Justice Department to undertake research into the relationship between Maori people and the criminal justice system. That 2½ year project utilized a research base of some 6,000 Maori people, and resulted in the production of his report which has been widely read and acclaimed.

He is a man who has made a significant contribution, I think, to the change in cultural perceptions that the Attorney-General talked about yesterday, in New Zealand, and which I am sure all of you are interested in and which, I have no doubt, is going to be a matter that occupies lawyers and men and women of goodwill in New Zealand for quite some years. Moana Jackson.

Moana Jackson
Kia ora . . . (Maori address)

I was very grateful to receive the chance to speak at this session of the Conference, but my gratitude was tempered somewhat by nervousness, partly because I would be sharing the platform with such distinguished people, but also because I felt somewhat like Daniel entering the lion's den. What I would like to do is look at the question of access to justice in the context of a proverb of our people which goes: . . . (proverb stated in Maori). That is, a tree is blown by many winds, but whoever dares question the wind? And in relation to the question of access to justice, it seems to me that the baseline of the discussion is similarly unquestioned. That there is a given that justice, or access to justice, is synonymous with access to law, and that law is synonymous with process, and that that law is, of course, the common law, and that process embraces the procedures and theories of legal pluralism and adaptation within a Westminster Court framework. The debate is therefore predicated on the notion that with constant amendment, good faith, and absorption, the common law can provide mechanisms that will ensure access to justice for all. And as its mixed antecedents show, the common law seems to have been particularly successful in incorporating and reshaping different views and philosophies.

The canons of Roman law have fused with the writings of the Salamanca Divines, and many jurists nowadays attempt to fuse customary or indigenous practices of marriage and adoption into a new culturally aware common law. This propensity to absorb differing viewpoints, and then to apply them in countries with different cultures and different histories, has bred in the common law a confidence in its belief to adapt, and a faith, some would say an arrogant faith, in its inherent capacity to provide justice. At its best, that confidence has led to a firm, albeit often slow, recognition of the realities of social change. At its worst, it has led to a myopic mono-legalism that has dismissed the worth and validity of other systems of law, and has so denied justice to those who are not

raised within the common law heritage.

In New Zealand, that myopia has blinded many in the profession and in the community, to the ongoing debate within the Maori world about justice and law. That debate sees access to justice not as an issue of common law adaptation to Maori concerns, not, in other words as a matter of legal pluralism or Aboriginal title or bi-cultural sensitivity, but as an issue of legal parallelism; of Maori laying claim to rights within their own jurisprudence, and vis-a-vis the Crown, as members of tribal nations asserting their self determination.

The question of access to justice for Maori people thus starts from a different given. It is not an essentially procedural question of whether the common law can be made more accessible to Maori through, for example, the incorporation of Maori custom or even the sitting of common law courts on Maori forums, such as marae. Rather it is a more basic consitutional legal question of how Maori can regain access to the processes and theories imposed on native people.

The reality of that imposition is often masked by the stated need for majority rule, for equality under the law, for the notion that there must be one law for all, provided, of course, that that law is the common law. It is also masked in New Zealand by a legal reliance upon the English text of the Treaty of Waitangi, signed in 1840, which claims a cession of Maori sovereignty, and a granting to Maori of the same rights as British subjects. According to the received legal wisdom, those provisions indicate a Maori acceptance of Crown control and common law application. Indeed, such a view was refined just last year when the Government published a document called *The Principles of the Treaty of Waitangi* which stated that the Treaty actually selects the common law as the process to govern legal relations within New Zealand.

This mono-legal view shapes the New Zealand law's attitude towards questions of access to justice, and enshrines the common law as the method, the given of ensuring access and defining justice. However, it is a view which is inconsistent with the Maori text of the Treaty of Waitangi, the text signed by both the Crown and over 500 Maori leaders. In Article 2 of that text, the Maori tribal nations, or Iwi, are reaffirmed in the concept of *tino rangatiratanga*, and it is this concept which defines the Maori debate about justice and access to it. The notion of *rangatiratanga* embodies the sovereign power of tribal nations to exercise authority for their people. The thread which traditionally wove together the many strands of this essentially political power was called *te mana o nga tikanga*, the force of the law, in fact the rule of law. The precendence of this law, and the philosophies which underlay it which were called *te maramatanga o nga tikanga*, provided a mechanism for justice, a goal to be attained through a clear set of culturally defined processes. Those processes both shaped, and were shaped by, the authority of *rangatiratanga* itself.

The law was an expression of *rangatiratanga* through which political processes were seen to create legal relationships and obligations. Such relationships reflected the Maori axiom, that people live not under the law, but with it. The ancestral and divine sources of Maori law were ever present. The ties of *whakapapa* or genealogy, which identified individuals within their kin group, also provided the rules by which they lived. Access to justice was a reality that flowed from genealogy. Who you were established your links to the ancestors from whom the precedents for the law came, and made you a descendant within, a beneficiary of, and a contributor to, the law. The *rangatiratanga* of the *iwi* was thus a mechanism which established people's rights at law, and protected them in the exercise of those rights. It was both the provider, and the guarantor, of access to justice. It tied to the common ancestral and divine origin those who first gave the law, those who were subsequently entrusted with amending and adapting it to new and changing circumstances, and those whose lives existed within it.

This notion of what may be termed individual rights, or access to justice, is interwoven with the laws and authority of the tribal nation as a collective. The legal rights of the individual within the collective, their need for justice, and the constitutional or political rights of the group, its need for self determination, were inseparable. It is this concept of law, justice and self determination which Maori see as being reaffirmed in the Treaty of Waitangi, and to which they now reclaim a right of access.

In the context of the Treaty of Waitangi, *rangatiratanga* was thus a power based in law. It enabled leaders to claim political dominion over *iwi* resources, and legal authority to ensure justice for *iwi* members. Its exercise was a symbol and an assertion of the authority of the tribal nation itself, as well as an assurance that people would be treated according to accepted ideas of what was just. When it was exercised to settle disputes within the tribal nation, it was an exercise of sovereign and jural authority; when it was exercised in relation to other tribal nations, it was an assertion of *iwi mana*, or sovereignty. By its very nature, *rangatiratanga* is therefore both a legal and political power. In the latter sense, it is a statement of *iwi* independence. Indeed, in the 1835 Declaration of Independence signed by Maori leaders, the word *rangatiratanga* is used for independence.

The Treaty of Waitangi, of necessity, recognises the common source and interrelationship of these personal legal rights of the individual, and the political rights of the group. In this sense, the Treaty guarantees Maori law itself, since it is both the source of *rangatiratanga*, and the product of its exercise.

The rights which Maori derived from the law as individuals within their kin group, or as tribal nations, still exist. They are indigenous rights. Although the processes by which they were exercised have been suppressed by the imposition of the common law, the rights and ideals of justice remain. They are not dependent upon, nor subordinate to, the legal or political sovereignty or any other nation, neither do they gain validity merely through access to the process of justice of another legal system. Rather, they retain validity through being sourced in Maori law, a law reaffirmed by treaty.

That law, in turn, exists in a

symbiotic relationship with the ideal of Maori self-determination which does not lose its validity because of the present minority status of the Maori people within their own land, nor by notions of majority rule within a modern nation state. Rather, its efficacy also flows from its source in Maori law, and in its Treaty affirmation.

The origin of indigenous rights, of justice for Maori, therefore do not lie in the theories of the common law. They lie, instead, in the law and culture which shape them. Their expression today requires an acknowledgment of that law's validity, and recognition of the self-determination needed to give it force. An expression of such views in New Zealand is sadly often dismissed as being the claims of radical extremism, or merely unattainable dreams. But to dismiss them on the first ground is to blindly adhere to the Crown definition of what the Treaty means, and to misunderstand the constitutional and political debate which has taken place within the Maori world since 1840. To dismiss them on the second ground is to ignore the truth in the poet Yeat's words that "on dreams begin the surety of responsibility and reality".

The challenge which faces the profession, and indeed all of New Zealand, is how to call up that surety and how to honour the Treaty which guaranteed it. It is unfortunate that the mono-legal mindset of many in the profession and in the community has precluded reasoned debate on how Maori self-determination might be realised, and how Maori legal processes might function. Where debate has taken place, it has been within the context of legal pluralism, or what is quaintly called "cultural awareness". Thus there have been suggestions to give Maori committees the same powers as Justices of the Peace, or to allow more Maori control of criminal diversion schemes, or to recognise Maori rights with doctrines, such as that of Aboriginal title. There has even been some discussion of tribal Courts. However, in each case, the common law will remain the base, and the common law Courts will retain final jurisdiction. The given of access to justice therefore remains unchanged. It is the common law, albeit a new hybrid, a bi-cultural common law. Such an approach denies the Treaty and refuses to acknowledge the Maori perception of their own authority. The consequence of that is a growing frustration within the Maori community.

In its report on the Maori Language claim, the Waitangi Tribunal stated that when one section of the community burns with the sense of injustice, the rest of the community cannot pretend that there is no reason for that discontent. The profession and the community need to understand the discontent, for as our ancestors have done since 1840, the Maori continue to feel aggrieved, and to seek justice. In a wide political sense, that justice will only come from the recognition of Maori self-determination. In a narrower legal sense, it will only come from access to Maori judicial processes. The path for such justice wil be difficult in practical and political terms, the gateway of access to justice will require adaptation and discussion. But it is an achievable, and an inevitable goal. For as another proverb of our people says: . . . (proverb in Maori) . . . — the law never stands alone, but waits for people to feel its need, so that it may show the way.

(Closing address in Maori)

Mr Justice Smellie
Thank you for that address. Nobody listening to you could describe you as an extremist. It was careful and temperate, and we all hope that you continue to pursue those dreams and put out the burning sense of injustice among many Maori people.

And now we have arrived at the state where the topic is open for discussion.

Mr Shetty (India)
Just now we have had the adavantage of hearing distinguished addresses from the speakers and have also had the advantage of going through their articles. A gathering like this should address itself as to how justice could be made available to the rural masses, and how it could be made more purposeful and meaningful. In this direction, I would view the four or five sections of the society to make justice accessible to the masses or the underprivileged. They are the lawyers, the Judges, and law teachers and law students, social action groups and the press. So far as lawyers and Judges are concerned, I am proud to say that the judiciary and lawyers in India have had a fairly high degree of success in promoting delivery of justice to the rural masses. I must acknowledge with gratitude and satisfaction the pains and the talk that has been assimilated and the learning that has gone into in the article produced by Justice Manohar of my country. I am proud to say that aricle could be taken as reading material for any underdeveloped country which is anxious to deliver justice to the rural or the underprivileged.

One other aspect of the matter I would like to emphasise is that the social groups of the lawyers and the Judges must try to promote para-legals and deliver justice or continuing legal education to the masses. We are agreed on one question, on one point, that is no country can be a success, no country can enjoy a high degree of success unless the masses are made aware of their legal rights. Unless they are aware of their legal rights, they cannot have access to their Courts. Therefore, it is the duty of the privileged in the society, that is the lawyers and the Judges and the secondary teachers to give legal training, continued legal training to the masses and para-legals.

Mr Prakash (India)
I am a practising educator and also an honorary Professor in the Indian Law Institute.

Now we have had very learned discourses from Lord Mackay and our other speakers and its quite correct that as far as the judiciary is concerned, particularly in India, it has made vast strides in bringing justice to the poor. I have heard also with rapt attention what the Lord Chancellor had to say about procedure.

While recognising all that, I still feel that whatever has been done has made only a very marginal difference to the whole legal system, because in spite of whatever progress has been made in the last 20 years, the evils have overtaken us, and therefore, even in India or

elsewhere, in spite of efforts to simplify procedure in spite of the procedure, in spite of efforts to bring justice to the common man . . . the problem becomes more and more complicated. So for example in the matter of procedure, you have given us the Code of Civil Procedure from Britain, you have given us the Evidence Act, you have given us the Criminal Procedure Code. Now the amount of discretion that the Judges are able to use in the face of statute law is very, very marginal, and therefore the arrears seem to continue to mount, and the justice system, in spite of all the progress that has been made, still continues to be very expensive and is getting more and more expensive as time goes on, particularly with the growth of commerce. And with the natural tendency of the lawyers, in spite of doing some marginal work for the poor, to go in for commercial and other litigation, which is far more lucrative. Can we find some solution which will keep pace with the pace of development so that we can make a dent on the system and make real progress in the next 10 or 20 years?

Tony Holland (Plymouth, England)
I've got a question for the panel rather than a statement. Politicians inflict upon us more and more complex laws. Lawyers get richer and richer interpreting those laws and put themselves outside the cost of the ordinary litigant, or person seeking help. If the panel were in their dying hours, what would their one solution be to this eternal problem of helping access to justice?

Lord Mackay
Well, I am not sure that I shall have any better solution in my dying hour than I have now. But I do think that there is a tendency for more and more complicated laws to be passed. These reflect the increasing complexity of our society, and I think also reflect a desire on the part of the legislature perhaps to lay down over minute directions to the Courts. I believe, personally, that the most effective means of dealing with these matters is the simplification of procedure to have the issues resolved, and also a degree of control by the Court of the individual cases before it. Now I cannot pretend that would produce an instant solution, but I believe these are steps in the right direction, certainly so far as England and Wales are concerned. If we could get out of the system the amount of time and effort put into cases that settle without actually being tried, we would release a good lot of resources to assist in dealing with that problem. So, I don't believe there is a single simple solution, but I do believe that there is in an attitude of mind and direction of progress and hope that even in my dying hour I would like to grasp.

Mrs Justice Manohar
I think you answered for all of us — we all feel the same way. I don't think you can totally do away with procedures. You can only simplify them, because basically, procedures are meant to ensure that you hear both sides, and they will both get a fair opportunity to present a case before the Judge decides. There is bound to be some delay, but it should not be too much.

Well, probably you don't know, but in India we have tried in some cases to do away with lawyers. We have simply set up Family Courts — well, in my State, they were set up only last year — where a lawyer is required [to get] permission to appear and normally, unless there is a complicated question of law, which is rather rare in such disputes, lawyers are not allowed to appear. The results have been mixed. Sometimes the cases, well, the cases do get decided much faster as a result of it, but we do receive a number of complaints from the litigants who were before this Court saying, well, the Judge did not listen to me fully or he did not understand what the Judge was trying to do and he thought that he was not well represented. But the Judge thought otherwise, he thought he had allowed both sides to express their points of view before deciding.

So by eliminating lawyers, you may be able to decide faster, but the ultimate satisfaction that your case has been heard properly then decided, if it is not available to the public as such, I think the image of the Court will suffer, so it is very difficult to say how you can simplify the system and still deliver justice.

Victor Achikeh (Nigeria)
Legal aid in my country is still in its infancy. The paper by the Honourable Mrs Justice Manohar has raised very interesting points. But I would like to know from the honourable speaker the extent of the contribution or the funding of the Indian Government of the Legal Aid Scheme. And also, the commitment and contribution of the Indian Bar Association to this scheme.

Mrs Justice Manohar
Well, all of the Legal Aid Schemes are funded by each of the States. We have a Federal structure with a number of States, so each State funds its own Legal Aid programme. And I think about, but I am not sure about the figures, but I would say about 400,000 Rupees a year, or roughly something like that, is made available for this. It is not very much. But they have a panel of lawyers who are paid some stipend by the State to appear free of charge for people who go before this Committee. As a result, of course, you do not get the best people appearing in Legal Aid cases, and sometimes I feel that the old days when you could request a senior lawyer to appear free of charge in a couple of cases a year might have given a more effective redress to a poor man. But of course, on a voluntary basis, you cannot function for all times, so we have to have some sort of programme. As I said, there are problems with the quality of lawyers that appear in these programmes, and the Bar Associations have been called upon to submit names for this work. Sometimes they do, and sometimes they don't; but even now, in a number of cases, members of the Bar are willing to appear free of charge, despite there being an official Legal Aid agency available.

Jane Kelsey (Law Faculty, Auckland)
I would like to voice my appreciation to Moana Jackson for actually being prepared to place the arguments he has today before a forum which has, within this country, not generally been receptive to those arguments. In the last couple of years, we have, in fact, had two Reports which have put forward

similar sorts of views. One in fact was convened by the organiser of this session, and one was co-ordinated and written by Moana Jackson himself.

The response to that from the Government has, in fact, been extremely hostile. The response to that from other politicians has also been very hostile, and unfortunately, the response from the legal profession and the Law Society itself has also been very hostile. And I think it is important for us to remember that if we have a genuine concern with access to justice, and if we also have a concern to see in the future the harmony of this country develop in a way in which both of the signatories to the Treaty of Waitangi, Maori and pakeha, Maori and the Crown have a role to play, that it is not simply for Maori to voice these arguments and to create the ground on which recognition of *tino rangatiratanga* and Maori access to justice can occur.

It indeed is for the lawyers, the majority of whom are Pakeha, for judges and for the Law Society itself to acknowledge the essential ground rules of this country, of its birth within its current structures and recognise that those structures have an inherence injustice in them, and until we address those injustices ourselves, we cannot talk within this country of providing access to justice.

And so I would say that it is not the responsibility of Maori, in fact, to create the arguments and to force us to listen, it is for us to exercise the responsibility of taking the initiatives, of recognising the right to self-determination, and hence in being true partners in the provision of access to justice for Maori within Aotearoa. Kia ora.

Unidentified (India)
With reference to the answer which Justice Manohar gave a little while ago, I would like to point out that in the Supreme Court of India, some of the Senior Advocates decided that they must voluntarily argue at least two cases a month free of charge by way of Legal Aid, so that kind of voluntary service is available and quite a large number of my colleagues there have been good enough to offer that.

Referring to the other aspect of justice, what appears to me to be one problem of some significance is this. That while the doors of justice want to be open and procedural overburdens have to be removed as far as possible, this itself creates a problem of access to justice for those who have already had access to justice or are waiting in the queue to get justice. The doors are open too wide, as has been done to some extent in India. The result is that pending cases go in the back seat, and cases which are supposed to be cases involving social justice get a priority and they occupy too much time sometimes. That problem has been faced in the Supreme Court to such an extent that sometimes some Judges have expressed the view that this open-ended system of access to justice needs a lot of control and it has created a reaction in that direction.

I would request the learned speakers here to consider what is the correct method of screening out, because we cannot say that access to justice, which in this sense goes particularly to the under-privileged ought not to be given, but at the same time, we must have a proper method of screening so that irrelevant and unnecessary matters will not waste public time.

Des Deacon (Wellington, New Zealand)
I though it proper that this forum should depart without having some balance to the views expressed by Moana and Jane Kelsey. Moana and I have agreed to differ in the past, and no doubt will agree to differ in the future. But it is significant that neither mentioned the Legal Service Bill currently before the House.

It is true that the profession is very concerned in this country about access to the law. A lot of work was put in to the Legal Services Bill by those concerned with it; it spent some 18 months in gestation; it will be many more months before it comes into effect, if it does at all in the present regime. But the profession as a whole, I consider, is duty bound to regard access to the law for all in this country. It is accepted that certain groups have specific difficulties, but I regard it as important not to lose sight of the fact that justice is for all, and access is for all, and that is what I wish to say.

Naganand (Bangalore, India)
We have been discussing the topic of access to justice. I have one thought passing in my mind. Professor Wade in his revised edition of the Hamlyn Lecture Series refers to a very interesting development in the English scene when he talks of an administrative Ombudsman. Now unfortunately, we do not have any such concept in several countries, including India. And Professor Wade commends the way that it has worked in England and says that access to justice, the main problem that we have is that the Courts are getting clogged and cannot dispense justice. So we must have a matter of screening cases which come to Court.

After all, I think in India I think more than 50% of the litigation is between the citizen and the State. In a large number of cases, we do find when the matter is ready for trial in the High Court, the Government Counsel says, yes I can see this point and you may allow the petition. Why should the courts get clogged with this type of a situation? I think it is a good thing to think of a machinery within the Government – after all the dispensation of justice is not the sole prerogative of the Courts – it is the Government which is really interested and which should do something about the availability of justice.

Justice need not necessarily be one which you get in a Court of law. And therefore I think that maybe the lawyers could think of a recommendation to all the Commonwealth countries to have a system of administrative review before a matter goes to Court. Whether it should be statutory or voluntary is a matter of detail. But I think this is a very important step to cut down the number of cases going to Court, and to ensure the person does not necessarily have to go to Court to seek justice. It is another form of getting access to justice.

Mr Justice Smellie
Moana wanted an opportunity to respond to what Mr Deacon said, and I propose to give him that opportunity.

Moana Jackson
I would just like to point out to Mr Deacon that I have no argument at all with the point that there must be access to justice for all. The thesis which I attempted to discuss today was that there are different ways of achieving that justice, and that for Maori people, the way of achieving justice is through the judicial processes which were reaffirmed to them in the Treaty, so it is a question of the appropriate procedure, if one likes, or the appropriate process, rather than a basic difference in the concept.

Barry O'Keefe (President of the Bar Council of New South Wales)
There seems no doubt that lawyers are committed to access to the Courts. There is concern about how that access should be facilitated in terms of people appearing for those who are unable to afford to pay for representation. It seems to me that the role of professional associations, be they Law Societies, or Bar Associations, is to give the lead in this respect.

In New South Wales, our proposal presently under consideration, is to return to an ancient system – the equivalent of the old Dock Brief system that has long since gone, to actually make it a requirement of our rules that each practitioner give not less than a week's work pro bono during each year. That would, at the New South Wales Bar, when you take out those members who are employed as public defenders, Crown prosecutors and the like, give 1250 Court weeks of work, which is full time work for 30 Judges, and that's a lot of cases in a year.

If professional associations representing lawyers are serious about providing access, then it seems to me that though we can improve our image by providing pro bono work, we can at the same time provide for people who are underprivileged be they in the middle income bracket where they get no legal aid, or in the lowest income bracket where they might conceivably get legal aid. We can provide for them the best of representation by ensuring that the highest and the most junior at the Bar and, I suppose the same can apply to solicitors, be as a matter of legal obligation, professional obligation that is, required to appear pro bono. I think it would do much to lift the image of the profession. It would do much to scotch the cheap jibe that says lawyers grow fat on the misfortune of others. It would show also, I think, that professional associations were serious in giving leadership to their members.

Judge Gibson (Zimbabwe)
It occurred to me that some of [Mr Jackson's] grievances, some of his concerns for his community are not unlike some of the grievances that we have experienced in Zimbabwe, both before independence and now. But even before independence in Zimbabwe, in the quest for justice or access to justice, for the indigenous community there existed separate Courts, inferior Courts, which dealt with matters that pertained to customary and cultural matters with jurisdiction in that respect. But not only that, those Courts were subject to a special Court of Appeals for Native Cases. Today, since independence, there has also been enacted a particular statute which introduced – and this I should call the Primary Courts Act – it introduced an inferior Court in tribunals from the Chiefs to the villagers to the community Courts, with rights of appeal right up to the Court of Appeal. Those Courts exist, in fact, to deal with matters which pertain to the indigenous peoples and deal with disputes in that area.

But even before independence, in the indigenous population, there was a choice or an alternative which was available and existed for those people who felt that perhaps from their style of life, and this was permissible under the law, from their style of life and conduct, they were not then subject to the customary law and practices in which case, if that was the case, they had a right or choice to go to the ordinary Courts that administered the general law. It seemed to me that perhaps in your quest and concerns, you may well wish to look into what existed in Zimbabwe both before and today to see what can be done to introduce a system of justice or Courts that would be amenable to that sector of the population – the indigenous sector of the population – which is not otherwise amenable to the ordinary course of the Common law.

Now if I could deal with the other matter, the question of Legal Aid to the poor and the underprivileged, we have no legal aid as such in Zimbabwe, but we have what we call a pro deo. There has been experienced, as anywhere else, a reluctance by private practitioners to handle legal aid work because it does not pay. Much better to do private work where the fees are much more remunerative. And what was done about three or four years ago was that through consultation rather than anything else, or practice directives, we, the legal profession of the country was to provide lawyers to agree and to accept that this was part of a public service to be rendered to the community by the legal practitioners so that from time to time, and this is allocated entirely by the Registrar of the Court, work would be allocated, both civil and criminal, among the legal practitioners that exist in the country, so that every firm has a certain amount of pro deo work or, if it's civil work, what we call *in forma pauperis*. We have not experienced any difficulty, although sometimes we feel that we do not always get the best practitioner that there is. The tendency is to use the newly qualified legal practitioner in the Courts. But that is available to the populace who would not otherwise have access to justice. I just thought I'd make those comments.

Reed Smith
I hesitate to rise as obviously I'm a dropout from the Commonwealth. I am a former President of the American Bar Association here by invitation. I rise to support the observation of the gentleman from New South Wales. I doubt that there is any government anywhere, including my own, that will ever be able to provide sufficient funds to meet all the legal needs of the poor. And therefore I think it incumbent upon the organised Bar to make it part of the traditions and practices of our profession to contribute reasonable amounts of our time pro bono publico in support of providing access to justice through access to the law on behalf of the poor.

It can be done through organisation. We now have approximately one-third of private practitioners in the United States involved in organised pro bono legal aid work. It took a long time for us to get there; it's difficult to sustain. It has been my observation that legal aid systems in some parts of the world seem to be regarded more as a Lawyers Relief Act, than they are to provide access to services to the poor.

Furthermore, it seems to me some of the systems discourage, rather than stimulate, voluntary participation, and I wonder if the panel has given consideration to whether the legal aid systems, world-wide, need to be examined more carefully, to see that they are competent to provide the delivery of legal services which are required in a complex world.

James Muirhead

I do not want to respond so particularly to that last comment; but it makes me realise I'm a pretty old fellow listening to this, because when I first started work in the law over 40 years ago, the legal assistance scheme in South Australia was basically wholly promoted by the profession — by the Law Society of South Australia. It obtained a small grant from the state to set up the two or three staff necessary to administer the scheme, but applicants for legal aid would go to the Law Society; the Law Society would assign the case, if it found it had some merit, to various solicitors — if possible in their fields of expertise.

This spilled over, of course, into the criminal jurisdictions. It was not unusual, in those days, for Judges on a day when all the bad fellows are brought up to speak to the prisoners and say: "Do you wish legal aid" and, specially with pleas of guilty, Mr Jones or Mr Smith at the Bar would just be asked to see the man and come back and make submissions in the afternoon.

Where the Dock Brief procedure was then in vogue, and the Judge had the power of certifying fees to Counsel, this really kept legal aid not only under the control of the profession, but it did provide an opportunity for younger people at the Bar to become involved in Court proceedings. Their value, and not, in my view looking back, to the loss of the clients, it was a scheme which was a professional scheme. [I thought of] all of that when Barry O'Keefe was raising the same point about the profession shouldering greater responsibility and providing legal aid. That's all I wish to say. □

Motor Vehicle Dealers Fidelity Guarantee Fund

The following information has been received from the Executive Director of the Motor Vehicle Dealers Institute Inc. Misunderstandings arise from time to time concerning claims on the Guarantee Fund because of the relationship between ss 89 and 40 of the Motor Vehicle Dealers Act 1975. The Executive Director has accordingly requested that this information be drawn to the attention of legal practitioners.

The Motor Vehicle Dealers Institute has become concerned about a problem which repeatedly arises where a licensed motor vehicle dealer has failed to give good title to a purchaser of a vehicle, as warranted by all licensees under s 89(1) of the Motor Vehicle Dealers Act 1975. Section 89(2) of the Act, relating to warranty of freedom from encumbrance, has been repealed consequent upon the coming into force of the Motor Vehicle Securities Act. Section 89(1) however still implies a term in the contract for sale of a motor vehicle that the vendor is the true owner, or has the authority of the true owner.

Where this statutory term has been breached, the matter may come before the Court in a variety of ways. For instance, the true owner (whether under a hire purchase agreement or otherwise) may repossess the vehicle, leading to an action by the purchaser against the dealer. Alternatively, the true owner may sue the purchaser and/or the dealer for conversion. In many instances, however, the purchaser, often through his solicitor, makes a claim directly to the Institute for payment from the Motor Vehicle Dealers Fidelity Guarantee Fund.

It has become apparent that many legal practitioners are not sufficiently aware of the specific statutory restrictions which control payment from the Fund in these circumstances, and that this lack of understanding leads to unnecessary and unsatisfactory distress and costs to their clients.

Section 39 of the Act allows the Fund to be applied to reimburse any person who has suffered loss due to inter alia a breach by a licensee of the term implied in contracts of sale of motor vehicles by s 89 of the Act; (s 39(c)). The provision *must* be read, however, together with s 40, which governs claims against the Fund. Section 40(3) provides that no person shall be entitled to make a claim against the Fund in respect to a s 89 loss except in respect to any loss found to have been suffered by him by a disputes tribunal or Court. Section 40(2)(iii) provides that a written claim must be made within three months of a determination given by a tribunal or Court in respect of the subject matter of the claim.

The Institute accordingly has no discretion to allow a claim, or make payment, under s 40 unless and until a disputes tribunal or Court has made a determination that the loss suffered is due to a breach by the licensee of s 89(1).

It is not sufficient that a finding is made that a claimant has suffered loss. There must be a specific determination by a tribunal or Court that the loss is due to a breach of s 89 by the licensee and is not due to any other cause, before the Institute is empowered to make payment from the Fund.

From a practical point of view, in many cases either a dealer is sued by his customers, or the customer is sued by a financier, and neither party pleads or argues the particular provision of the Act, or draws it to the Court's attention. In order to enable a claim to be paid by the Fund, on the dealer's default, it is essential that the Court is made aware by the parties that a specific declaration of loss due to a breach of s 89 of the Act is included in the decision, to allow final recourse against the Fidelity Guarantee Fund. □

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common Article 3 in each of the four conventions contains an absolute prohibition of torture. France ratified the Geneva Conventions on 18 June 1951 and these conventions represented France's duties at the time of the French-Algerian war.

France participated in the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms which it signed on 4 November 1950. Article 3 of that Convention says that no one "shall be subjected to torture or to inhuman or degrading treatment or punishment." France did not ratify the Convention until 3 May 1974, 20 years after the outbreak of the French-Algerian War. So it was not formally a party to the European Convention at the time of the war. However Article 18 of the Vienna Convention on the Law of Treaties says:

> A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty.

So, even though France was not a party to the European Convention, it had a clear legal duty to refrain from acts such as torture which clearly defeated the object and purpose of Article 3 of the Convention.

The clear answer to the proponents of torture during the French-Algerian War is that such practices were quite simply illegal. It is our duty as lawyers to make that point and it is to our shame that Ms Maran, who is not herself a lawyer should have to point this out to us.

It is important for a lawyer, even in the midst of a busy practice, to pause and reflect on her or his role as a lawyer in protecting individuals and in protecting human rights. Ms Maran's book does precisely that. Furthermore, in a country which has only recently had the benefit of exposure to France's *mission civilisatrice* this book provides us with a fascinating insight into the French mind. □

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simply that governments should not get over-ambitious about the amount of wholesale change they can realistically accomplish in a given time. To quote again from *Unbridled Power*, "New Zealand passes too many laws, and it passes them too quickly".[41] □

1 See 2nd ed, published 1987, p 159.
2 Ibid.
3 Standing orders of the House of Representatives provide for the automatic referral of government bills to select committee, except in respect of money bills and where the government takes urgency (as to the frequency of which, see below).
4 SO 50.
5 *NZPD*, Vol 503 (1989), pp 14264-79 (1R); *NZPD*, Vol 504 (1989), p 14754-64 (3R).
6 *NZPD*, Vol 498 (1989), pp 10498-10518 (2R), pp 10518-21 (committee of the whole House), pp 10521-26 (3R).
7 *NZPD*, Vol 496 (1989), pp 9380-90 (1R), pp 9458-90 (2R), pp 9499-9516 (3R).
8 *NZPD*, Vol 496 (1989), pp 9610-26 (1R), pp 9643-84 (2R), pp 9687-88 (committee of the whole House), pp 9688-90 (3R).
9 For the period 21 February 1989 (when the House reconvened) until the end of July, it sat for 192 hours in normal session and 97 under urgency: see [1989] *NZPD*, No 59, p 12540. For the year ended 31 March 1989, the House sat for 480 hours in normal session and 159 under urgency (ie for one quarter of total sitting time): see *Report of the Clerk of the House of Representatives for the Period ended 31 March 1989, AJHR*, A8, p 5.
10 Quoted in *NZPD*, Vol 498 (1989), p 10691 during second reading debates on the bill.
11 Ibid, pp 10691-92. According to an Opposition member on the Finance and Expenditure committee which reported on the bill, the Government Whips announced at 9:30 am on the day the bill was reported back that the legislation would proceed through all stages that day, notwithstanding there were no printed copies for members incorporating the 53 pages of typed amendments made by the select committee. In the event there was a second reading under urgency that day while deferring the further stages.
12 [1989] *NZPD*, No 68, 14082.
13 See *NZPD*, Vol 498 (1989), pp 10756-57.
14 See D G McGee, *Parliamentary Practice in New Zealand* (1985), p 260.
15 For the introduction of the Law Reform (Miscellaneous Provisions) Bill 1989, see *NZPD*, Vol 495 (1988), pp 8931-8943 (1R).
16 For Government acknowledgement, see *NZPD*, Vol 495 (1988), p 8884.
17 See the Education Bill 1989. For the Bill's introduction, see *NZPD*, Vol 499 (1989), pp 11538-45, 11660-71.
18 See *NZPD*, Vol 502 (1989), pp 13234-52 (1R); *NZPD*, Vol 504 (1989), pp 14433-57 (2R), 14659-63 (committee of the whole House), pp 14664-76 (3R).
19 See *NZPD*, Vol 501 (1989), pp 12826-39 (1R); *NZPD*, Vol 503 (1989), pp 14140-65 (2R), pp 14282-93 (committee of the whole House), pp 14293-14313 (3R).
20 See *NZPD*, Vol 498 (1989), p 10693.
21 See *NZPD*, Vol 485 (1987), pp 1619-27 (1R); *NZPD*, Vol 493 (1988), pp 7461-65 (2R).
22 See *NZPD*, Vol 497 (1989), pp 10366-86 (1R); *NZPD*, Vol 501 (1989), pp 12503-12505 (select committee report), pp 12622-52 (2R).
23 See *NZPD*, Vol 495 (1988), pp 6892-94 (1R); *NZPD*, Vol 501 (1989), pp 12665-77 (interim select committee report); *NZPD*, Vol 504 (1989), pp 14406-16 (final select committee report), pp 14522-44 (2R).
24 See, eg, *NZPD*, Vol 496 (1989), p 9382 (School Trustees Bill 1988).
25 *Parliamentary Bulletin* (1989), Part 5, pp 8 and 25.
26 *Parliamentary Bulletin* (1990), Part 6, pp 7 and 10.
27 *Parliamentary Bulletin* (1990), Part 9, pp 7 and 9.
28 *NZPD*, Vol 503 (1989), pp 14278-79 (referred for submissions from selected organisations only).
29 *NZPD*, Vol 496 (1989), p 9380.
30 Ibid, p 9385.
31 Ibid, p 9383.
32 See respectively *NZPD*, Vol 496 (1989), p 9380; *NZPD*, Vol 503 (1989), p 14279; [1990] *NZPD*, No 5, p 881.
33 See [1990] *NZPD*, No 5, pp 881-882 (1R) and 897-900 (2R).
34 [1990] *NZPD*, No 3, pp 445-455 (particularly pp 452-453).
35 See *NZPD*, Vol 501 (1989), pp 12592-99.
36 See Standing Order 220.
37 G Palmer, *Unbridled Power* (2nd ed, 1987), p 159.
38 *Auckland Harbour Board v Auckland City Council*, unreported, CA, 28 April 1989.
39 See the Telecommunications Amendment Act 1988.
40 Lord Radcliffe (1950) 10 *CLJ*, 361, at 366.
41 Op cit, p 139.

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15 In England "Approved Inspectors" (in practice the NHBC) must carry insurance which provides owners with 10 year no fault cover in respect of any non-complying conditions which threaten health or safety, and covers inspectors against liability for negligence for 15 years up to a limit of twice the cost of the work approved.
16 In Britain two companies have recently introduced latent defects policies in respect of houses to compete with the NHBC warranty scheme. Municipal Mutual Insurance guarantees new houses against structural defects for 15 years, the premium rate varying according to the experience of the builder. The Lloyds broker Gibbs Hartley Cooper offers 10 year cover of structural defects in building up to a value of £500,000.